STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DISTRICT 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, Complainant,

vs.

ANDIS COMPANY, Respondent.

Case 10
No. 59158
Ce-2207

Decision No. 29988-A

Appearances:

Mr. Nathan D. Eisenberg and **Mr. John J. Brennan**, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North RiverCenter Drive, Site 202, Milwaukee, WI 53212, appearing on behalf of the Union.

Mr. Thomas W. MacKenzie, Lindner & Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Suite 1000, Milwaukee, WI 53202, appearing on behalf of the Company.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

District 10, International Association of Machinists and Aerospace Workers filed a complaint with the Wisconsin Employment Relations Commission on August 31, 2000, alleging that the Andis Company violated Sec. 111.06(1)(a) and (f) of the Wisconsin Employment Peace Act by violating a collective bargaining agreement by disciplining David Laycock. The Commission appointed Karen J. Mawhinney, a member of its staff, to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. A hearing was held in this matter on November 7, 2000, in Racine, Wisconsin, and the parties filed briefs by January 6, 2001.

FINDINGS OF FACT

1. Complainant, District 10, International Association of Machinists and Aerospace Workers, herein called the Union, is a labor organization representing employees within the meaning of Sec. 111.02(11) of the Wisconsin Employment Peace Act (WEPA), and maintains its offices at 1650 South 38th Street, Milwaukee, WI 53215.

2. Respondent, Andis Company, herein the Company or Employer, is engaged in manufacturing in the State of Wisconsin and is an employer within the meaning of Sec. 111.02(7) of WEPA, and maintains its offices at 1800 Renaissance Boulevard, Racine, WI 53408-5005.

3. The Union and the Company are parties to a collective bargaining agreement effective August 1, 1998 to July 31, 2000. Article III, the grievance procedure of the bargaining agreement, does not provide for final and binding arbitration of grievances. Article III, Section 1, states:

> A grievance is defined to be any matter involving an alleged violation of an express provision of this agreement by the Company as a result of which the aggrieved employee maintains that his or her rights or privileges have been violated by reason of the Company's interpretation or application of the provisions of this agreement.

The collective bargaining agreement does not provide for just cause for discipline other than for discharge.

4. The Company makes personal hair care products, such as clippers, animal grooming equipment, shavers and trimmers. The Company is set up with a manufacturing side which is unionized and an assembly side which is non-union. The Company has a lot of turnover of employees. Lisa Morelli-Angst was a recruiter training specialist with the Company in June of 2000. Morelli-Angst received between 40 to 80 applications on a weekly basis and interviewed between 20 to 30 people. She took about 80 percent of the people interviewed on tours of the plant, and most of those applicants were offered jobs. Morelli-Angst estimated that 99 percent of applicants offered jobs accepted the offers and came to work for the Company.

5. David Laycock has worked at the Company for more than two years in the manufacturing side of the plant. His job involves polishing blades on a buffing wheel. On June 7, 2000, Morelli-Angst took a job applicant on a tour of the plant. She showed him the polishing area where Laycock works and asked Shawn McCue, another employee working there, to show the applicant how to operate the machine. McCue showed the operation, and the applicant asked if the job was safe. Laycock said it was not safe, that he gets hit in the chest or arm with blades. According to Morelli-Angst, Laycock said he got hit 15 times a day.

McCue recalled that Morelli-Angst said to the applicant that the blades always go up the exhaust shoot and then asked – isn't that right, or something like that. At that point, Laycock said, "No, sometimes they fly off and hit you in the chest." McCue testified that Laycock was being truthful, and that blades fly off the wheel and hit employees in the chest. McCue might not have heard everything that was said because he was wearing earplugs. Another employee, Renee Lock, was next to Laycock and heard almost all of the conversation in question. They were all cleaning up and not working at the machines at the time. Lock testified that Morelli-Angst said to the applicant that if the blades fall off, they get sucked down into the exhaust system by a vacuum cleaner, and then said to Laycock, "Isn't that right?" Lock recalled that Laycock said, "Not necessarily, sometimes they fly off and hit you in the chest." Morelli-Angst asked Laycock if he should talk to his supervisor about that, and he said that it would not do any good and that the supervisor would not do anything about it if he reported it. The applicant asked to see another job and did not accept a job offer with the Company.

