

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
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 LOCAL 986, AFSCME, AFL-CIO : Case 231
 : No. 43749
 and : MA-6059
 :
 MANITOWOC COUNTY (HIGHWAY DEPARTMENT) :
 :

Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40,
 AFSCME, AFL-CIO, on behalf of Local 986.
Mr. Mark Hazelbaker, Esq., Administrative Coordinator for Manitowoc
 County, on behalf of the Employer.

ARBITRATION AWARD

According to the terms of the 1989-1990 collective bargaining agreement between the Manitowoc County Highway Department (hereafter the County or Employer) and Local 986, AFSCME, AFL-CIO (hereafter the Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an impartial arbitrator to hear and resolve the dispute between them involving the verbal warning issued to employe Gerald Drumm for statements he made over the County radio system on December 8, 1989. The undersigned was designated arbitrator and made full written disclosures to which no objections were raised. Hearing was held at Manitowoc, Wisconsin on June 4, 1990 and a stenographic transcript of the proceedings was taken. The transcript was received by July 18, 1990 and the parties submitted their initial briefs by August 15, 1990 (which were thereafter exchanged by the undersigned). The parties waived their right to file reply briefs herein.

ISSUE:

The parties stipulated that the following issue is involved in this case:

Did the Employer have just cause to reprimand
 the Grievant for his conduct on December 8, 1989?

If the answer to the above is in the negative, the parties agreed that the Grievant's record should be purged of any reference to the discipline, as a remedy.

RELEVANT CONTRACT PROVISION:

ARTICLE 5 - DISCIPLINARY PROCEDURES

A. Employees may be disciplined for just cause. It is understood and agreed that just progressive discipline shall be followed. The Employer shall provide the employee and Union with a letter setting forth the reason(s) for the disciplinary action.

BACKGROUND:

Grievant Gerald Drumm (hereafter Drumm or the Grievant) has been employed by the County in its Highway Department for the past 10 years. The Grievant's work record is clear of any formal discipline until the instant verbal warning was issued. 1/

1/ Evidence was adduced, however, by both the Employer and the Union concerning an incident which occurred in November of 1989 in which Braunel accused the Grievant of abusing his Workers Compensation benefits in a conversation at the Drumm Forest. (Braunel had observed the Grievant raking gravel while he was on Workers Compensation leave following carpal tunnel surgery on his hand). This evidence was adduced by the County to show the Grievant's demeanor generally and his motivation for his alleged rudeness to Braunel over the radio on December 8th, not to show the Grievant's work record was blemished.

Robert Braunel had been Patrol Superintendent of the Highway Department for less than three years at the time of the instant hearing. Fritz Emme, Assistant Patrol Superintendent, was promoted to his position in January, 1990 although he was Acting Assistant Patrol Superintendent on December 8, 1989. As a general rule, Braunel and Emme check out the jobs and/or confer on what jobs to assign to which employes in advance of the assignments being made. Braunel normally makes assignments to the employes.

It is undisputed that the Highway Department has safety meetings for all employes at least twice a year, and that there was such a meeting in the Fall of 1989, prior to the December 8th incident. Although it is unclear whether the Grievant was present at this meeting, he admittedly has attended departmental safety meetings over the years. At the Fall, 1989 safety meeting, Braunel stated that proper radio procedure was discussed including the fact that the public listens in on the County radio transmissions and that employes should be cautious and avoid second-guessing or questioning management decisions over the County radio system. Braunel stated that employes were told at the Fall, 1989 safety meeting (as well as at other meetings in the past) that if they had questions about a job, they should radio and ask for someone from management come out to look at the job.

FACTS:

In December, 1989, the owner of Bollen Riding Academy died and Emme secured permission from the heirs to cut down a large maple tree (18"-24" in diameter) on the Bollen property. The County had wanted to remove this tree for some time, since the tree posed a potential safety hazard to drivers along the abutting roadway, County Trunk "B". If the tree were to fall or be blown down, it would block the right-of-way for drivers.

In advance of any assignment, Emme went out and looked the tree over. He determined that the tree could be removed from the ground, although there were wires running through the upper branches of the tree. (The upper branches had been trimmed out around the wires over the years by Public Service.)

