

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KRC HEWITT, INC.

and

**INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, LOCAL 1855**

Case 50
No. 55531
A-5615

(Grievance of Robert Novak)

Appearances:

Mr. Frederick Perillo and **Ms. Jill M. Hartley**, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, on behalf of the Union.

Godfrey & Kahn, by **Mr. Dennis W. Rader**, 333 Main Street, Suite 600, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, on behalf of the Company.

ARBITRATION AWARD

According to the terms of the 1997-2000 collective bargaining agreement between KRC (Hewitt), Inc. (hereafter Company) and International Association of Machinists and Aerospace Workers, Local 1855 (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding the discharge of Grievant Robert Novak. The Commission designated Sharon A. Gallagher to hear and resolve the dispute and a hearing was held at Neenah, Wisconsin on January 14, 1998. A stenographic transcript of the proceedings was made and received by January 28, 1998. The parties agreed to submit their initial briefs postmarked March 6, 1998 which would be exchanged by the Arbitrator. The parties reserved the right to file reply briefs and agreed to do so directly with each other on a date that was agreeable with them. All documents in this case were received by March 30, 1998, whereupon the record was closed.

ISSUES

The parties were unable to stipulate to an issue for determination in this case. However, the parties stipulated to allow the undersigned to frame the issue by taking into consideration the relevant evidence and argument and their suggestions for the issue. The Employer suggested the following issue for determination:

Did the Company violate the contract when it terminated Robert Novak for just cause pursuant to Work Rule 2, Section 3, for willful or reckless damage to Company or customer property? If so, what is the appropriate remedy?

The Union suggested the following issue for determination herein:

Was there just cause for the discharge of Robert Novak? If not, what is the appropriate remedy?

Based upon the relevant evidence and argument, as well as the above-suggested issues, I conclude that the Union's issue shall be determined herein.

RELEVANT CONTRACT PROVISIONS

ARTICLE XI

DISCHARGE

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Section 1. No employee will be discharged, disciplined or suspended without just cause.

Section 2.

...

All disciplinary action taken under the provisions of this Article shall be subject to the grievance procedure. If it is determined that any employee has been wrongfully discharged, the employee shall be reinstated. If it is determined that the employee has been disciplined too severely, payment of backpay, if any, for time found excessive shall be made.

WORK RULE

A minimum number of Plant Rules have been established. These are intended for the welfare and protection of each and every employee, and are basic to the orderly conduct of daily business. Each rule has been carefully considered and will be enforced uniformly and fairly on a plant wide (sic) basis.

There are three levels of violations of these work rules:

...

Level II - Violation will result in suspension and/or termination.

- I. Stealing, including tampering with or using slugs in vending machines.
- II. Disobedience or gross insubordination.
- III. Willful or reckless destruction or damage to Company or customer property.

...

BACKGROUND

In 1991, the Hewitt Machine Company was purchased by KRC Rolls, and the Company became KRC (Hewitt), Inc. The main business of the Company is to disassemble, test, regrind and cover rolls for the paper industry which can weigh from 5,000 to 100,000 pounds. These rolls may be hollow or solid and may be constructed of stone or steel; they also vary in length and diameter. Approximately half the Company's work requires that customers' rolls be received at the plant, disassembled, tested for cracks or defects, washed and/or resurfaced or reground and covered with shrink wrap material for shipment back to the customer. Often, as rolls move through the factory, their weight will vary as they are disassembled, and worked on. Swim rolls, which have a shell on the outside and are normally filled with oil or some other liquid in order to assure that the paper that is run over them remains flat and straight, very often weigh a great deal more when they enter the factory than when they leave it. The Company also designs and manufactures new rolls as replacements for its customers and covers these and ships them to the customer.

The Company's Neenah plant is divided into two sections, one for service and one for recovering rolls. The Company uses overhead cranes and beams to lift and transport rolls through the facility. It is normal for a roll to be stored, prior to being serviced, on the floor of the plant. On the service side of the plant, the cranes run on double tracks along the entire length of the plant and are operated by pendant controls which hang from a cable with buttons to control movement of the crane and beam. Each crane has a (Weightronic) scale attached to its hook system. Lifting beams can be attached to each crane by means of the hook on the crane.