6. Morelli-Angst reported the incident to the Vice-President of Human Resources, Mary Kosch, as well as to Plant Superintendent Michael Stefka. Stefka talked with Laycock's supervisor, Rick Sederberg, the following day. Stefka thought that Laycock's statements were not true, because he was not aware of injuries on that job and supervisors would respond to injuries. Sederberg is the General Foreman at the Company in charge of the machine shop. After Morelli-Angst told Sederberg what Laycock had said, Sederberg asked Laycock if he said he got hit 15 times per day with flying blades, and Laycock said yes. Kosch, Stefka and Sederberg decided to discipline Laycock and suspend him for three days. The notice of discipline states:

> You are in violation of personal conduct which states willfully and intentionally making false statements to or about the company is prohibited. When the recruiter was showing a potential polisher around and he asked if the job was safe and you stated that his job is unsafe and you get hit in the chest about 15 times per day. This also brings up another safety violation. You have failed to turn in accident reports for the times that they occurred. For the 2 violations you have committed we will be suspending you for 3 days on 6/9/00, 6/12/00, and 6/13/00. Any further incidents will lead to further disciplinary action up to and including discharge.

7. The Company's safety rules state, among other things, the following:

> All injuries, no matter how slight, must be reported at once to your supervisor, who will see that you receive medical attention. Indifference to small cuts and scratches can cause severe infections.

. . .

Report all safety hazards to your supervisor immediately.

Laycock testified that he does not report little nicks when he gets hit by blades, although he got hurt a couple of times on the wheel where he had to get medical attention. He is paid by the piece and would lose time and the money when not at the machine. McCue does not report small nicks from blades hitting him but he would report an injury if he were bleeding. McCue has gone to a supervisor with little cuts and asked for peroxide and a bandage. Susan Herling was working on the polishing machines and a blade hit her in the finger. She needed stitches, and she reported the injury to Sederberg. The compound bar has also flown off and hit an operator in the face, and that operator needed stitches. Lock said that blades spin off the machine every day, and the machine operators get hit by them every day. Lock was injured in 1980 when a hunk of compound came off the machine, blew her off the chair, and she cracked two ribs and ripped her rotator cuff.

8. Stefka testified that the Company works closely with its insurance carrier to reduce its insurance rating by adopting a "Zero Accident Culture" where they recognize all injuries and try to solve scratches and bangs that could end up being near misses of greater catastrophes. There are safety suggestion boxes in every department, and forms that will be reviewed by a safety committee. Stefka testified that he has weekly meetings with supervisors and prompts them to address safety issues. The Company was most recently inspected by OSHA and did not receive citations regarding the polishing equipment. The Company's insurance carrier has also had safety experts walk through the plant and they have not made any recommendations regarding the polishing equipment. Sederberg asked for new guards for the buffing machines after talking with Laycock and after the disciplinary incident at issue in this matter. The new guards have been installed on the equipment to prevent injuries. Morelli-Angst maintained weekly spreadsheets on all injuries at the Company for two years and had not seen any injuries on the records for blades striking employees. She had seen a blade fall of the polishing machine when McCue started up the machine.

CONCLUSION OF LAW

The Company's suspension of David Laycock is an unfair labor practice within the meaning of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act.

On the basis of the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER

The Respondent, Andis Company, its officers and agents, shall immediately take the following affirmative action which the Examiner finds will effectuate the purposes of the Wisconsin Employment Peace Act:

1. Expunge all references in personnel files to the suspension of David Laycock, and make him whole by paying to him a sum of money for the three days of time lost, with interest. The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency, which was August 31, 2000.

2. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Elkhorn, Wisconsin, this 8th day of February, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Karen J. Mawhinney /s/
Karen J. Mawhinney, Examiner

ANDIS COMPANY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

This dispute is over the three-day suspension of David Laycock for an incident on June 7, 2000, when a recruiter was showing a job applicant around the plant. Under Sec. 111.06(1)(f) of WEPA, it is an unfair labor practice for an employer to violate the terms of a collective bargaining agreement. Because the parties' collective bargaining agreement contains no provision for final and binding arbitration of grievances, the Union brought the instant complaint for a determination of whether the Company violated the bargaining agreement and therefore Sec. 111.06(1)(f) of WEPA by its suspension of Laycock.

THE PARTIES' POSITIONS

The Union

The Union asserts that the Company disciplined Laycock without just cause. His statement was neither untruthful nor willfully and intentionally false. There is no proof that Laycock received an injury that required reporting. The discipline violated the just cause provision of the collective bargaining agreement.