Emme told Braunel there would be no problem removing the tree. Without having viewed the job himself, Braunel selected the Grievant and employes Barry Bolle and Kevin Somers to take the tree down on December 8. 2/ Braunel spoke to the Grievant when he handed out the assignment and told the Grievant that if he had any problems he should call Braunel on the radio. The Grievant was not given instructions on how to remove the tree. It is undisputed that the Grievant has otherwise been engaged in the logging business, including topping trees, for at least the past 40 years and he is very experienced and knowledgeable in all aspects of logging work as well as in the machinery used to perform this work (including chain saws). The Grievant stated that Braunel told him to take along a front-end loader and a five-yard truck to do the job and that Braunel also told the Grievant to use the end loader to move the wood to the truck and then to haul the wood to the dump when the job was done.

December 8th Incident

Management's Version:

After Braunel gave the tree removal assignment to the Grievant, between 8:00 a.m. and 8:30 a.m., the Grievant called Braunel on the County radio. According to Braunel, the Grievant stated "I am not cutting. There's wires up there. If you want somebody to cut, get somebody else." Braunel stated that Drumm's voice was "hostile, aggressive and loud." At this point Fritz Emme who had heard Drumm's initial broadcast, came on the radio and said that he had "looked at the tree the other day" and he "didn't see any problem with it." Emme then stated that he would go to the site and that he could be there in 15 or 20 minutes. At this point the radio transmission broke up and both Braunel and Emme heard the Grievant make essentially the same statement quoted above. Emme corroborated Braunel that Drumm was hostile and aggressive in the manner in which he spoke over the radio. Emme also testified (corroborated in part by Braunel) that at some point, the Grievant also stated, "Get ahold of Skip. If Skip tells me to cut it down, I'll cut it." 3/

Emme stated that when he arrived at the job, Drumm told him that the job was unsafe because of the wires running through the tree. Emme asked if there were any volunteers to cut the tree. Since no one came forward, Emme stated that he would cut the tree himself. Emme, in order to expedite the job, decided to put sand in the bottom of the bucket of the end loader and to get into the loader (extended to a height of 13 feet) with a chain saw and top the tree. Emme stated that the job would not have had to be done this way - that he believed the tree could have been felled from the ground. But Emme decided

2/ Braunel stated that he assigned these three employes to the job because Drumm and Bolle were experienced in tree removal and all three were at the Manitowoc shop that day, close to the job to be performed.

3/ "Skip" is the nickname of Mr. Handl, Union President.

to finish topping the tree quickly so that the Grievant, Somers and Bolle could get back to work and remove the rest of the tree from the ground. After Emme had topped the tree, 4/ the three employes took the rest of the tree down from the ground and they then completed the clean-up work.

At no time before or during this incident, did Emme or Braunel order any employe to do the job, to get into the loader bucket to top the tree or to cut over their heads with a chain saw. Rather, after Drumm (and by their silence, Bolle and Somers) refused to perform the job, nothing was said to them regarding their position and they were not ordered to do anything against their better judgment.

The Grievant's Version:

On direct examination, Drumm stated that he went on the radio on December 8th and told Braunel "We'll have to get Public Service here to top this tree. There's wires go (sic) right through the tree." Braunel came on the radio and said that Fritz (Emme) had looked at the tree and he thought there would be no problem. Drumm stated that he replied, "well, there is going to be a problem because we can't cut this tree without topping it." At this point, the Grievant stated that Emme came on the radio and said that he had looked at the tree and there was no problem with it. Drumm stated that he replied that the tree had to be topped and could not be cut without topping it; that there was a loader at the job so topping should be "no problem." Drumm added "I'd be glad to have somebody else cut this tree. You won't make me mad if you get somebody else, but as far as I'm concerned, I won't."

Later, while still on direct examination, Drumm testified that he called Braunel on the radio and stated, "Bob we got a problem here. We got wires in the tree. We should have this tree topped. We should call Public Service." Drumm stated at the instant hearing that he assumed because the loader was on the job that Braunel expected him to get the loader bucket to top the tree. Drumm also stated that at some point during the transmission, he also said, "Well then call Skip on the job and if he says it's safe to cut the tree, I'll cut it. I'll top it."

The Grievant admitted herein that he raises his voice and is hostile and loses his temper sometimes without thinking about it and that he generally talks loud because he has a hearing problem. Drumm also admitted on cross examination that he could have lost his temper on December 8th although he did not specifically recall that. Drumm stated that he never intended to be, and did not believe he had been hostile, insubordinate, mean, inconsiderate or abusive, abrasive, rude or impolite on December 8th and that he did not swear but only "talked firm" on December 8th. Finally, Drumm stated that no one warned him for his radio conduct on December 8th, although Drumm admitted that someone from management may have said he was "pretty rough on the radio" that day. Drumm then stated that he didn't recall this being said.