The Company owns several lifting beams of different capacities, only two of which are relevant to this case. At the time of the incident which gave rise to this grievance, the Company owned a 12-ton beam also known as the "yellow beam", and a dual 50-ton orange beam. The "yellow beam" has been at the factory for many years. That beam previously had been rated at 20 tons. The orange beam is composed of short and long pieces which can be used together or separately but must be bolted together to achieve the full length for lifting with that beam. The capacity of each beam was first stenciled on their side in 1992 or 1993. Before that time, workers had no way of knowing the beam capacity. The beams each have slings on either end thereof which can be attached to the ends of rolls to promote stability while lifting. As a general matter, the beam selected to lift a roll should be as long as the roll itself so that stability is maintained. At the time of the incident that gave rise to this grievance, very few customer rolls were marked with their appropriate weights.

The Company has a Safety Committee which makes monthly walk-through inspections of the plant. In October, 1993, the shop Safety Committee issued a memo urging management to observe and instruct personnel on the use of beams only up to their capacities, which were then marked on the beams. By memos dated December 12, 1995, March 1, 1996, June 20, 1996 and August 27, 1996, the Safety Committee sought to have the Company regularly place roll weights on all rolls that came into the factory.

When using a beam, the employe must subtract the weight of the beam which is listed thereon from the capacity of the crane in order to get the weight of the roll which the beam and crane will lift. Every crane has a Weightronic scale. The employe must push a button on the crane's pendant to activate the scale. As the cables begin to tighten to lift up the roll, the weight is shown in lighted numbers on the scale. In order to get the total weight of a roll, the employe has to lift the roll slightly off the ground (1/8 inch) in order to determine the weight of the roll. If a roll weight exceeds the beam capacity and crane capacity, employes are expected to contact their supervisor. Only the manufacturing manager, Gerald Poss, can authorize the lifting of a roll which is in excess of the beam and crane weight capacities. If the scale on a crane is not working, employes are expected to call the maintenance department to get the scale repaired. It is undisputed that employes are trained that they are not to lift a roll if they are unsure as to its weight.

Prior to the discharge of the Grievant, employes Van Handel, Sorby and Gosz stated that they had used the "yellow beam" to lift rolls in excess of that beam's capacity. Regarding these incidents, Poss asserted that the Company was unaware of the instances and would not have authorized or condoned such activities. Poss stated that, as a general matter, he has authorized the lifting of rolls which were in excess of the beam's capacity only in writing, upon consultation with a supervisor, not an employe. Poss' assertion was borne out by the documentary evidence. The employes who testified herein that they had either observed or themselves lifted rolls in excess of a beam's capacity, did not state that supervisors were aware of their actions except by means of supervisors being generally present in the plant when the rolls were lifted and moved.

When rolls are lifted to be moved from one end of the service area to the other, they generally must be lifted approximately 10 feet off the plant floor so that they can clear equipment and other rolls that are stored on the plant floor. All of the witnesses in this case stated that an employe of the Company can estimate the weight of a roll by looking at it but the amount of time that would be necessary to gain sufficient experience to "eyeball" a roll was disputed. However, all of the witnesses confirmed that before a person could be certain as to the actual weight of a roll, that person must weigh the roll with one of the scales attached to the cranes at the facility. It is also clear that there is no rule or policy that would allow employes to guess the weight of a roll rather than weighing it.

Employes in the maintenance department receive calls from employes regarding scale maintenance regularly. If a scale is not working, employes may go to the maintenance department and ask a maintenance employe to check it out, or call maintenance on the intercom system to check out the scale. When called on the intercom system, it takes only a couple of minutes for maintenance to respond. On each scale there is a low battery light on the upper left hand side, and if the battery is low, that light will flash. However, if the battery is dead, no lights on the scale will work. Maintenance employe Louis Welsh stated that he is unaware of any practice whereby if a scale is not working, employes are allowed to go ahead and lift a roll without weighing it. It is undisputed that maintenance employes do not regularly check the scales, but that if a scale is not working, employes normally call a maintenance employe and ask that employe to troubleshoot the problem.

In 1992 or 1993, the beams were recalibrated by an engineer and their capacities were marked on them. Approximately one month after this, employe Gary Van Handel stated that he overheard a conversation between then-Plant Manager Senecal and Shipping Clerk Tom Peeters. Peeters asked Senecal whether he should use the yellow beam to pick up a particular roll which was allegedly heavier than the capacity of that beam. Van Handel stated that Senecal replied: "You know your job, just do it." 1/

FACTS

Grievant, Robert Novak, was hired by the Company as a trainee-machinist in May, 1996. The job description for the machinist-trainee position reads in relevant part as follows:

...

DEPARTMENT: Manufacturing (Service)

JOB TITLE: Trainee Machinist

LEVEL OF AUTHORITY: 1-09

PARTS I & II OF NEW EMPLOYEE ORIENTATION CHECKLIST TO BE COMPLETED.

