

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TEAMSTERS LOCAL UNION NO. 43

and

W. H. PUGH OIL COMPANY

Daniel Nielsen, Chair
Robert Weber, Company Member
David Drissel, Union Member

Case 3 No. 55101 A-5576
Alan Wesley Discharge

Appearances:

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Post Office Box 12993, Milwaukee, WI 53212, by Mr. John Brennan, Attorney at Law, appearing on behalf of the Union.

Van Remmen Law Office, S.C., 1652 North Main Street, Racine, WI 53402, by Mr. Geoffrey T. Van Remmen, Attorney at Law appearing on behalf of the Employer.

ARBITRATION AWARD BY THE
COMMITTEE FOR ADJUSTMENT

Pursuant to the provisions of their collective bargaining agreement, Teamsters, Chauffeurs and Helpers Union No. 43 (hereinafter referred to as the Union) and W.H. Pugh Oil Company (hereinafter referred to as the Employer or the Company) jointly requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen, a member of its staff, to serve as neutral chair of a Committee for Adjustment to hear and decide a dispute concerning the discharge of Alan Scott Wesley in January of 1997. The designation of the neutral chair was made. The Company designated Robert K. Weber as its member of the Committee, and the Union designated David Drissel. A hearing was held on June 12, 1997 at the Union's offices in Racine, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted post-hearing briefs, which were simultaneously exchanged through the neutral chair on June 20, 1997, whereupon the record was closed. The parties requested that the Committee for Adjustment issue an expedited Award, consisting of a statement of the issue, a very brief statement of the background, and several paragraphs explaining the essential reasoning for the result, within a period of thirty days from the close of the record.

Now, having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Committee makes the following Award.

I. Issue

The parties stipulated that the following issue should be determined herein:

1. Did the Employer have just cause to terminate the grievant on January 30, 1997? If not,
2. What is the appropriate remedy?

II. Pertinent Contract Language

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ARTICLE 7. DISCHARGE OF EMPLOYEE

Section 1. The Employer shall not discharge any employee without just cause. Cause for immediate discharge shall include drunkenness or dishonesty. Any employee may request an investigation as to his discharge. If the Employer and the Union cannot agree on the proper disposition of the case within five (5) days, the case may be referred to the Committee for Adjustment as provided in Article 6. Should such Committee for Adjustment decide that an injustice has been done, the employee shall be reinstated and compensated at his regular rate of pay while he has been out of work. Appeal from discharge must be taken within five (5) days by written notice to the Employer and the Union.

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III. Background Facts

The Employer operates a variety of businesses in Racine, Wisconsin, including a fuel oil delivery and furnace sales and service operation. In so doing, it employs personnel in the classifications of Truck Drivers/Warehousemen and Service/Repair, who are represented by the Union. Those in the Service/Repair classification perform cleaning and repair work on furnaces in customers' homes. They are also expected to obtain a commercial driver's license (CDL) so that they can drive the tank truck and ultimately become delivery drivers for the Company. The

grievant, Alan Wesley, was hired in October of 1995 as a Service/Repair worker.

The grievant was discharged on January 30, 1997. He was off work that day, due to a burn suffered at work the previous day. The Company's president, Bill Pugh, came to his home, and told him that he had to let him go. Later that day, the instant grievance was filed, setting forth the grievant's view of events:

Boss said he had to let me go because of some call backs, some clients did not want me at their homes, was injured on 1-28-97 from burn. Boss came to my house with my check and injury report telling me he had to let me go (around noon on 1-30-97). Said he would tell me my options about grievance or whatever I wanted to do. Left note for items to be returned to Company.

Some time later, the Company submitted a written statement of its position:

On January 11, 1997, Terri talked to Bill Pugh in regards to Scott. Customers are complaining about having 3,4,5 or more return visits from Scott to fix a problem with the furnace. Also changing all kinds of parts, charging customer, and still having the initial problems. Customers stating they do not want Scott touching their furnace anymore, and to send someone else!! Customer made comments about how she didn't like the way he was looking at her antiques and possessions in her home. Made her very uncomfortable. How Scott does not listen to any advice or training from Lorin or Bill was also mentioned. Scott did things however he wanted, even when told it was the wrong way.

On January 13, 1997, Bill Pugh took Scott aside in his office and talked to Scott about the discussion on January 11th.

