

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION, LOCAL 565

and

THE CARNES COMPANY

Case 62
No. 54618
A-5536

Case 63
No. 54619
A-5537

Appearances:

Mr. Richard Lewis, Business Manager and Financial Secretary/Treasurer, on behalf of the Union.

Michael, Best & Friedrich, by Mr. Marshall R. Berkoff, on behalf of the Company.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "Company", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Middleton, Wisconsin, on February 17, 1997. The hearing was transcribed and the parties thereafter filed briefs which were received by April 11, 1997. Based upon the entire record, and the arguments of the parties, I issue the following Award.

ISSUE

The parties have agreed to the following issue:

Was the Company justified in suspending and then discharging grievant Shelby Riley and, if not, what is the appropriate remedy?

BACKGROUND

The Company manufactures heating and air conditioning distribution equipment at its Verona, Wisconsin, plant.

Grievant Riley, a Welder B, has been employed there for about 17 years. During that time, he was disciplined in 1991 for building a metal cart with wheels for his own personal use without receiving permission from supervision to do so. He was then told that he could be fired if he ever did that again. Riley over the years also had been warned about his attendance and failure to punch his time card.

The Company lets employees purchase redundant scrap metal and to work on personal projects on their break times. In order to do so, employees must first contact a supervisor for permission to use Company equipment and to buy scrap, after which they pay for it.

Riley was scheduled to work his normal 3:30 p.m. to 12:00 a.m. shift on Friday, September 27, 1996. 1/ He reported and punched in early at 1:15 p.m. that day, thereby qualifying for overtime. Riley and other employees on the second shift were entitled to a contractually provided for break from 5:35 p.m. to 5:45 p.m., an unpaid lunch period from 8:00 p.m. to 8:30 p.m., and another break from 10:05 p.m. to 10:15 p.m.

It is undisputed that Riley that night built a 12 foot high tree stand for hunting which weighed about 120 pounds; that he and fellow employee Mark Conley moved it out to the loading dock near the end of Riley's shift; that Riley at the end of his shift drove home on his motorcycle; that he returned to the plant where he loaded the tree stand on his truck; that he drove his truck home and went to bed; that the local police that night at about 1:15 a.m. - 1:30 a.m. came to his home to inquire about the tree stand; and that Riley that night returned the tree stand to the plant.

There is a considerable dispute, however, relating to the circumstances surrounding the building of the tree stand that night with the Company claiming, and Riley denying, that he built it on paid work time.

Riley testified that he only worked on the stand during his 5:35 p.m. - 5:45 p.m. break, his 8:00 p.m. - 8:30 p.m. lunch break, and his 10:05 p.m. - 10:15 p.m. break. He therefore flatly denied ever working on the tree stand at any other times and he denied ever working on it before 5:35 p.m., the start of his first break.

Riley said that he had made about 10 tree stands in the last five years; that he told supervisor Denny Stampfli on September 27 he was building a tree stand; that he used drop-off and scrap material on the stand; that the steps for the stand already had been cut and were stored near his bench; that supervisor Chuck Flood accompanied the police when they came to his house at about 1:15 a.m., Saturday, September 28; and that no one from the Company before then had questioned him about the stand. He added that he in the past had always paid eight cents a pound for scrap material and that he planned on paying for the stand on Monday, September 30, per the instructions he received on September 27.

Riley on cross-examination admitted that he did not prepare a labor sheet on September 27, as he was required to do, and that he used Company tools that evening without permission in violation of Company Rule 10. He also said that he did not ask supervisor Flood (who was there until 7:00 p.m.) for permission to build the stand on September 27 because Flood was located too

1/ Unless otherwise stated, all dates hereinafter refer to 1996.

far from his work station; that he that night cut sturdicore in Department 104; that he did not ask supervisor Marcella Newell for permission to build the stand on September 27 because it was already built when he saw her; that he earlier had saved scrap in his work area which he used for the stand; that fellow employes Leland Haglund and Mark King testified that they saw him that day between 2:30 and 3:00 p.m. because of a "misunderstanding on the time"; and that he told Newell that night that he had used about 40 pounds of scrap, which he admitted "turns out not to be accurate, yes."

Riley's testimony was directly challenged by several fellow employes who testified that Riley worked on the tree stand outside of his authorized break and lunch times.