DUTIES:

1. Perform (sic) all job requirements according to procedures as outlined in the KRC Quality Manual, Company Procedures, and Work Instructions.
2. Reports problems to higher levels of authority as required by the Quality System.
3. Confer (sic) with Engineers, production personnel, or others as needed to satisfactorily resolve quality problems.
4. Inspects and measures part to determine conformance to specifications through use of precision measuring equipment.
5. Performs all inspection functions as required by Work Instructions.
6. Initiate (sic) Reject & Disposition Actions as required.
7. Initiate (sic) Corrective Action Requests as necessary.
8. Serve (sic) on &/or support (sic) Internal Audit Teams.

SPECIALIZED KNOWLEDGE:

1. Understanding of operating procedure, quality policy, and ISO 9001 quality system.
2. Possess good mechanical aptitude.
3. Minimum three (3) years of previous machine shop experience.

EDUCATIONAL BACKGROUND:

1. High school graduate or equivalent.
2. Vocational school graduate in machine shop practices, or equivalent.

...

It is undisputed that part of Novak's job duties was to move rolls in the plant. On June 7, 1996, Novak received hands-on training from then-Maintenance Leadman Jerry Riehl. Riehl stated that although he could not specifically remember Novak's training, his general approach is to review the operation of the crane, review how to look for damaged slings and chains, show the employee how the chains on the cranes work, describe what to do (and not do) regarding beams, and tell employees to avoid carrying a roll over someone's head. Riehl stated that during his training of employees, he does not actually weigh and lift a roll with the crane and beam, but that he generally tells employees that if the weight is not on the roll, the employee must weigh the roll or ask a supervisor to make sure the employee is using the right lifting equipment for the load. Riehl stated that it is his general approach to tell all employees that if the employee is not sure of the weight of a roll or if they think that the roll is too heavy to be lifted by the beam selected, the employee should ask a supervisor what should be done. 2/ Riehl stated that he does not normally tell employees he has trained that they are to call Manufacturing Manager Poss regarding beam weights because if Poss is called, the supervisors do this, not employees.

On June 3, 1996, Novak received videotape training as well as a packet of material regarding safety matters and the use of cranes and beams. In the written information given, the following statement was made:

Your supervisor is responsible for developing the proper attitude for safety in him/herself and those supervised, and for ensuring that all operations are performed in a safe manner. . . You are responsible for completing your assigned duties in a safe manner - and in compliance with all plant safety rules and regulations. . .

From June 3, 1996 through August 30, 1996, Manufacturing Manager Senecal rated Novak as adequately trained in all areas of his job description. In the middle of March, 1997, the Company offered six weeks of training from employees of US Sling and Fox Valley Technical Institute, including three hours of training regarding cranes and lifting devices. Novak completed his training on March 14, 1997. Employees were given written safety booklets during the training provided by Fox Valley Technical and US Sling representatives. 3/ All employees receive both video training and hands-on training in weighing and lifting rolls by maintenance department employees as well as safety training experts. The U.S. Sling booklet urged employees to "slow down and think" and stated that if employees had a question, they should get an answer from a supervisor who is responsible to research that answer and that employees should never lift anything if they are not certain of what they are doing.

The facts surrounding the events of the evening of June 25, 1997 are disputed. 4/ On June 25, 1997, third shift supervisor Eugene Pingel (a ten-year employee of the Company who had then been a supervisor for nine months) arrived at work and picked up the following list of jobs to be done:

6/25/97

6737	VOITH RHINELANDER		R & J TO BE HERE PRE 8:00 TONITE TO P/U
7107	CPI		BRING IN BLUE STEEL BOX WHEN SHELL IS NEARLY READY TO SHIP. R & J SETUP TO HAUL SHELL IN STEEL BOX TO SALISBURY. WE MUST CALL THEM THURS MORNING WHEN ROLL IS READY.
7127	MEAD		WHEN ROLL IS READY TO SHIP, PAGE FILKINS TRUCKING AT 1-888-632-2071. THEY ARE WAITING TO HAUL THE ROLL BACK TO MEAD. ROLL IN F-8.
5637	FSC	6/20	CLEAN HOUSINGS, PAINT HOUSINGS & ROLL ENDS CHOWDER WHITE. ROLL IN SHIPPING
6107	WEYERHAEUSER	6/20	ROLL ACROSS FROM DRILL ROOM. MOUNT ON STEEL SKID.
5727	CPI LK SUP	6/25	ROTATE HOUSINGS & FINISH CLEAN & PAINT ROLL IN SOUTH PIT. WOOD BOX WITH COVER.