While the Company stated at hearing that the dispute is not arbitrable, that interpretation is overly narrow. The dispute involves cooperation of employees, the Union and the Company over safe and healthful working conditions as provided in Article XV of the contract. Moreover, unless there is a clear provision to the contrary, a just cause basis for discipline is implied in modern collective bargaining agreements. Article IV governing seniority specifically mentions a just cause standard, and such seniority provisions raise a presumption of just cause in other provisions of the contract. The Union asserts that Article III and Article XV should be construed in light of the implied just cause standard within the agreement.

The Union argues that the reasons for which Laycock was disciplined are mutually exclusive. If his statement that blades routinely fly off the buffing machines were false, then there would be no injuries to report. If he had injuries which he failed to report, his statement that blades fly off the machine and hit him would not be false. Laycock's statement that blades fly off the machines and hit employees was truthful. Other employees testified about injuries received from the machines, and the Company's testimony that they were not aware of injuries is dubious. The testimony indicates that the reporting procedures are not stringently enforced. Moreover, Laycock had not received an injury sufficient to warrant reporting.

The Union contends that the reason given for Laycock's discipline was pretextual, because it appears that the Company wanted to discipline Laycock for potentially driving away a job applicant and not for violating safety regulations. The Union asks that Laycock be made whole and the disciplinary action against him be removed.

The Company

The Company argues that the suspension of an employee does not violate the collective bargaining agreement. The Union has identified no section of the contract allegedly violated by Laycock's suspension. The contract contains no binding arbitration procedure and the parties have not addressed any limitation on the right to discipline or discharge an employee with the exception of Article IV, the seniority provision. The sole reference in the contract to a just cause standard is the reference to seniority shall be broken if an employee is discharged for just cause. The Company acknowledges that some arbitrators have implied a just cause on discharges even where the contract is silent. But in this contract, by imposing the just cause standard solely on the act of discharge, the parties have not restricted the Company from taking discipline short of termination. Thus, the parties have excluded other forms of discipline by expressing one thing – just cause for discharge.

Assuming arguendo that the Examiner was to imply a just cause standard on discipline, there was just cause to support the suspension. Arbitrators have long recognized that duty of loyalty owed by an employee to his or her employer. Laycock knew that the applicant was a potential new hire for the Company and owed a duty to help put the Company's best foot forward, or to refrain from making comments that would disparage the organization. The comment that blades hit him 15 times a day was disparaging. His further comment that it wouldn't do any good to report that to his supervisor compounded the injury. The applicant was being told that the job was unsafe and that his new employer did not give a damn about safety. The fact that operators may occasionally be bumped or nicked begs the issue. The applicant was asking whether the job was safe, and Laycock told him it was not.

The Company asserts that Laycock's statements were simply not true. Morelli-Angst maintained safety records and had seen no reports of injuries for the polishers in her tenure with the Company. Stefka testified as to the aggressive safety program maintained by the Company, which includes the obligation to report any injury, no matter how small. The Company maintains safety suggestion boxes and reviews safety logs on a weekly basis. Prior to June 7th, Laycock never raised a safety issue with respect to the polishers. If he had concerns, there were multiple avenues to voice them. After the discipline was issued, he made a suggestion on changing the material on the guard, which was implemented by the Company.

The Company asserts that Morelli-Angst's version of the events of June 7th should be credited. Laycock offered a different version, and his co-workers offered a third version. The Union's witnesses were not consistent in their testimony. Moreover, Morelli-Angst no longer

works for the Company and has no motive to lie. The written statements prepared by the Union witnesses were done months after the event. Morelli-Angst's statement was prepared the following day and contemporaneous writing is worth more weight.

The Company concludes that Laycock's statements were a serious lapse in judgment, and a three-day suspension was a measured and appropriate response under those circumstances.

DISCUSSION

The Company raises a threshold issue of whether there is any contractual clause that was violated because the contract does not refer to a just cause standard for discipline or any other standard for discipline. The collective bargaining agreement contains a just cause standard for discharge in the seniority clause. Discipline short of discharge is not mentioned anywhere in the agreement. However, arbitrators usually hold that a contract giving the right to discharge for cause and making no reference to other forms of discipline does not deprive management of the right to impose discipline (see Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 888). The Union does not claim that the Company did not have the contractual right to suspend Laycock.

