

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SPARTA MANUFACTURING COMPANY

and

LABORERS' INTERNATIONAL UNION, LOCAL 140

Case 40
No. 55457
A-5607

(Dearman Discharge)

Appearances:

Lindner & Marsack, S.C., by **Mr. Dennis G. Lindner**, on behalf of the Company.

Arnold & Kadjan, by **Mr. Hugh B. Arnold** and **Mr. Donald D. Schwartz**, on behalf of the Union.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "Company", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Sparta, Wisconsin, on November 13, 1997. The hearing was transcribed and the parties thereafter filed briefs that were received by January 5, 1998.

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:

Whether the Company had just cause to discharge grievant Norman Dearman and, if not, what is the appropriate remedy?

BACKGROUND

The Company produces cylinder sleeves and operates a foundry at its Sparta, Wisconsin, facility. Parts of its facility are very dirty and noisy.

Grievant Dearman, the Union's Shop Steward, has been employed there since 1973 as a maintenance man. The Company on February 4, 1996, terminated him for sexual misconduct after he told an employe for one of the Company's vendors: "You can not tell me you wouldn't like it with a man. You can put your nuts on this beard and your pecker in here [i.e. his mouth]."

Dearman then pulled down his pants and said: "You can't tell me you wouldn't like this."

Dearman flatly denied ever making any such statements. Indeed, he even denied speaking to the other employe that day. Arbitrator Lionel L. Crowley discredited Dearman because he found that Dearman "is not credible" and that he did make the statements attributed to him. Arbitrator Crowley therefore overturned Dearman's termination into a long unpaid suspension because of Dearman's good past behavior and long employment history. SEE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 140 AND SPARTA MANUFACTURING COMPANY, Case 37, No. 53827, A-5450 (7/96). In doing so, Arbitrator Crowley stated at page 9 of his Award:

"This penalty should be sufficient to prevent any repetition of such conduct on the part of the grievant."

After his reinstatement near the beginning of August, 1996, Dearman was issued a verbal warning on November 1, 1996, for refusing to clean up and he was sent home on July 18, 1997, by Supervisor Wayne Dearman, his brother, because he was suspected of being "tipsy" on the job. Neither incident was grieved.

Dearman on July 29, 1997, 1/ was standing in a portable forklift cage about 12-13 feet in the air as he was repairing certain overhead piping in the core room. Dearman, who works on the second shift, testified that he was working above the shell core machine while rerouting some pipes on the air collector tank and that he "got blasted with a whole bunch of dirt" which ended up on "my head and down my shirt and down into my trousers". He said he looked around to see if anyone was watching him and that when he did not see anyone, he pulled his shirt out; that he took off his belt and pulled his pants down; that "I took the back of my underwear and pulled them down and I brushed it all off"; and that he did not say anything to anyone else when he did so. Dearman then put back all of his clothes and resumed working. He flatly said "I didn't moon nobody" and testified that he once before had pulled down his pants in the back room when he "got a bunch of sand down myself. . ." Dearman also discussed the several grievances he had filed at the end of July, 1997, and said that General Manager

Randy J. Priem told him on one of those occasions several days before his discharge: "Norm, I'm digging in on you now."

On cross-examination, Dearman said he wiped his body off with his dirty hands; that "I could not tell you" whether his rear end got dirty from his hands; that he did not look to see if that were so; and that he did not then go to the bathroom to clean up because he was suspended in the air on a forklift and because: "I didn't have the opportunity to walk off the job and go to the bathroom", a matter he said was "my choice". He also said that more dirt fell on him as he continued working. Dearman also claimed that employees Bill Bloom, Nate Bergh, and Wayne Hagen on other occasions had all taken off their clothes when dirt and dust fell on them.

Bloom testified that he was working with Dearman on July 29 when dirt and sediment fell on him and Dearman; that "Norm got ninety percent of the stuff that came down"; and that Dearman then dropped his pants and underwear, at which point he brushed himself off. Bloom then told Dearman: "Thanks a lot, buddy, for getting me dirty." He also said that "Over the years quite a few people" had lowered their pants to clean themselves up by the mold machines and that employees can get written up for showering on Company time.