5707	CPI LK SUP	6/25	CLEAN ROLL ENDS & HOUSINGS, PAINT HOUSINGS DARK BLUE WOOD BOX WITH COVER. ROLL IN SHIPPING.
6647	CPI-ST PT	6/27	CLEAN ROLL ENDS & HOUSINGS. ROLL ACROSS FROM DRILL ROOM.
6657	CPI-ST PT	6/27	CLEAN ROLL ENDS & HOUSINGS. ROLL ACROSS FROM MAINTENANCE.
6387	APP PAPER	6/30	PRESSURE WASH GROOVES. DRY, PAPER & STRETCH WRAP WITH PLASTIC. REMOVE COLLARS, PLASTIC GUARDS. FINISH CLEAN. PAINT CHOWDER WHITE. REASSEMBLE.
6467	MEAD		CLEAN ROLL ENDS OF ALL NDT SPRAY. ROLL IN COVER SHOP. 2 BLUE WOOD SADDLES. STEVE BRUCE TO INSPECT BEFORE SHIPPING. VIDEO TAPE ON TRUCK BEFORE SHIPPING.

The first seven jobs on the list had already been completed on second shift and were marked off by those employees who completed those jobs. Pingel then made assignments of the remaining jobs to the Grievant and Steve Mabry. Pingel gave Steve Mabry the two CPI ST PT jobs to perform listed on the jobs list, and then told the Grievant to "go on this one", pointing to the Appleton Paper job just below the two he had given to Mabry. Pingel also told Novak that if he needed help, he could get Steve Mabry to help him out. Pingel did not review the jobs he assigned in detail prior to assigning them to Novak and Mabry so that Pingel did not know that the Appleton Paper roll had to be washed. 5/ At this time, Novak did not ask Pingel any questions about his assignment on June 25th. Pingel left the Service Department to perform other work after assigning work to Novak and Mabry.

Novak used the yellow beam to move a roll that was in the washroom out of the wash saddles to clear the way for moving the Appleton Papers roll into the saddles. Novak then sought out Steve Mabry and asked Mabry to help move the Appleton Papers roll into the wash saddles. Mabry agreed. Mabry was closer to the controls on the pendant and Novak asked Mabry if the yellow beam would work to move the Appleton Papers roll. Mabry responded in the affirmative. There were two other employees standing nearby who were long-term employees, Scott and Lambert. These employees did not stop Mabry and Novak from using the yellow beam to attempt to lift the Appleton Papers roll.

Mabry began lowering the beam down so that he and Novak could get the beam straps around the housings at either end of the roll. Mabry pushed the button on the scale before he began picking up the roll and the scale did not light up. Novak then asked Lambert if he knew how much the roll weighed and Lambert said he had no idea. Novak then started walking back toward the washroom as Mabry began to pick up the roll. Novak stated that he was then about 30 feet from the roll. Novak never touched the controls during the task of lifting the roll that evening. Novak then walked ten feet away and began talking to someone whom he did not identify. As Mabry began to pick up the roll, Mabry and Novak noticed that the roll was not lifting straight, so Mabry set the roll back down. Novak stated that Mabry set the straps out farther on the ends of the roll to balance the roll so that the beam would pick the roll up straight. (Novak did not recall assisting Mabry in resetting the straps). Neither Mabry nor Novak attempted to call Pingel or the maintenance department to ask someone to check the scale out.

As Mabry began picking up the roll a second time, employees Scott and Lambert left the area. Mabry lifted the roll about three feet off the ground, and at this point, Novak looked at Mabry and heard a noise. Novak looked up and saw the roll coming down so he turned and started running. The roll then hit the ground and tipped over, damaging the roll and the shop floor.

At this time, Supervisor Pingel heard a crash and went back to the Service Department to see what had happened. When Pingel arrived, he asked Mabry about the scale on the crane, and Mabry told him that it did not work. Pingel then called Maintenance Leadman Louis Welsh and had him test the battery on the Weightronic scale. Welsh put in a new battery. Neither Mabry nor Novak had come to Pingel that evening to talk to him about the Appleton Papers roll. The Appleton Papers roll was a swim roll, 40 inches in diameter, 96,000 pounds in weight, and under 60 inches long. Only the big orange beam (50 ton capacity) could be used to lift such a roll. After conducting an investigation on June 25th, Pingel recommended that Mabry and Novak be suspended for lifting the 96,000 pound AP roll with the yellow beam because he felt their conduct was reckless.