It should be noted that Kevin Somers testified that he did not hear the December 8th radio transmission between Drumm and management because he was outside the truck at the time. Bolle was on the end loader at the time of Drumm's broadcast and he heard it because the loader has a radio on it. But Bolle stated that he did not pay much attention to the transmission although he admitted, that he would not say it was "casual," but it was not "abusive."

Finally, the County questioned Drumm regarding a November, 1989 incident between him and Braunel which the County asserted went to Drumm's credibility as well as his motivation for speaking to Braunel and Emme the way he allegedly did on December 8th.

Drumm testified as follows regarding this incident. On a Friday in November, 1989, while Drumm was on a Workers Compensation leave following surgery for carpal tunnel syndrome in his hand, Braunel saw Drumm raking gravel or property near Drumm's house known as the Drumm Forest. Braunel stopped and confronted Drumm, accusing Drumm of abusing Workers Compensation. Drumm stated that he told Braunel, "I'm doing what my doctor told me to do and you're no doctor." During this conversation, Drumm also said "I hear that you're blankity-blank to work for." The next Monday, Drumm returned to work. Later, Braunel and the Highway Commissioner spoke to Drumm about the (latter) comment he had made to Braunel.

4/ Evidence was proffered to show that branches hit wires as well as the loader basket while Emme was topping the tree. Evidence was also proffered to show that Drumm, Somers and Bolle all felt the job was unsafe and that to do it would require getting into the bucket to top the tree before felling it. Evidence on proper use of a loader and a chain saw was also proffered. This evidence need not be described in detail here, because, as discussed, *infra*, this evidence has no bearing on the verbal warning issued to Drumm for his manner of speech over the County radio on December 8th.

Prior Discipline For Radio Communications

In regard to the history of discipline for improper use of the County radio system, Superintendent Braunel was himself issued a verbal and a written warning for improper use of the radio on March 18 or 19, 1989, while Braunel was still on probation as Highway Superintendent. Braunel, who had been on the job for 36 hours at the time of the incident, was trying to get on the County radio and was unable to do so. At this time, Braunel broke in on the radio and made the statement that if the towns wanted to use all of the County's radio time, they should rent or purchase their own system. Braunel stated that County Highway employees were aware of his being disciplined for this incident.

In addition, there was testimony that on occasion, County employees have used foul language or swear words over the County radio system. However, these incidents (there were two of them) occurred prior to Braunel's being made Patrol Superintendent according to Braunel and although Braunel believed that the two employees involved were disciplined this was not otherwise confirmed by the evidence herein.

Positions of the Parties:

County

The County asserted that it was justified in issuing Drumm a verbal warning for communicating over the County radio system in an insubordinate and offensive manner. The County emphasized that it did not discipline the Grievant for refusing to perform allegedly unsafe work. The County did not dispute that the Grievant had a right to refuse to perform a work assignment he considered unsafe and to have that assignment reviewed by management. However, the County asserted that the Grievant had a duty to communicate his concerns about the job over the radio in a considerate manner which the Grievant did not do.

The County urged that its witnesses should be credited here over the Grievant. In this regard, the County pointed out that Emme and Braunel confirmed both the hostile and loud tone of voice used by the Grievant as well as, essentially, the words the Grievant used to convey his feelings/opinions over the radio on December 8, 1989, and that no witness actually corroborated the Grievant's version of the radio conversation in question. In light of Braunel and Emme's obvious credibility, Braunel's uncontradicted testimony regarding the County's well-known policy of requiring County employees (including managers like Braunel) to maintain a polite tone and content in their County radio transmissions, and in light of the Grievant's personality, demeanor and his motivation to misstate the facts herein, the County asserted that Braunel and Emme should be credited over the Grievant. The County asserted that the Grievant's admission that he sometimes swears and loses his temper at work support the County's assertions.

Furthermore, the County contended, the confrontation between Braunel and Drumm in November 1989 also supports the County's case. In contrast, the County asserted that there was no evidence presented to show that either Emme or Braunel had any motive to misstate the facts regarding the Grievant's December 8 broadcast. Indeed, the Grievant could have simply asked for a management representative to view the job and in that event nothing of any significance would have been broadcast over the radio system. The Grievant chose not to do this but to air his feelings on the radio for anyone monitoring the system to hear and take note of.