Lawrence Karl, then a core maker, testified pursuant to a Company-issued subpoena that he saw Dearman drop his pants and that he saw Dearman's butt; that he and fellow employe Al Stoekl laughed about it; that he told supervisor Production Supervisor Dan Journey later that day that Dearman's actions were "disgusting"; that he once saw Supervisor Wayne Dearman, the grievant's brother, undo his fly without dropping his pants as he brushed dust off of him in the back of the plant; and that he told Safety Director and Personnel Assistant David Amundson that Dearman "must not have been brought up right. He has some problems." Karl denied telling Amundson that Dearman "gave me a moon". Instead, Karl said he told Amundson: "I saw the moon." Karl added that he never asked management to take any disciplinary action against Dearman and that "there was a lot of dust around" where Dearman worked on July 29.

Production Supervisor Journey testified that he on July 29 saw Dearman pull up his pants and buckle his belt; that Stoekl and Karl were "kind of laughing at the time"; and that after he asked them what had happened, Karl replied Dearman "gave me the moon". Journey added that Karl later that night told him what Dearman had done and that he, Karl, believed it was disgusting.

On cross-examination, Journey acknowledged that Karl never told him he was offended by what Dearman had done; that he "grinned" when he saw Dearman pull up his pants; that Dearman at that time never said anything; that he did not immediately report the incident to higher

management on July 29; that there was dust around Dearman's work area; and that he has no reason to doubt Dearman's claim to him a few days later that he had dust all over him

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and that he was trying to clean himself up. Journey also said that neither he nor any other factory employee ever sought to have Dearman disciplined for this incident.

Safety Director and Personnel Assistant Amundson testified that the Company's sexual harassment policy, (Company Exhibit 2), is posted on a bulletin board by the time clock. He also said that he spoke to Karl on July 30 who told him that Dearman had dropped his pants and that he "must not have been brought up right. He had some problems", as Karl related what had happened the day before. Karl at that time told Amundson that he did not want to file any charges over the incident.

Amundson added that he met with Journey, Stoekl and Karl the next day, at which time Karl stated that Dearman "had mooned him". Amundson said that Stoekl then said that while he had not seen the incident, "You know, this shouldn't be happening because, you know, it's not right. People could be offended by it. The office girls could be coming out, you know, in that area there."

About 20 minutes later, Amundson met with Journey, Union Steward Charley Vian and Dearman, at which time Dearman said he dropped his pants because dirt and dust fell on him and because he needed to shake it out. Amundson stated that he never before had ever seen any other employees drop their pants to shake dirt and dust out in that fashion and that a restroom was about 40-50 feet from where Dearman stood at the time of the incident. Amundson later that day attended a meeting where Dearman was told that he was being placed on indefinite suspension.

On cross-examination, Amundson admitted that Dearman had filed 2-3 grievances on July 29 or 30th; that he did not know how long Dearman had dropped his pants; that no one ever told him they were offended by Dearman's conduct; that no secretary or vendor saw the incident; and that he does not doubt that dust fell on Dearman.

General Manager Priem testified that during his 22 years of working at various foundries, he had never seen any employee drop his pants and that he had a "good" relationship with Dearman. He added that he decided to fire Dearman because Dearman had admitted that he dropped his pants and underwear; because he believed Dearman had deliberately mooned other employees; and because he did not believe Dearman's explanation as to why he had done so. Priem also flatly denied that Dearman's termination was related to his union activities or to his filing of grievances.

On cross-examination, Priem admitted that no employees complained about Dearman; that he did not know how long Dearman's pants were down to his knees; that he did not feel he "had to determine the ultimate cause on why Norm pulled his pants down", and that he never told Karl it was inevitable that Dearman would be fired.

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Recalled as a witness, Priem admitted, "Showering on Company time is not permitted" and he acknowledged discussing several grievances with Dearman at that time. He also discussed his relationships with other union leaders at his prior places of employment which he described as excellent.

Priem on July 31 placed Dearman on an indefinite suspension and he terminated Dearman on August 4.

POSITIONS OF THE PARTIES

The Union argues that the Company lacked just cause for Dearman's discharge because "Priem ignored Dearman's intent"; because Dearman "intended no improper conduct"; because "Dearman's conduct was not improper under any standard"; because Dearman's prior disciplinary suspension does not support the present discharge; and because Dearman's "steward position improperly affected the discipline imposed." As a remedy, the Union asks for Dearman's reinstatement and back pay.

The Company, in turn, maintains that Dearman mooned co-worker Karl without any "reasonable justification for doing so"; that arbitral authority "has universally condemned mooning as an intolerable offense"; that Dearman's union activities played no role in his termination; and that it had just cause to terminate him.