The Union is correct in stating that the most arbitrators would hold that the just cause standard may be implied in collective bargaining agreements. For example, Arb. Roumell, Jr., stated in HURON FORGE & MACHINE CO., 75 LA 83, at 88:

> Even though the Contract does not specify a just cause standard, such a standard is implied in the Contract. See Worthington Corp., 24 LA 1 (McGoldrick, 1955). Thus, Arbitrator Walter Boles, in Cameron Iron Works, 25 LA 295 (1965), wrote as follows:
> "A just cause basis for consideration of disciplinary action is, absent a clear proviso to the contrary, implied in the model collective bargaining agreement." 25 LA at 301.
> Further, as stated by Arbitrator Donnelly at Atwater Mfg. Co., 13 LA 747 (1949):
> "If the company can discharge without cause, it can lay off without cause. It can recall, transfer, or promote in violation of the seniority provision simply by invoking its claimed right to discharge. Thus, to interpret the Agreement in accordance with the claim of the Company would reduce to a nullity the fundamental provisions of a labor-management agreement – the security of a worker in a job." 13 LA at 749.
> Just cause is normally defined as that which is reasonable under the circumstances given the type of employment involved. See Riley Stoker Corp., 7 LA 764 (Platt, 1947), and Enterprise Wire Co., 46 LA 359 (Daugherty,

> 1969). Thus, a discharge or, for that matter, a written reprimand will be upheld if it was found that an employer's actions could be considered reasonable under the circumstances.

See also FORT WAYNE COMMUNITY SCHOOLS, 78 LA 928 at 935 (DEITSCH, 1982); HERLITZ, INC., 89 LA 436 at 441 (ALLEN JR., 1987); Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 886 n.7 and cases cited therein; The Common Law of the Workplace, Editor St. Antoine (1998), pp. 157-158. As noted therein, even under in a contract without a just cause clause, neither side may act arbitrarily or capriciously. See WESTVACO, VA. FOLDING BOX. DIV., 92 LA 1289, 1290 (NOLAN, 1989).

In this case, the contractual language regarding wages and overtime could be undercut if the Employer could arbitrarily and capriciously suspend employees. Thus, whether or not a just cause standard should be implied, at least an arbitrary and capricious standard should apply. The Company does not argue that it can discipline at whim but contends that it had just cause for the suspension.

It is the Company's burden to prove that Laycock intentionally made false statements to or about the company, since it accused him of that in suspending him. In most complaint cases, the Complainant bears the burden of proof. However, the Commission has recognized that this is not always the case:

> In an unfair labor practice complaint alleging that an employer has violated a collective bargaining agreement by taking action against an employe, e.g., discipline, suspension, discharge, etc., where the employer, in defense thereto, alleges that the "just cause" provision in the collective bargaining agreement permits such action by the employer, the employer has the burden of establishing, by a clear and satisfactory preponderance of the evidence, that there was just cause for its action, provided the Complainant first establishes a prima facie violation of the collective bargaining agreement involved. SCHOOL DISTRICT OF SHELL LAKE, Dec. No. 20024-B, (WERC, 1984); HORICON JOINT SCHOOL DISTRICT, Dec. No. 13765-A (WERC, 1976).

The record does not show that Laycock intentionally made a false statement to or about the Company. Laycock answered a question truthfully. He was asked, either by the job applicant or by Morelli-Angst, if the job was safe. He said no, that he got hit in the chest or arms several times a day by flying blades. He might have said that he got hit as many as 15 times a day, but it makes no difference because the parties agree that the substance of his comment is that he got hit by blades flying off the machine. And that was the truth. All the machine operators have had the same experience. Operators have been injured to the extent they have needed medical treatment, though infrequently. While Laycock's statement may have put the Company in a bad light in front of a job applicant, it was truthful, and the Company's discipline for willfully and intentionally making false statements about the Company cannot pass any standard for imposing discipline.

The Company's further discipline for failing to turn in accident reports for getting hit by flying blades is also arbitrary and capricious. The operators do not report every small event such as blades flying off the wheel and hitting them, but they do seek medical attention if they are cut or injured. Laycock did not claim that he was injured by all the blades that fly off the machine, and he has sought medical attention in the past when injured enough to do so. While the Company's concern about safety is commendable, it does not ask employees to report nicks, bumps, bruises, and everything that can happen where there is no reportable injury. The evidence on the record shows that Laycock and the other operators act responsibly in balancing the needs of the Company to report injuries that need some medical attention, even if just a cleaning and a bandage, while continuing to maintain production where possible.

For the above reasons, the Examiner has concluded that the Company violated the collective bargaining agreement when it suspended Laycock for three days and has ordered the Company to remove the suspension from his record and to reimburse him for his wages for those days.

Dated at Elkhorn, Wisconsin, this 8th day of February, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Karen J. Mawhinney /s/
Karen J. Mawhinney, Examiner

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