Even assuming the job was unsafe, the County asserted that this "fact" (not admitted by the County) does not excuse the Grievant's verbal abuse of his supervisors over the radio on December 8th, and the County's comparatively mild response -- issuing a verbal warning -- was justified and supported by the evidence. Thus, the County sought that the discipline be sustained and the grievance denied and dismissed.

Union

The Union contended that Grievant Gerald Drumm was not insubordinate for refusing to cut down a tree on County Trunk "B" near the Bollen Riding Academy on December 8, 1989, and that Drumm should not have been disciplined for being "too verbal" on the County radio system that day. In this regard, the Union asserted that the Grievant's safety was endangered by the work order to cut the tree and that Drumm was within his rights not to cut the tree under Article 8 of the Agreement. 5/ In addition, the County did not prove that it had cause

5/ The contract provides, inter alia, as follows at Article 8 "Grievance Procedure":

C. Steps in Procedure:

to issue a verbal warning to Drumm for his radio communications on December 8th, in the Union's view. The Union contended that the Employer failed to prove any misconduct on the part of Drumm. The Union also contended that the County denied Drumm due process because the County lacked a clear work rule or policy regarding radio communications. The Union asserted that the Employer also did not prove what facts it acted upon at the time the discipline was imposed, or what documentation would be maintained in the Grievant's file due to his being verbally warned.

In its brief, the Union asserted that the testimony of Braunel regarding what was said at bi-annual safety meetings regarding proper radio procedures should be disregarded as hearsay. 6/ The Union noted that no evidence was adduced to show that the Grievant was actually present at any of these safety meetings. The Union also asserted that the County denied Drumm's right to due process by not making clear, in advance, what conduct would result in discipline. Further, the Union asserted that the County never demonstrated that Drumm knew that anyone else had previously been disciplined for radio communications.

Therefore, the Union asserted that the discipline of Drumm was in direct retaliation for Drumm's refusal, on safety grounds, to fell the tree and for Drumm's requesting that Union President Handl view the job before Drumm would take the tree down. The Union also contended that the County failed to show that Drumm carried a grudge against Braunel. Rather, the evidence showed, in the Union's view, that Braunel held a grudge against Drumm. Furthermore, the Union asserted the letter of the Highway Commissioner in response to the grievance was "vicious" and "beyond the bounds of fair play." The Union also took offense at the offer to Drumm of the use of the Employee Assistance Program in this letter: the Union asserted this reference was a threat.

The Union contended that County management lacked credibility and that management, by meting out the discipline here, wished to send a message to employees not to question their bosses under any circumstances and not to seek Union representation. The fact that Emme and Braunel (assertedly) expected Drumm to get in a fully extended loader bucket and cut branches (intertwined with wires) over his head with a chain saw, the Union asserted, should not have resulted in any discipline of employees. Drumm's actions on December 8th according to the Union, amounted to self-help, not insubordination -- it was an attempt to assert the fact that Drumm was right about the safety of the job and that he was entitled to tell management so.

The Union further contended that Drumm's version of the December 8 radio broadcast should be credited, noting that Barry Bolle heard it and found it unremarkable and noting that Emme and Braunel's versions did not match up exactly. The Union asserted that Drumm did not embellish his account of the broadcast. Furthermore, the Union asserted that both Bolle and Somers agreed with Drumm that the job could not be done safely.

Thus, the Union urged, Drumm could and did reasonably refuse to perform an unsafe task on December 8. This was not only supported by the contract but also by the manufacturers' descriptions of the recommended usage of the loader and the chain saw, in evidence here. The Union, therefore, asserted that the Grievant's good reputation had been "viciously" attacked by the County and that he was being "persecuted" by management for his refusal to perform the December 8 job. Therefore, the Union urged that the grievance be sustained.

DISCUSSION:

The sole issue in this case is whether the County had just cause to issue Grievant Gerald Drumm a verbal warning for the manner in which he communicated over the County radio system on December 8, 1989. This case does not require any determination by the undersigned regarding whether the tree near the Bollen Riding Academy could be removed safely or whether it was in fact removed safely by Emme on December 8th. Similarly, this case does not require a finding regarding the safe operation of end loaders or chain saws. It is further significant that the case before me is not one concerning discipline for an employee's refusal to perform an allegedly unsafe task.