Other things, that have occurred during Scott's employment;

Scott was having a problem with the emergency break (sic) on his truck. He made an appointment at Elmer's service station to fix the break on January 8, 1997. Instead of dropping the truck off that morning at Elmer's like we always do, he dropped the truck off after work on January 7th and did not inform anyone he was doing this. Scott was ON CALL and did not have a truck if he got a service call. When the Answering Service did beep him that night with a service call, he told them to beep Lorin, he didn't have a truck. Lorin was beeped on the #2 beeper, and did go on the call.

Lorin was very upset because he was awakened by this and did not know he would be going on service calls. Also, Scott would not return Lorin's phone calls to him until many phone calls later.

On many occasions throughout Scott's employment, he would oversleep and needed to be beeped or called at home in the morning when he wasn't at work at the time he was suppose to be.

Other employees did not see any change in Scott prior to dismissal and after warning.

The grievance was not resolved in the lower stages of the grievance procedure and referred to the Committee for Adjustment. A hearing was held before the Committee on June 11, 1997, at which time the following testimony was taken:

A. The Company's Evidence

The Company presented the testimony of Terri Presta, Joe Arvai and Bill Pugh.

Terri Presta, Service Secretary

Terri Presta testified that she is the Service Secretary for the Company, and is responsible for taking phone calls, fuel orders, service orders, and dispatching workers in response to these orders. Over the past two years the Company has had only two service people, the grievant and Lorin Lichterman. Service people make approximately three calls per day during the summer season for furnace cleaning, and between five and six per day in the winter for servicing furnaces.

She presented business records for fourteen accounts on which the notation "Lorin only" appears in one form or another, indicating that the customer did not want the grievant to make calls to the account. She also presented customer cards from fifteen accounts where multiple calls had been made by the grievant to fix a problem with the customer's furnace. Presta testified that the Company had thousands of cards in its files, and acknowledged that there were other customer accounts not involving the grievant with notations that only a particular service person was to be sent out to the account. Presta indicated, however, that over the seven years that she had been dispatching, there had been only one or two times that a customer called to insist that some other employee not be sent to service the account, as compared with fourteen for the grievant.

Joe Arvai, Vice-President and Bookkeeper/Accountant

Joe Arvai testified that he is the Vice-President of the Company and handles the Company's bookkeeping and accounting work. He stated that the fuel oil business was a declining field, as more and more customers converted to the use of natural gas for heating. Arvai expressed the opinion that it was very important for the Company to have good customer relations,

as existing customers are hard to replace in a shrinking market.

Arvai also has some involvement in the Company's training system for new employees, which consists of on-the-job training. New employees start out watching others clean furnaces, and then go out on their own to clean furnaces. Likewise, the employee will then accompany an experienced employee on service calls, and will then start to make service calls on his own. The grievant accompanied Lorin to learn the job, and Arvai provided him with service manuals for the furnaces the Company sells and showed him a video about servicing furnaces. This was more than is usually done with new hires, but the Company needed a service person, and wanted the grievant to work out in that position.

Arvai reviewed one customer account on which the grievant had made multiple calls, replacing a variety of parts until Lorin finally inspected the unit and determined that there was a hole in the heat exchanger. The customer was not charged for the work done by the grievant nor for the unnecessary parts he installed.

On cross-examination, Arvai acknowledged that there were many more types of furnaces than those sold by the Company, and that he did not provide the grievant with manuals for any of those. He could not identify any customers that the Company had lost as a result of the grievant's work, and said that the grievant was a hard worker, who displayed initiative and had done work that needed to be done without being assigned to do it. Arvai said that the grievant seemed to want to obtain his CDL so that he could become a delivery driver. The grievant did pass the written exam for his CDL, but never passed the road test. In order to pass the road test, he needed to get some experience driving the tank truck, and Arvai agreed that the grievant had approached him and offered to drive the truck on his own time in order to get the experience. No time was specifically set aside for him to get driving experience, and his temporary permit ultimately expired. The grievant also approached Arvai on his own initiative to ask whether there was training available on furnace installation, a function that the Company was subcontracting to others. Finally, Arvai agreed that the only way to know that a heat exchanger was cracked was to have the furnace running.