Manufacturing Manager Poss terminated Novak for violating Work Rule Level 2, Rules 2 and 3 because Novak (having had complete training in lifting rolls, been rated adequate in all areas of his job description, with over one year's experience in the plant), did not follow instructions or call a supervisor. Poss stated that Novak should have called the Maintenance department when the scale was discovered to be inoperable or Novak could have called his supervisor if he had questions regarding lifting the roll and that Novak should not have lifted the roll without having complete information regarding the weight of the roll. In Poss' view, lifting the roll without complete information constituted reckless behavior, punishable by immediate termination. 6/

Novak's testimony contained internal inconsistencies and admissions important to this Award. For example, Novak stated that during the time he was employed at the Company, he

usually weighed rolls and he admitted that it is important to weigh rolls because this determines the type of beam that is needed to move them through the factory. However, Novak denied that it was standard procedure to weigh rolls at the Company. Novak admitted that when a scale on a beam does not work, Company employees should seek assistance from Maintenance employees; and that he was a little bit nervous about hooking up the AP roll to the beam after he found out that the scale did not work because he was unsure about the weight of the Appleton Paper roll. Novak also admitted that on June 25, Supervisor Pingel did not tell him to use the yellow beam to complete his task regarding the Appleton Paper roll. Novak also admitted that on June 25th he never attempted to weigh the roll he had to move out of the wash saddles to make way for the AP roll and that after Mabry tested the scale and found it to be inoperable, neither Novak nor Mabry contacted Pingel regarding what they should do. Novak admitted that Pingel never told him to get Steve to help him on the evening of June 25; and that Novak decided to get Mabry to help him because Mabry was a helper and it was Mabry's job to move rolls. Novak stated that when he was trained by Jerry Riehl, Riehl never stated that beam ratings mean nothing, or that employees can lift any size roll with any beam they wish, and Riehl never told him to disregard the weight capacity on beams. Novak stated that while he was employed at the Company, the scales on the yellow beam did not work for approximately two weeks. Novak stated that he did not mention this to Maintenance department employees, although he admitted that would have been important to do. Novak stated he was not sure whether he used that beam to lift rolls during the two weeks the scale was not functioning. Novak stated that many times he had seen other employees lift heavy rolls with the yellow beam, even though the rolls were heavier than the capacity of that beam. Novak stated he never reported any non-functioning scales to the Maintenance department during his 13 months of employment at the Company. At other times when the scale did not work on a beam, Novak admitted that he did not report it to Maintenance and that he proceeded to lift the roll that he was assigned to lift without knowing its weight as compared to the beam's capacity. 7/

POSITIONS OF THE PARTIES

The Company

The Company noted that in his testimony, the Grievant admitted that lifting rolls was part of his regular responsibilities; that Novak understood he must check the weight of a roll to be lifted prior to hooking it to a beam to determine whether each roll was too heavy for the capacity of the beam; that Novak understood that he was expected to check with the Maintenance department if a scale was not functioning; and that Novak also knew that if he had any uncertainty about a situation in the plant, he should check it out with someone working there. Yet, the Company pointed out, Novak did not follow his knowledge in completing his work on June 25, 1997. In this regard, the Company noted that although Novak admitted he was nervous

about picking up the roll with the yellow beam after he discovered the scale did not work, he did not ask anyone, and he did not check with the Maintenance department before he lifted the roll.

Therefore, the Company urged that Novak's action constituted recklessness.

The Company argued that the record demonstrated that Novak consciously deviated from the standard practice in lifting rolls when he admitted considering using the proper procedure and then decided to lift the roll with the yellow beam without following that procedure. The Company noted that Novak was responsible for lifting the roll on June 25; that Novak had been trained in the proper procedures for lifting rolls and had substantial experience in this area; and that Novak was aware of the proper procedures for lifting rolls because he asked Lambert what the roll weighed before lifting it on June 25. Even if the equipment Novak attempted to use on June 25 was faulty, he was aware of the procedure for checking it out and he was responsible to get the scale fixed when he discovered it was inoperable. The Company also argued that with over one year's experience, Novak should have had an idea that the Appleton Papers roll was far too heavy to be lifted by the yellow beam. In any event, the fact that the scale battery was dead should not lead to a conclusion that Novak had the right to assume that the yellow beam was of adequate size to lift the Appleton Papers roll.

