

BEFORE THE ARBITRATOR

- - - - -
In the Matter of the Arbitration :
of a Dispute Between :
TEAMSTERS LOCAL UNION NO. 43 : Case 21
and : No. 49684
MODERN BUILDING MATERIALS, INC. : MA-5111
- - - - -

Appearances:

Mr. Charles G. Schwanke, President, appearing on behalf of
the Union.
Mr. William J. Sweeney, Representative, appearing on behalf
of the Company.

ARBITRATION AWARD

The Company and Union are parties to a 1993-96 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve the discharge grievance of Terry Mazzulla.

The undersigned was appointed and held a hearing on October 12, 1993, in Kenosha, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on November 2, 1993.

Issues:

1. Was Terry Mazzulla discharged for just cause?
2. If not, what remedy is appropriate?

Relevant Contractual Provisions:

Article 12. SENIORITY

. . . .

An employee's seniority and recall rights shall terminate if the employee:

- A. Quits or retires.
- B. Is terminated for just cause.
- C. Is not recalled from layoff before the first to occur of: nine (9)

months or the length of an
employee's seniority at layoff.

- D. Fails to return from an approved leave of absence.
- E. Works for another employer during a leave of absence or gives a false reason for a leave of absence.
- F. Continues to be absent from work for three (3) working days without notification to the company.

. . .

ARTICLE 16. DISCIPLINE AND DISCHARGE

The right to discipline and discharge for just cause and to maintain order and efficiency is the sole responsibility of the company, subject to the grievance procedure herein provided.

. . .

ARTICLE 30. GRIEVANCE PROCEDURE

A grievance is defined as a good faith complaint by an employee, arising during the term of this Agreement, that an express term of this Agreement was violated by the Employer. During the term of this Agreement, a grievance shall be processed as follows (it is understood that an employee may discuss a grievance with the employee's supervisor prior to the filing of a grievance, but such discussion, which the foreman may delay until after the employees are punched out, shall not be considered a formal step in the grievance procedure):

- A. If an employee has a complaint, the employee shall first take the matter up with the employee's foreman. The employee may or may not request the foreman to send for the steward for the purpose of assisting and settling the complaint.
- B. If such issue is not settled with the foreman, then the issue shall be considered a grievance, reduced to writing and signed by the employee and the steward, whereupon the company shall write its

decision of the issue and sign the same. All grievances must be reduced to written form within five (5) working days of its occurrence.

- C. Any decision between the union and the company shall be final and binding at any step of the grievance procedure.
- D. Such decision is final unless within five (5) working days of the date of the decision a request is made to the company for a review.

. . .
EXHIBIT "B"

WORK RULES

The work rules which follow have been established for your benefit and protection. These rules are not intended to restrict or impose on the privileges of anyone. They are installed to insure the right and safety of all employees.

<u>RULES</u>	<u>FIRST</u> <u>OFFENSE</u>	<u>SECOND</u> <u>OFFENSE</u>	<u>THIRD</u> <u>OFFENSE</u>
5. Fighting on	Subject to		
company property	discharge.		
while on duty.			
27. Proven reckless-	Subject to		
ness while on	discharge.		
duty.			

Discussion:

Grievant Terry Mazzulla was employed by the Company for sixteen years when he was discharged on Saturday, July 24, 1993 for two incidents which occurred that morning. The grievant had previously received a three-day suspension on July 9 for leaving the plant for half a day without permission. At that time he was

told in writing "Your absence all afternoon from the workplace with unfinished production and concrete hardening on the machines is considered gross misconduct. Another such occurrence and you will be subject to discharge."

On Saturday, July 24 the grievant arrived at work at approximately 6:00 a.m. Almost immediately, he had an altercation with supervisor Jerry Tranberg. The fact of the altercation is admitted, but the details differ depending on the witness.

Tranberg testified that the grievant came in about nine minutes late, and went to his station and looked at his production sheet. He then "stormed off" into the lunch room, and Tranberg followed him. The grievant came up to him, put his hands around Tranberg's throat and told him to get out of his face. Tranberg stated that he left the building, but that the grievant followed, yelled at him and pushed him. Tranberg stated that the grievant pushed him over, and that when he got up he told the grievant he was fired. Tranberg stated that he was physically assaulted: not hit, but shoved to the ground. He stated that he had no discussion with the grievant before the grievant went into the lunch room, and he does not know what was going through his head.

A second incident then occurred, which the Company independently relies on for its discharge action. Employee Rodney Pringle, who was hired by the Company three and a half months earlier during a strike, testified that he was sitting in a forklift that morning when a truck came by, slid to a stop at within one or two feet of his forklift truck, backed up, and drove around him. He testified that it was Terry Mazzulla's truck, although he could not see who was in it, and that the truck was going between 30 and 40 miles per hour as it came around the corner at the back of the plant. Pringle testified that he was with employee Dennis Strasser at the time.

The Company also offered in evidence a written statement by employee Joe Ashlin. The Company stated that this statement was written on the morning of the incident and relates to Ashlin's observation of the first incident, but did not offer to call Ashlin as a witness. The Union did not object to admission of the document. Ashlin's written statement states as follows:

At approximately 6:45, I saw Jerry walk out of the breakroom with Terry walking closely behind him. Terry was yelling, "Come on, you fuckin' pussy! and he started pushing Jerry. Jerry continued trying to walk away from Terry, but, Terry kept grabbing him and kept yelling, "Come on you fuckin' pussy" over and over while foaming at the mouth. Jerry finally broke away from Terry and he said, "Your (sic) fired!" and walked away.