Bill Pugh, President

Bill Pugh testified that he is the President of Pugh Oil, and that he is the person who initially hired the grievant, and ultimately fired him. The grievant was hired to clean and service furnaces and to drive for deliveries. He received the same on-the-job training opportunities as all other employees had. Although Pugh had mentioned to him several times that he needed to get his CDL, the grievant always cited other work he needed to do or had some reason that he couldn't do it. As a service person, the grievant had a lot of call backs and complaints on work that he had done, by far the most of any service employee at the Company. While he seemed to

be trying, he was too independent and was not willing to call for help or advice when he ran into something he couldn't figure out. Call backs damage the Company in two ways -- the customer cannot be charged for the service visit, and the customer gets very upset when their heat is not restored immediately.

Pugh testified that Lorin Lichterman was called back to his job at Chrysler in October of 1996, leaving him with just one service person -- the grievant -- going into the winter season. He met with the grievant and told him that there were customer complaints and that he had to improve. He promised to help the grievant with schooling or reference materials if he wanted, and the grievant said he would do better. As it turned out, Lichterman continued to work for the company for a time, but he did ultimately go back to Chrysler.

On January 13, 1997, he met with the grievant for about five minutes to discuss his performance and a complaint that had been received from a customer. The customer had said that the grievant's hair was too long, he looked like a hoodlum and she did not like the way he seemed to be eyeing her antiques. He also told the grievant that he had to improve his performance, because Lichterman was definitely going back to his old job at Chrysler. The grievant did promise to improve, though he never asked for any help or took any steps to improve his performance. Pugh finally told the grievant he was fired on January 30th. He had decided on termination a week or so before this, because he was still getting call backs and was losing money on the grievant's work.

On cross-examination, Pugh acknowledged that there was only one week between the January 13th meeting where he told the grievant to improve, and the decision to terminate him. Although the decision was announced only after the grievant suffered a work related injury, the injury had nothing to do with the decision, and the delay was simply caused by Pugh's reluctance to fire someone. Before firing him, Pugh spoke with Lorin Lichterman and Bill Salbrieter (phonetic), the driver, about him and both men reported that he had not sought them out for help or advice. Pugh conceded that there had been times when the grievant did seek advice, but said that he did not do it often enough to avoid call backs.

Pugh testified that he never actually told the grievant that his job was in jeopardy or that he would be fired if he did not improve. Nor did he set any deadline for improvement when he spoke with the grievant. He did not have any way of knowing what the grievant knew or believed as far as his job status was concerned before January 30th.

B. The Union's Evidence

The Union presented the testimony of the grievant, Alan Wesley:

Alan Wesley, Grievant

Alan Wesley testified that he was hired in October of 1995 to clean furnaces. He had little relevant experience, and learned the job by following Lorin Lichterman on about eight cleaning jobs over the period of a week or two. Although he was not told he would be doing service when he was hired, he eased into that as well, following Lichterman to ten "no-heat" calls, watching what he did, and listening to him explain how to determine what the problem was. He also read the manuals that Arvai had given him, though these did not relate to more than a handful of the hundreds of different furnaces he would encounter on service calls. When he encountered problems, he would call Lichterman for help. This happened perhaps once a week, and Lichterman would advise him on what to look for and what to do. Lichterman was always helpful, although he did not like to receive such calls at night when it was not his turn to be on-call.

The grievant said that he had tried to get additional training and schooling, and that he had approached Arvai about this. Arvai said that if he identified some classes he wanted to take, the Company would pay for them, but he never did get around to taking any additional classes. He tried to get his CDL, and did pass the written exam, but aside from one trip he himself arranged with Lorin Lichterman, the Company never set aside any time for him to drive the tank truck to prepare for the road test. He asked to be allowed to go along on Saturday deliveries, without pay, but nothing was ever arranged.

The grievant said that he had never been criticized for work performance or evaluated in any way, until his meeting with Bill Pugh on January 13, 1997. On one occasion in the summer of 1996, he asked Pugh how he was doing, and Pugh told him he was doing fine. In October of 1996, he met with Pugh, and was told that with Lorin leaving, he would have to shoulder responsibility for the service work. Pugh did not criticize his work or reprimand him in any way during this meeting. When he met briefly with Pugh on January 13th, Pugh told him a customer had complained that he looked like a hoodlum. He asked Pugh about getting additional training, and Pugh told him he would check with other oil companies to see where they sent their people. Pugh did not otherwise reprimand or criticize him in this meeting.

Until Pugh came to his home on January 30th, he had never been reprimanded, suspended or in any way disciplined during his time with the Company. Before he was fired, he never had any idea that he was in danger of losing his job.

The grievant testified about the service call where he made numerous trips, and said that he had no way of knowing that the heat exchanger was defective without running the furnace, which was impossible because the furnace would not start.