Al Christensen testified that Riley approached him before the 5:35 p.m. break and asked him to unlock the angle cutting machine, and that he did so. Christiansen added that Riley told him that Stampfli had given him permission to use the angle cutting machine. Christiansen also said that Riley later that evening asked him before the 8:00 p.m. lunch break to cut a piece of metal into several pieces with the shearer, and that he did so. 2/

Fellow welder King testified that he saw Riley in Department 104 by the angle cutting machine between 2:30 p.m. - 3:00 p.m.; that he saw Riley set the stops on that machine; and that he then heard that machine start. He did not, however, directly see Riley operate the angle cutting machine. King's shift ended at 3:30 p.m., thereby making it impossible for him to have seen Riley after 5:35 p.m. that day.

Haglund testified that he saw Riley operate either the angle cutting machine or notcher in Department 104 "around two" and that Riley had a short piece of angle iron. Haglund, now retired, also said that his shift ended at 3:30 p.m. that day, thereby making it impossible for him to have seen Riley at his 5:35 p.m. break.

Supervisor-facilitator Stampfli testified that Riley spoke to him about 2:30 p.m. - 3:00 p.m. on September 27 about buying two lengths of angle scrap; that he, Stampfli, told Riley that it would total \$13.60; and that he told Riley to pay his immediate supervisor. Stampfli added that Riley never told him on September 27 that he was building a tree stand; that Riley mentioned the stand to him a couple of weeks earlier; and that he estimates Riley used about \$50 worth of Company stock in building the stand (Company Exhibit 4).

On cross-examination, Stampfli acknowledged that Riley many years ago maintained a running tab for materials he purchased from the Company; that he did not see Riley build any part

2/ The Company later suspended Christensen for one day for helping Riley during his work time. Christensen never grieved that suspension. The Company also suspended supervisor Newell for her failure in not looking more carefully into the events of September 27.

of the tree stand on September 27; and that employees sometimes have taken materials out of the plant without paying for them, provided that there was written documentation of what was being purchased.

Former supervisor Newell, who was subsequently terminated by the Company, testified that she first spoke to Riley about 8:30 p.m. or 8:40 p.m. on September 27; that they talked about his tree stand; that she never saw him work on it on Company time; that Riley offered to pay her for the materials he was using; that she told him to pay Flood on Monday, September 30; that employees "almost every day" forget to submit their labor sheets; and that other employees in the past have taken Company materials without immediately paying for them.

On cross-examination, Newell acknowledged that employees are required to get permission before working on their personal projects; that she never gave Riley such permission; and that Riley never told her that he would be taking the tree stand home with him that night.

Supervisor-facilitator Dennis Breese, a former welder, testified that he conducted a study on how long it took Riley to complete his tree stand and that he codified his conclusions in Company Exhibit 14 which shows that Riley spent a total of 3 hours and 23 minutes on that project (that total included Riley's break and lunch times). Breese answered "absolutely not" when asked if any employee in the plant could make the stand in an hour and he added that he himself would need about six hours to do the job.

On cross-examination, he admitted that he has not done any production welding since about 1977; that he does not have a current certification for welding; that the Company changed some of its procedures relating to the purchase of scrap after the Riley incident; and that he has no training in time-study.

Ron Zettle, a Welder B, was called as a Union witness and testified that it is "possible" that Riley could have finished the tree stand in about 50 minutes. He said that the Company's policy of working on personal projects immediately changed after Riley was terminated; that he sometimes worked on personal projects without first getting permission from his own supervisor; that some of the materials used in the tree stand came from Riley's work area; and that he sometimes took materials without immediately paying for them.

On cross-examination, Zettle admitted that he could not recall ever working on a personal project without supervisory approval; that in estimating how long it took Riley to finish the tree stand, he did not calculate how long it took Riley to retrieve all of the materials; and that he himself had never built a tree stand with a ladder.

The Company on Monday, September 30, placed Riley on an indefinite suspension and, following an investigation conducted by Human Resources Manager Julie A. Sundby, it discharged him via an October 15 letter which stated:

. . .