The Company urged that the testimony of the Union's witnesses should not be credited in this case. In this regard, the Company noted that the Grievant contradicted himself several times during his testimony. The Company pointed out that at one point Novak admitted operating the Weightronic scale on the night of June 25 and at another point he denied doing so, stating that Mabry was the only person who touched the scale that evening. In addition, the Company noted that Novak's testimony regarding the fact that the scale which he used on June 25 had not been working for at least a couple of weeks was not credible in all the circumstances. Third, the Company urged that Novak's testimony was contradicted by the great weight of the evidence: Novak asserted that he was never told during training that he had to seek supervisory permission to exceed the weight limitations on a beam, and that he had never seen other employees in the plant seek supervisory permission when questioning the beam's capacity, and that no other person but Mabry, the helper, was available to assist him during the evening. Based upon the other record evidence the Company urged that these assertions by Novak were essentially false yet simple attempts to side-step his responsibility for his actions and that therefore, Novak's testimony on all of these points is incredible. In addition, the Company also contended that the testimony of Mike Gosz regarding statements made by former supervisor Senecal are also incredible.

The Company asserted that there is no practice to disregard the proper roll lifting procedures in the plant and that in this regard, the Union failed to prove that any supervisory personnel had ever given permission for employees to disregard the proper procedures for lifting rolls with Company beams. Specifically, the Company asserted that no Union witness indicated that supervisors were aware of the alleged practice of disregarding employees lifting rolls without

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regard for the Company's lifting policies/procedures; that no witness stated that supervisors were aware of the alleged practice occurring, and therefore no binding past practice to disregard proper lifting procedures was proven.

The Company noted that Novak admitted that he sometimes lifted rolls several times per shift during the 13 months he was employed with the Company and that he was fairly comfortable with the operation of cranes during his employment. The fact that employees are not routinely taught how to change batteries on Weightronic scales does not change the fact that Novak was aware that rolls need to be weighed prior to being placed on a beam and that a scale that is not functioning cannot perform the weighing process. Had Novak followed the simple procedure of requesting Maintenance to take a look at the scale (a procedure which he admitted he was aware of) or had he asked his supervisor, the beam, the roll and the plant floor would not have been damaged. In this case, Novak made the conscious decision to lift the roll without knowing its exact weight. This decision constituted recklessness in violation of the work rules, in the Company's view. Therefore, the Company seeks denial and dismissal of the grievance in its entirety.

The Union

The Union took issue with Company witnesses' testimony and it urged that Novak be credited over accounts which varied from his. The Union asserted that because Novak was carrying out orders he had received from supervisor Pingel regarding the Appleton Papers roll, he could not be guilty of insubordination. The Union noted that, according to Novak, Pingel instructed him to move the Appleton Papers roll into the washroom, wash it and prepare it for shipping the next day but that Pingel did not give Novak any specific directions for moving the roll into the washroom.

The Union also asserted that there is no shop policy or rule requiring employees to receive supervisory permission before they lift a roll which exceeds the beam's capacity. Indeed, the Union asserted that there is a practice to the contrary -- that employees regularly lifted rolls which exceeded the yellow beam's capacity and supervisors were aware of this and condoned it. As Novak followed the latter practice, Novak's conduct on June 25 was not willful or reckless.

The Union noted that arbitration cases have defined reckless as meaning more than just making a simple mistake, and that to be reckless, conduct must show a disregard or indifference to consequences under circumstances involving danger to life or safety of others. 8/ The Union also noted that willful conduct requires a showing that a grievant have knowledge in advance that the conduct for which he/she is being disciplined is prohibited and that the grievant nonetheless intended to, and did take, the prohibited action. 9/ The Union contended that the Company must have clear and convincing evidence to show that Novak had been careless and failed to do his job within minimum standards. The Union urged that Novak's actions constituted, at most,

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ordinary negligence and thus were insufficient for the Company to discharge him under its work rules. Indeed, the Union urged that Novak should have merely received a written warning pursuant to Company work rules.

In addition, the Union took issue with the Company's assertion that common sense should have told Novak and Mabry that the yellow beam would not handle the Appleton Papers roll. The Union noted that hindsight declarations are always convenient and that two other experienced employees who were present at the time did not intervene to indicate that the roll was too heavy for the beam. Furthermore, the Union asserted that supervisor Pingel, who testified that he normally gave work assignments on the basis of who he believed could handle the job, admitted that he was unaware of the type of job he had assigned to Novak that evening. Thus, the Union urged, there was negligence on the part of KRC, while Novak was merely ignorant and inexperienced.

The Union argued that although Novak knew as a general matter that employees should weigh a roll prior to lifting it, Novak's failure to make sure that the roll was weighed in this case, does not constitute willful or reckless conduct. Indeed, the Union noted that many things could have been wrong with the Weightronic scale and Novak's failure to call Maintenance to fix the scale before continuing with his work task was only ordinary negligence, based upon an error of judgement, not reckless conduct in disregard of consequences or willful conduct intended to cause damage.

The Union contended that the Company was also at fault for the accident because it had allowed employees to violate its rules by its lack of enforcement of lifting policies. The Union pointed to the fact that the employees who testified stated that employees had often lifted rolls with the yellow beam that were in excess of that beam's capacity and that manager Senecal had also told employees to continue to use the yellow beam according to this past practice. Although there was no direct evidence in this case that supervisors knew the exact weight of every roll in the shop, the Union urged that their presence in the shop while rolls were being lifted by the yellow beam could reasonably lead an employee to conclude that this practice of exceeding the beam capacity was condoned.

Finally, the Union pointed to a 1990 incident in which a suction box was dropped from a crane yet the employees involved received no discipline, as evidence to show that the Grievant was being disparately treated here. In all the circumstances, the Union sought an award stating that Robert Novak had not been discharged for just cause and ordering that he be reinstated to his former position and made whole for all losses suffered as a result of his discharge.

Reply Briefs

Employer

The Company argued that the Union misstated or mischaracterized facts proven at the hearing. For example, the Company pointed out that management never condoned a "practice" of lifting rolls in excess of the beam's capacity and that all witnesses confirmed that all supervisors were unaware of such a practice (if it existed) by employees. The Company observed that the Union failed to prove that employees simply "eyeballed" rolls based on experience. The record demonstrated that Novak had several options which he failed to use when the scale on the yellow beam failed. Despite the Union's assertions, there was no evidence to show that Mabry was assigned to move the AP roll or that he had more experience than Novak in moving rolls. Also contrary to the Union's assertion, employees Lambert and Scott never approved Mabry and Novak's actions, even assuming Novak's account thereof is true. Furthermore, contrary to the Union's arguments, although employees are not trained to fix scales, they are trained to call supervisors and/or Maintenance if problems arise.

The Employer took issue with the Union's citation and use of SAFEWAY STORES, 95 LA 63 (Lebak, 1990) and EBERLE TANNING CO., 71 LA 302 (Sloane, 1978). In this regard, the Union noted that neither case is applicable to this case; that no express condonation was present here as was the case in the SAFEWAY decision, and that the facts in EBERLE demonstrated that supervisors must have known that employees were not using safety guards on radial saws because the guards hung in plain view on the plant walls where saws were in use. In the instant case, there was no evidence regarding how many rolls were lifted per day, whether supervisors were always present, or whether the lifting process was always visible in the KRC plant.

In the Employer's view, eyeballing rolls cannot replace weighing them to get the actual weight unless a roll is extremely small. However, the Company noted that the AP roll was huge, bigger than most rolls in the shop, which should have indicated to Novak that he should weigh such a roll. The Company noted that Novak admitted on cross-examination being aware of the proper procedures for lifting rolls and that the proper focus here should be on whether there was any justification for Novak lifting a roll without weighing it, not whether he knew he should obtain supervisory permission before lifting a roll when the scale did not work. The Company observed that Novak knew that if a scale was not working, he should call Maintenance to check it out and that the Union's witnesses indicated that they had asked supervisors before lifting rolls that were in excess of a beam's capacity. In regard to the suction box incident, the Employer urged that the suction box incident is factually distinguishable: no rolls were lifted with improper beams and the incident had nothing to do with the weight capacity of a beam.

The Employer urged that "new" evidence regarding statements by former Manager Senecal were submitted in an untimely fashion, disadvantaging and prejudicing the Company. Therefore, the Employer urged, the testimony of Gosz must be disregarded due to the timing of its proffer, where (notably) it had not been previously raised during the processing of this grievance. Therefore, the Company sought that the grievance should be denied and dismissed in its entirety.

Union

The Union argued that the cases cited by the Employer regarding reduction of penalty were inappropriate as the contract here, unlike those cases, specifically allows the arbitrator to reduce the penalty in an appropriate case. In addition, in the Union's view, the arbitrator would have a general equitable power to reduce a penalty meted out to an employee where the penalty is unreasonable or unduly severe. In any event, because the Employer failed to prove that Novak was reckless, the Employer could not discharge him under Level 2 of the work rules, there being no evidence that Novak disregarded a known risk. The Union noted that Novak received only minimal training and that he was following shop practice when he failed to weigh the AP roll.

In regard to the Employer's argument that the arbitrator should discredit Novak's testimony, the Union asserted that Novak as well as other Union witnesses should be assumed to be telling the truth unless there is conclusive proof to the contrary. The Union claims that Novak's testimony stood uncontradicted and that therefore Novak's interest in the outcome would not warrant a presumption that he is lying in this case. In terms of the use of this presumption (urged by the Employer), the Union contended that application of the presumption effectively negates an Employer's burden of proof in a discharge case and operates in an unfair manner. Specifically, regarding the minor discrepancy in the transcript concerning who pushed the button on the Weightronic scale, the Union found the evidence insufficient to discredit Novak. The Union asserted the evidence was not inconsistent on this point because the Employer asked questions using a plural "you" reference which could have applied to both Mabry and Novak. Finally, the Union asserted that Novak should not be criticized for asking Mabry for assistance on June 25th, as the Employer contended.