DISCUSSION

This case turns on Dearman's credibility. If one believes that he did not intend to "moon" anyone on July 29, his discharge would be overturned for the reasons advanced by the Union. If Dearman's testimony is discredited, I would sustain his termination for the reasons advanced by the Company.

Three pieces of independent evidence exist on this issue: one involves Karl's statement to Journey on July 29 that he found Dearman's conduct "disgusting"; the second centers on Karl's statement to Amundson that Dearman "must not have been brought up right"; and the third centers on Stoekl's statement to Amundson on July 31 when he said that "this shouldn't be happening because, you know, it's not right." These statements all indicate that Dearman deliberately chose

to "moon" those working beneath him, rather than merely dusting himself off, as he now claims. In addition, I credit Journey's testimony that Karl told him on July 29 that Dearman "gave me the moon".

In addition, I find Dearman's testimony to be incredible since he claimed that, after he dropped his pants, he wiped himself off with his dirty hands and that he never turned around to see whether he had wiped himself clean. If Dearman, in fact, wanted to clean off his butt, it

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is difficult to see how he could do that with his dirty hands. It likewise is inherently implausible to believe that he did not turn around to see if he had brushed off the dust from his butt. His professed need to clean himself in the manner chosen - by dropping his pants and drawers - hence rings hollow.

Given all this, I conclude that Dearman dropped his pants and drawers on July 29 for the purpose of "mooning" those beneath him, which constitutes a dischargeable offense. See, H & L TOOTH CO., 66 LA 1020 (Delden, 1976); SOUTH CENTRAL BELL TELEPHONE CO., 80 LA 891 (Nicholas, 1983).

It therefore is immaterial that other employees in the past had dropped their pants to brush themselves off as any such prior situations did not involve deliberate acts of "mooning". In addition, it does not appear that any other employees had ever dropped their underpants and exposed themselves the way Dearman did here.

Hence, there is no merit to the Union's claim that Dearman "intended no improper conduct". For here, Dearman clearly knew that mooning was wrong and that it can constitute a dischargeable offense. That, clearly, is why he chose not to tell the truth here and that also is why it is inherently implausible to believe his claim that he did not intend to do anything wrong. That also is why the various cases cited by the Union - OZARK LEAD CO., 69 LA 1227 (Belcher, 1978); NUCLEAR FUEL SERVICES, 93 LA 1204 (Clark, 1989); LOUISVILLE GAS AND ELECTRIC CO., 81 LA 730 (Stonehouse, 1983); IOWA-ILLINOIS GAS AND ELECTRIC CO., 86 LA 273 (Berger, 1986); SOUTHERN CALIFORNIA CARTON, 88 LA 591 (Scholtz, 1986) - are all inapposite.

The Union also asserts that Dearman's discharge was improper because it was tainted by anti-union considerations and the Company's hostility to Dearman's union activities. I disagree. The record, in fact, shows that the Company treated Dearman leniently when it only gave him an oral warning on November 1, 1996, for being insubordinate when he refused to clean up and when it did not even discipline him on July 18, 1997, when he reported to work under the influence of alcohol. 1/ Either of these two infractions - which utterly belie Dearman's claim that he had learned his lesson after his prior suspension - standing alone could constitute grounds for

discharge following Dearman's earlier suspension. The fact that the Company did not impose harsher discipline much earlier utterly belies any claim that Priem or anyone else was out to "get" Dearman because of his union activities. Moreover, I credit Priem's testimony that Dearman's union activities played absolutely no role in his termination.

It is true, as the Union points out, that no employees ever complained to management about Dearman's actions; that Journey himself smiled when he saw Dearman pull up his pants; and that Journey did not immediately report this incident. All that is immaterial, however, because higher-level management had the absolute right to review Dearman's conduct even if

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no one complained about it and even if Journey did not see anything wrong with it. The Company itself has an institutional interest in preventing this kind of misconduct, particularly when the entire issue of sexual misconduct on the job is such a sensitive issue and particularly when Dearman himself previously engaged in sexual misconduct when he made the obscene remarks related above at page 2.

In light of the above, it is my

AWARD

That the Company had just cause to terminate the grievant, Norman Dearman; his grievances are therefore denied.

Dated at Madison, Wisconsin, this 20th day of March, 1998.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

ENDNOTES

1/ Unless otherwise stated, all dates hereinafter refer to 1997.