On cross-examination, the grievant admitted that his employment application showed that he was applying for a job cleaning, servicing and driving, and that he knew at the time he would ultimately be doing more complicated work. He also understood that he was going to have to

learn how to do this work as he went along, and that he would also have to obtain a CDL. He conceded that although the Company did not make formal arrangements for behind the wheel training, the Company did nothing to prevent him from getting the CDL. As for the on-the-job service training, he felt that he probably would have benefited from more time watching Lichterman before going out on his own. He agreed that repeated call backs would make the customers unhappy, but pointed out that Lichterman had also had multiple call backs on jobs. The grievant could not say for sure whether he had ever been told that he had to improve his work performance, but he acknowledged that he himself felt he needed improvement, and that he wanted to improve.

IV. The Positions of the Parties

A. The Position of the Company

While the contract requires "cause" for discharge, and specifies two reasons -- dishonesty and drunkenness -- for summary discharge, no reasonable reading of the agreement prohibits immediate discharge where it is clear that an employee is incompetent. There is no specific progression of discipline set forth in this contract and the Committee may not impose what the parties have not bargained.

The evidence in this case makes it absolutely clear that the grievant is not capable of working as a service person. The only other job available is as a truck driver, and the grievant does not possess the CDL required for that job. Despite receiving the same training as every past service person, and every opportunity to obtain the CDL, the grievant lacks the qualifications for any of the jobs in the bargaining unit, and the Company should not be expected to simply continue him on its payroll. For these reasons, the Committee should deny this grievance in its entirety.

B. The Position of the Union

The Union takes the position that the grievant cannot be summarily discharged under the contract. Since there are only two grounds for immediate discharge, it stands to reason that any other basis for discipline requires the use of progressive discipline. Prior notice is a fundamental element of just cause, and the Employer concedes that it gave the grievant no warning at all before firing him. In the summer of 1996, Pugh assured him that he was doing a good job. While there was a meeting between the grievant and Bill Pugh in October 1996, and another in January 1997, neither of those meetings could have warned the grievant that his job was in jeopardy. The October meeting was to advise him that Lorin Lichterman was leaving and he would have to take responsibility for the service function. The January meeting was to hold in order to pass along a customer's complaint about his appearance. Pugh admits that he did not tell the grievant he was

in danger of discipline nor did he lay out any plan of improvement that the grievant was to follow.

The evidence does not establish that the grievant's work performance was inadequate. He failed to obtain a CDL, but he did pursue the license, and the Employer made no arrangements for him to get the necessary road experience. As for his service work, he may have had more call-backs than past service persons but it was still a very small percentage of his overall workload. Nothing in his work record justifies the Company's decision to impose discharge as the first measure of discipline. For these reasons the grievance should be granted and the employee made whole.

V. Discussion

Poor work performance is generally acknowledged to be grounds for discipline. From the evidence presented at the hearing, the Committee agrees that the grievant's work performance was quite probably less than the Company would reasonably have expected. While the Union is correct in pointing out that the grievant's call-backs were not numerous in comparison to his overall number of service visits, this is a small business in a declining market, with less of a margin for writing off repeat visits and alienating customers than a large operation in a vigorous market might enjoy.

The fact that poor work performance is cause for discipline and that the grievant's work performance was poor does not automatically lead to the conclusion that the grievant is subject to discipline. The purpose of discipline is correction, not retribution. If an employee's conduct is to be corrected, at a minimum the employee must first have some clear idea what is expected. In some cases, this is accomplished through common knowledge and common sense. An employee who is to be disciplined for theft, for example, need not have been counseled that theft is against Company rules. All persons are held to know that theft is unacceptable conduct in any setting. 1/ In the area of work performance, however, expectations are not as clear-cut.