The parties have each urged that their witnesses should be believed by the undersigned and, that on this basis, the case should be resolved. In regard to the credibility issue here, I find that the County's witnesses are the more credible for the following reasons. First, I note that on direct examination, Drumm gave two different versions of what was said over the radio

Step 1. ...In the event of a grievance, the employee shall perform his or her immediate assigned work task, if any, and grieve the dispute later, unless his or her health or safety is endangered... .

6/ The Union did not object to the receipt of this evidence at the hearing.

on December 8th. Then, on cross examination Drumm added several facts to his description of the situation on December 8th which tended to corroborate the County's witnesses. In addition, on cross examination, Drumm admitted that he raises his voice, talks loud and that he is hostile and loses his temper without thinking about it at work. Furthermore, Drumm admitted that on December 8th he could have lost his temper. The evidence regarding the incident in November, 1989 between Braunel and Drumm further supports a conclusion that Drumm was actually hostile and aggressive over the radio on December 8th, as Braunel and Emme stated. In addition, I note that Braunel's written and testimonial accounts of what was said by Drumm on December 8th do not differ significantly from each other, or from Emme's testimony on the point. Finally, Drumm's demeanor on the witness stand in this instant proceeding also tended to support the County's claims in this case. It is significant, in addition, that Kevin Somers was unable to corroborate Drumm regarding the December 8 radio transmission and that Barry Bolle did not specifically corroborate Drumm's version of the radio transmission.

The fact that Drumm did not specifically deny being present at the Fall, 1989 safety meeting as well as the evidence proffered by Drumm regarding recommended safety procedures he had learned at Departmental safety meetings over the years and items Drumm had seen posted on the Department bulletin board and safety facts he learned from his experience and/or his supervisors at the County Highway Department, support the notion that Drumm paid attention at safety meetings and that he was aware of the County's policy (repeated in the Spring and Fall of each year) that employes should be polite over the radio and that they request that management visit a jobsite if there is a problem rather than broadcasting specifics of the problem over the County radio system. 7/ I note in this regard that Drumm did not deny being aware of the County's policy. The County's above-stated radio policy is also generally supported by common sense concepts, which the Grievant demonstrated he possesses at the instant hearing. Finally, Drumm did not deny being aware of Braunel's having been issued both a verbal and written warning for Braunel's March, 1989 statements over the County radio. Also, Braunel clearly stated that he understood that the two employes who had sworn over the County radio prior to his promotion to Superintendent had been disciplined by the County in a similar fashion.

The Union assertion that the County failed to show that Drumm had done anything wrong on December 8th, is simply not supported by the evidence. Had Drumm simply asked that a manager view the site on December 8th, no discipline, would have been warranted. Drumm went beyond reasonable use of the radio and the County appropriately determined that Drumm's radio comments deserved a verbal warning. 8/ Therefore, based upon settled arbitral principles and given the credible relevant evidence herein, there is no basis to second guess or set aside the County's decision to discipline Drumm at the verbal warning level.

Despite the Union's assertions, I find no violations, based on this record, of Drumm's right to due process. Nor do I find any evidence herein to support the Union's claims that the County acted in an arbitrary, capricious or discriminatory manner toward Drumm. Furthermore this record does not support the Union's contentions that the County treated Drumm unfairly or in a "vicious" manner. 9/

Based upon all of the relevant evidence and arguments and my analysis thereof, I conclude that the County did not violate the collective bargaining agreement by disciplining the Grievant with a verbal warning for his conduct of December 8, 1989, and I issue the following

AWARD

The Employer had just cause to reprimand the Grievant for his conduct on December 8, 1989.

The grievance is, therefore, denied and dismissed in its entirety.

7/ The Union's assertion for the first time in its brief that the undersigned should disregard County evidence relating to safety meetings as hearsay is untimely raised. In addition, had the Union objected to the evidence at the hearing, this evidence would have likely been admitted pursuant to the business procedure/records exception to the Hearsay Rule.

Furthermore, based on the record evidence here, I reject the Union's assertion that the County had no clear work rule relating to proper radio broadcast procedures.

8/ I note in regard to the level of discipline that the County issued the least severe discipline possible to Drumm in this case.

9/ The reference in the Highway Commissioner's letter of January 29, 1990 to the Employee Assistance Program is, in my experience, normal procedure in grievance cases. Employers that have an EAP often include a reference thereto in their grievance answers so that grievants are aware of the program and are given an opportunity to use the program if they choose.

Dated at Madison, Wisconsin this 12th day of October, 1990.

By _____
Sharon Gallagher Dobish, Arbitrator