We have completed our investigation into the matter that led to your indefinite suspension. Specifically, you engaged in the following activities on the night of September 27, 1996:

Unauthorized use or abuse of Company tools and property, falsifying Company records, taking Company property without proper authorization. In addition, we have also determined that you were dishonest during our 9/30/96 investigatory meeting regarding your activities on 9/27/96.

. . .

Riley grieved his suspension and discharge, hence leading to the instant proceeding.

POSITIONS OF THE PARTIES

The Union primarily argues that the Company lacked just cause to discipline Riley because, in its words, "Riley is being used as an example to establish a tougher policy on employees doing personal projects and purchasing scrap and stock materials." It thus claims that Riley was never subjected to progressive discipline; that no one on September 27 saw him work on the tree stand during work time; that the "Company's time line was not validated by any facts or testimony"; that Zettle corroborated Riley's testimony that the stand could be built in 50 minutes; and that the Company has overlooked the fact that Riley "tried to pay for the materials twice that night. . ." As a remedy, the Union seeks a traditional make-whole remedy which includes Riley's reinstatement and a backpay award.

The Company contends that it had just cause to fire Riley because: (1), he falsified his time card on September 27 in violation of Company Rule 2 by falsely claiming that he had worked for the Company between 1:30 p.m. - 12:00 a.m. during his non-break times; and (2), he also violated Company Rule 10 by not obtaining permission to use the Company's equipment.

DISCUSSION

This case turns on credibility: if Riley's testimony is believed, the Company lacked just cause to terminate him; if it is discredited, the discharge stands.

Thus, Riley testified in substance that he only worked on the tree stand during his authorized break and lunch times. If true, his grievance would be sustained because the record shows - through the combined testimony of Stampfli, Newell, and Zettle - that employees do not

always immediately pay for Company materials. Since Riley twice offered to pay for the materials on September 27, there is no basis for disciplining him over the fact that he did not do so that night.

Hence, the Company's case stands or falls on whether Riley worked on the stand during regular work time and whether he used the Company's equipment without permission. I find that he did work on the tree stand during his work time, as King and Haglund both testified that they saw Riley work on certain equipment between 2:00 p.m. - 3:00 p.m. Since their shifts ended at 3:30 p.m., it was impossible for them to have seen Riley during his 5:35 p.m. - 5:45 p.m. break.

It is true, of course, that they did not actually see Riley work on the stand. However, that inference can be drawn because Riley denied that he ever worked on the stand before his first break and because Riley's only motive for testifying in such a false fashion must have been his fear of admitting that he had done so. In addition, Christensen credibly testified that Riley approached him before his 5:35 p.m. - 5:45 p.m. break and asked him to unlock the angle cutting machine, which he did.

Once these basic facts have been established, it follows that the Company had just cause to suspend and terminate him for violating Company Rule 2 which states:

"Falsifying personal records, time cards, job cards, or any other records the Company requires its employees to maintain or keep."

For here, Riley deliberately falsified his September 27 time card when he claimed to be working from 1:30 p.m. - 12:00 a.m. when, in fact, he spent some of his work time on his own personal project.

That falsification warranted his immediate discharge, rather than progressive discipline, because it was so egregious and because Riley even at the instant hearing clung to a story which he knew to be untrue.

Riley on September 27 also violated Company Rule 10 which prohibits "unauthorized use of or abuse of Company tools or property", since Riley admitted that he did not ask for permission to use Company tools when he worked on his stand. That marked the second time he had done so. He had been warned in 1991 over the same matter, at which time he was told that he could be fired if he ever did so again. Having been earlier warned in that fashion, the Company therefore had just cause to terminate him when he repeated that misconduct on September 27.

One final point. The Union has expressed its concern that Riley is the victim of a Company crackdown on personal projects and the purchase of scrap and stock materials. If the record established such a fact, I would sustain the grievance and overturn Riley's discharge for the very reasons advanced by the Union. The record, however, fails to show that. Instead, it only

shows that Riley knowingly worked on the stand during paid work time and that he ever since then has tried to hide that fact. That was the basis for his termination and that is the basis for my ruling that the Company had just cause to terminate him.

In light of the above, it is my

AWARD

That the Company had just cause to suspend and discharge grievant Shelby Riley; his grievances therefore are denied.

Dated at Madison, Wisconsin, this 7th day of July, 1997.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator