

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

LOCAL UNION 1594, MIDWESTERN  
INDUSTRIAL COUNCIL

and

SIRCO MANUFACTURING COMPANY

Case 2  
No. 55212  
A-5588

Appearances:

Mr. Michael Kenny, Representative, on behalf of the Union.

Mr. Keith Eggleston, Representative, 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 Stevens Point, Wisconsin, on August 11, 1997. The hearing was not transcribed and both parties there presented oral arguments in lieu of filing briefs.

Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

Whether the Company had just cause to terminate grievant James R. Dana and, if not, what is the appropriate remedy?

BACKGROUND

Grievant Dana on July 18, 1996, agreed to a "last chance" agreement which stated, inter alia, that he would be subject to immediate discharge if he made any "derogatory remarks or offensive (sexual or otherwise) statements toward any employe of Sirco Manufacturing." Dana signed that agreement after he on June 14, 1996, admittedly said in front of employes Paul Klinger and Jacquelyn D. Belke that the room they were in "Smells like sex" and after he later asked Klinger: "Why don't you get a room?".

Floor Supervisor David W. Bembenek testified that Dana in December, 1996, remarked in front of him: "Barb [Nitka] is nothing but a slut." Bembenek said he at that time shook his head

and walked away. Nitka did not hear any such statement.

Bembenek said he that night reported that statement to then-production manager Mike Daniels (who since has been terminated by the Company), when they were at a local bar and that he also related it to employe Klinger about two months later. Asked why he did not report this incident to others, Bembenek testified: "You're right. I should have done something about it." Bembenek also said that Dana was a friend of his.

In March, 1997, Belke - who did not overhear Dana's alleged remark about Nitka and who apparently heard about it from others - told Bembenek that if the Company did not fire Dana for making the above-quoted statement about Nitka, she would take care of it herself.

Timothy S. King testified that Belke also brought Dana's alleged remark to his attention on March 6, 1997; that he then spoke to Bembenek who confirmed that Dana had made that remark in December, 1996; and that he fired Dana on March 7, 1997, for violating the July 18, 1996, "last chance" agreement.

Company Representative Keith Eggleston testified that he never spoke to Daniels about Dana's alleged remark; that he does not know whether Daniels was a friend of Dana's; that he does not know why Daniels did not do anything about the remark after Bembenek brought it to his attention in December, 1996; and that Belke filed a sexual harassment complaint (Joint Exhibit 5), against the Company after Dana's termination. He also said that Dana asked him in March, 1997, whether the "last chance" agreement could expire at that time and that he, Eggleston, answered no.

For his part, Dana flatly denied ever saying that Nitka was a slut and said that he, in fact, knows her "Very well". He also said that the Company initially charged him with making the statement about Nitka in February, 1997, which was impossible because Nitka was on voluntary layoff at the time. He added that Belke (who did not testify) once told him: "Sooner or later, I'm going to get you fired." He also stated that employes regularly engage in "shop talk" and that none of them have ever been disciplined; that "today" marked the first time that the Company ever asserted that he made his remark regarding Nitka in December, 1996; and that Daniels never spoke to him about that matter.

Nitka testified on Dana's behalf, saying that no Company representatives ever spoke to her about this matter and that, in any event: "Everybody kind of talks that way." She added, "I'm walking through the plant quite a bit" and that it thus was possible for Dana and Bembenek to have seen her when Dana supposedly made the remark about her.

## DISCUSSION

The Union asserts that Dana never made the statement attributed to him and that, as a result, the Company lacked just cause to fire him. The Company contends that he did and that it therefore had just cause to terminate Dana for violating the July 18, 1996, "last chance" agreement.

In determining whether the Company had just cause to fire Dana, it thus is necessary to determine whether Bembenek or Dana's testimony should be credited regarding Dana's alleged statement: "Barb [Nitka] is nothing but a slut". If Dana's denial is credited, the discharge decision must be overturned; if his denial is discredited, the decision stands under the terms of the July 18, 1996, "last chance" agreement.

Asked why Bembenek would lie, Dana replied that he did not know. Neither do I. Indeed, Bembenek testified that Dana was a friend - a fact not disputed by Dana.

Nevertheless, there is one fact that cuts the other way. Dana testified that the Company initially told him that he made the statement about Nitka in February, 1997. Dana's testimony is corroborated by his March 11, 1997, grievance which claimed: "Unjust termination due to hearsay that supposedly occurred 4 to 5 weeks prior to my date of termination - March 7, 1997." (Emphasis added). Here, however, Bembenek testified that the statement was made sometime in December, 1996, which is certainly outside the "4-5 weeks" period testified to by Dana. Hence, Bembenek's testimony relating to the date of this incident is off by 1-2 months from what was told to Dana at the time of his discharge.

This error, though, was not necessarily caused by Bembenek because we do not know whether he told management at that time that Dana made this statement in February, 1997, as opposed to December, 1996. As a result, the Company's error was not necessarily caused by Bembenek.

Absent any clear reason as to why his testimony should not be credited, I therefore credit Bembenek's testimony since Dana himself was unable to give any reason as to why Bembenek

would lie 1/ and since Bembenek testified in such a credible manner. I therefore find that Dana did, indeed, say: "Barb [Nitka] is nothing but a slut." By making such a statement, Dana violated his "last chance" agreement and the Company thereby had just cause to terminate him. 2/

In light of the above, it is my

AWARD

That the Company had just cause to terminate grievant James R. Dana; his grievance is therefore denied.

Dated at Madison, Wisconsin, this 18th day of August, 1997.

By Amedeo Greco /s/  
Amedeo Greco, Arbitrator

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- 1/ The Union asserted at the hearing that Bembenek has lied to save his job. There, in fact, is not one bit of evidence to support such a claim. To the contrary, it is clear that Bembenek himself never tried to do Dana in since it was Belke, not Bembenek, who brought this issue to the fore in March, 1997.
- 2/ It thus is immaterial that Nitka herself did not hear this remark since Dana's statement was still violative of the "last chance" agreement which governs the disposition of this matter. In addition, Dana's remark helped create a hostile work environment irregardless of whether Nitka heard it.