Every employer hopes that every employee will perform at maximum effort and efficiency, but there is a generally a range of acceptable performance that lies between that ideal and the imposition of discipline. Most employees feel they fall within this range, no matter what the objective facts might be. In order to shake a below average employee out of this belief, it is

1/ Indeed, this Agreement recognizes the distinction between behaviors that are obviously improper, and those that require advance notice in the form of progressive discipline. Article 7 provides for immediate discharge in cases of drunkenness and dishonesty. The logical implication of this language is that immediate discharge is not appropriate for lesser offenses.

necessary that the employer take some step to clearly define its expectations and what must be done to meet them. There is no set formula for accomplishing this. In some settings, this is done through set production standards and formal evaluations. In smaller companies, this may be accomplished through counseling employees. However the employer's expectations are communicated, it is a pre-condition to discipline in all but the most egregious cases. 2/

2/ The Committee stresses that this principle applies to work performance and productivity issues, and does not necessarily apply to misconduct issues. In addition, there are some fundamental aspects of work performance that an employee may be expected to know without any specific warning. Where low productivity falls to the level of loafing, for example, an employee is expected to know that an honest effort is expected without any formal notice being given. Likewise, in the Ernst Enterprises case (103 LA 782 (Doering, 1994) cited by the Company, a truck driver may be expected to know that becoming uninsurable will render him unfit for continued employment.

In this case, the Company's complaint about the grievant is essentially that he had too many call-backs. 3/ The Company attributes this to a reluctance to ask for advice often enough. All of the service persons have had call-backs, but the grievant clearly had many more than the others. According to Pugh, the extent of the counseling that the grievant received was to tell him in general terms during the October 1996 and January 13, 1997 meetings that he had to get better at the job. Pugh conceded that he did not raise the possibility of discipline with the grievant during these meetings. The October meeting was to prepare him to take over more of the service work in anticipation of Lichterman's leaving the Company. In the January 13th meeting, Pugh told him he would look into additional training opportunities. Telling an employee that he must get better at his job while at the same time holding out the prospect of greater responsibility and additional training would not put the employee on notice that his performance was so unacceptable that his job was in danger.

It is human nature not to want to have an unpleasant confrontation, but failing to clearly advise an employee that his job is in jeopardy is not an act of kindness to either party. In this case, Pugh's reluctance to tell the grievant where he actually stood left him with the incorrect impression that his work was in the acceptable range. It also prevented the Company from getting the kind of improvement it wanted, or at least from finding out whether he could improve.

The tangential issue of the Commercial Driver's License illustrates this point. The Company wanted him to get his CDL, and he was interested in doing so. However, no deadline for getting the license was ever set. The grievant had passed the written test, but felt no urgency in arranging for behind the wheel training. The Company took no steps to arrange such training. Thus even though both parties wanted him to get the CDL and he was apparently capable of

3/ The Company's statement of position after the discharge also mentioned some attendance issues, an incident where he took a truck in for service without telling anyone, causing him to be unable to respond to a service call, and customer complaints about his appearance. There was no discipline for attendance in his record, nor for the truck incident, and no evidence was presented on these points. As for the appearance issue, this was discussed with the grievant when he met with Pugh on January 13th, but no discipline was imposed or even suggested over this issue. Clearly his is a position that requires contact with customers and entry to their homes, and the Company can set reasonable grooming and dress standards if it wishes to. There is no evidence that it has, and the grievant cannot be held to a dress code that no one knows about.

getting one, his temporary permit lapsed before he took the driving portion of the test and he ended up not getting the license. Had he been told that he needed to get his CDL within a fixed period of time, the employer's expectations would have been clear, and he would have known that failure to meet them would trigger discipline. More to the point, he probably would have gotten the CDL, to the benefit of both him and the Company.

Based upon the fact that the grievant did not have reasonably clear notice of the standards the Company expected him to meet, nor of the deficiencies in his performance, the Committee concludes that the Company did not have cause for termination. The appropriate remedy is to immediately reinstate the grievant to his former position, to make him whole for his losses, and to counsel him on what the Employer's expectations are and what he needs to do to meet those expectations.

On the basis of the foregoing, and the record as a whole, the Committee has made the following

AWARD

1. The Employer did not have just cause to terminate the grievant on January 30, 1997.
2. The appropriate remedy is to:
 - a. Immediately reinstate the grievant to his former position;
 - b. Make him whole for his losses by paying him the amount of his lost earnings, less any interim earnings, crediting him with seniority for the period of the discharge, and restoring his lost benefits under the contract;
 - c. Remove any reference to the discharge from his personnel file and other such records;
 - d. Counsel him immediately upon reinstatement as to the Company's reasonable expectations regarding work performance and grooming standards; to clearly set out what he needs to do to meet those expectations; and to establish a reasonable timeline for him to obtain his CDL.

Dated at Racine, Wisconsin this 1st day of July, 1997.

Daniel Nielsen, Neutral Chair

Robert K. Weber /s/

Robert K. Weber, Company Member

David Drissel /s/

David Drissel, Union Member