Joe Ashlin

The grievant testified that ever since the strike he was not given adequate helpers for his regular function of running the core machine, just new hires off the street, and that the Company routinely told him he had to stay till the work was done. The grievant admitted coming in a few minutes late on Saturday, July 24, and admitted getting mad because he looked at his assignment sheet and it had twice as much work on it as the day before. The grievant further admitted yelling at Jerry Tranberg, but denied pushing him, and stated that Tranberg tripped while backing away from him, and fell. The grievant stated that when Tranberg then yelled at him that he was fired, he left, intending to take up the issue later with the Company's owners. On cross-examination, the grievant admitted that he simply assumed he would not have a helper on the day in question, because he did not have a helper the day before. (The Company introduced an exhibit to show that the grievant was assigned two helpers for the day in question, though one did not show up.) The grievant testified that while in the lunch room he just grabbed his stuff and got a cup of coffee and went back out, and that Tranberg followed him around.

With respect to the second incident, the grievant testified that he tried to leave the plant around the building because his truck was already facing that way and he had been ordered to leave. He claims that he was driving no faster than the forklift drivers, and that Pringle was moving in the forklift truck at the time. The grievant denied having to put the truck in reverse.

Employee Dennis Strasser testified that he was with Pringle at the time Mazzulla came around the corner in his truck, but that the forklift had stalled and was not moving, and they were about to get another one. Strasser testified that the truck was a good 25 to 30 feet away when it stopped, and that it was going no faster than Strasser himself drives in the plant.

The Union offered to prove, and the Company admitted, that Ashlin received \$1.50 increase in wages since the strike. The Company offered to prove that Ashlin participated in the strike along with other Union members.

The Company contends that Tranberg and Ashlin should be believed as to the incident which took place involving Tranberg, and that Pringle should be credited over the grievant as to the incident involving the truck. The Company contends that the reason for Ashlin's pay increases is that the contract permits larger-than-standard increases for employees who put forth an extra effort, and that Ashlin is being rewarded for doing so, not for his written statement. The Company notes that Ashlin participated in the strike. The Company further contends that within a few weeks after the strike was over, things were back to normal, and

that the strike cannot be used as an excuse for the grievant's actions. The Company contends that the grievant's actions included pushing and grabbing Tranberg in both Tranberg's and Ashlin's statements, and that the grievant is not credible. The Company notes that the grievant also had a prior three-day suspension recently on his record, for what it characterizes as insubordination. With respect to the second incident, the Company argues that in leaving the plant, the grievant recklessly speeded through the yard and almost collided with Pringle's forklift truck. The Company contends that while the grievant may have been angry over his altercation with Tranberg, the Company cannot tolerate behavior that puts the safety of other workers at risk, and that this violated Work Rule #27, independently justifying discharge.

The Union contends that the grievant should be credited as to the disputed parts of the events of July 24, for several reasons.

The Union argues that the written statement by Ashlin does not demonstrate any actual fighting or anyone physically hurt, and that swearing is common in this type of Company. The Union argues that there were tensions on both sides as a result of the strike, and that Pringle had been leniently treated in several incidents involving lateness and one minor accident, and had a reason to be grateful to the Employer. With respect to Ashlin, the Union argues that he may not be credible, because he got a substantial increase in wages since the strike. The Union requests that the discharge of the grievant be reduced to a written warning.

It is clear that by any account the grievant's conduct on the morning of July 24 was inexcusable and justified a severe penalty.

In concluding that discharge was -- by a very small margin -- too severe for the offenses that are proven on this record, I am influenced by two facts above all. One is that the grievant has sixteen years' service with the Company. This, however, would not be sufficient to overturn this discharge if the Company's evidence of wrongdoing was as consistent as the Company claims it is. The factor marginally justifying some doubt that the grievant was so culpable as to justify outright discharge is that there are some discrepancies in the Company's evidence. First, it is clear that the grievant approached Tranberg, and that Tranberg did nothing to set off the incident. It is not, however, entirely clear that the grievant pushed Tranberg over. In this context I note particularly that the written statement by employee Joe Ashlin does not include a statement either that the supervisor was physically pushed over or that he fell. A reference to that was added below his signature in another handwriting.

This combines with the fact that the Company did not call Ashlin as a witness, therefore not subjecting him to cross-examination, to raise at least a small amount of doubt as to

exactly what happened. And while there is no reason on this record to disbelieve either that Ashlin received his wage increase for working hard and effectively or that Pringle is an honest witness, the fact remains that there had recently been a strike, that Pringle's relationship with other employes may have been affected by that strike, and that the other employe present with Pringle at the time described the incident with the truck differently from Pringle.

It is more probable than not that Tranberg's recollection is correct. Certainly, there is no particular reason why Tranberg would lie about the details of this incident, while the grievant clearly has something to gain by doing so. Yet the fact that the

strike was recent, together with the inconsistencies in the testimony and particularly the failure to call Ashlin for live testimony where he was the most neutral witness available; and the grievant's length of service, combine to convince me that the Company has not proven the grievant's misconduct to such a degree that he should not be allowed his job back. Five months have elapsed since the discharge. I find that reinstatement without backpay will impose a sufficient hardship on the grievant that it adequately addresses the degree of misconduct that was convincingly proven at the hearing.

For the foregoing reasons, and based on the record as a whole, it my decision and

AWARD

1. That the Company lacked just cause to discharge grievant Terry Mazzulla on July 24, 1993.
2. That as remedy, the Company shall, forthwith upon receipt of a copy of this Award, reinstate grievant Terry Mazzulla to his former position or a substantially equivalent position, without loss of seniority. Backpay is not required.

Dated at Madison, Wisconsin this 15th day of December, 1993.

By Christopher Honeyman /s/