In summary, the Union urged that, as there was no written rule requiring employees to get supervisory permission to lift rolls in excess of beam capacity, and because the shop practice was to the contrary (condoned by supervisors), the Employer failed to meet its burden of proof to show that Novak knew it was wrong to lift the AP roll without first weighing it. Thus, the Union asserted that no just cause existed for Novak's discharge and urged that he be reinstated with full back pay.

DISCUSSION

Article XI of the effective labor agreement clearly provides that no employee will be discharged without just cause. The parties have also incorporated work rules into the collective bargaining agreement which provide for three levels of rule violations. The introductory paragraph to these rules indicates that the work rules:

. . . are intended for the welfare and protection of each and every employee, and are basic to the orderly conduct of daily business. Each rule has been carefully considered and will be enforced uniformly and fairly on a plant wide (sic) basis.

The Company discharged Novak based upon his alleged violation of Level 2, Rules II and III. Those rules provide for suspension and/or termination for:

"(II) disobedience or gross insubordination; (III) Willful or reckless destruction or damage to Company or customer property."

The Company has taken the position that by failing to follow the Company's policies and procedures regarding the use of lifting beams and scales, Novak disobeyed Company policy and thereby violated Level 2, Rule II. The Company has also contended that Novak's actions on June 25th constituted reckless destruction and damage to Company and customer property, in violation of Level 2, Rule III.

The Random House Dictionary of the English Language (College Edition, 1968) defines the word "reckless" as follows:

Utterly unconcerned about the consequences of some action; without caution; careless. . . .

Black's Law Dictionary (Sixth Edition, 1991), defines "reckless" in part, as follows:

. . . careless, heedless, inattentive; indifferent to consequences. According to circumstances, it may mean desperately heedless, wanton or willful, or it may mean only careless, inattentive or negligent. For conduct to be "reckless", it must be such as to evince disregard of or indifference to, consequences, under circumstances involving danger to life or safety to others, although no harm was intended. (Citations omitted).

The central question, therefore, in this case is whether Novak's actions on June 25th amounted to disobedience or reckless destruction or damage to Company or customer property. To answer this question, an ancillary question must be determined initially -- whether a well-

known rule or policy existed regarding what employees should do when selecting a beam to lift a roll. Initially, it should be noted that nowhere in the Company's rules is it written that an employee must weigh a customer roll prior to lifting it. However, in accord with good safety procedures, it is logical that an employee should not lift a roll without knowing its weight.

In addition, based upon Novak's admissions as well as the testimony of other employee witnesses, it is clear that despite the fact that no written rules exist on the subject, employees were generally aware that they should weigh a roll before lifting it. Indeed, I note that Novak (and all the employees who testified) admitted that it is important to weigh rolls to determine the type of beam that is needed to move them through the factory. Novak also admitted that he usually weighed rolls prior to lifting them; that when a scale on a beam does not work, Company employees should seek the assistance of a Maintenance employee; that when he was trained by the Company regarding beams and lifting policies, no Company official ever told him that beam ratings mean nothing or that employees can lift any size roll with any beam they wish, or that employees could disregard the weight capacity listed on Company beams. 10/

Furthermore, Novak admitted that he was nervous about hooking up the AP roll to the yellow beam on June 25th after he found out that the scale on that beam did not work, as he was unsure of the weight of the AP roll. The fact that Novak asked both Mabry and Lambert whether the yellow beam would be sufficient to lift the AP roll and the fact that Mabry attempted twice to weigh the AP roll as he was beginning to lift it indicate that both Novak and Mabry were aware that they should weigh the roll prior to lifting it. All of this evidence tends to support a conclusion that KRC employees, and Novak specifically, were fully aware that no one should lift a roll when they are unsure whether the beam they have selected can safely lift and move the roll. 11/

In the circumstances of this case, it is also clear that Novak's testimony regarding what occurred on June 25, 1997 was not credible. In this regard, I note that Novak's version of the facts differed widely from that stated by former Supervisor Eugene Pingel. I credit Pingel over Novak for several reasons. Although Novak stated on direct examination that he was told by Pingel to use the yellow beam to complete his tasks regarding the AP roll, Novak admitted on cross-examination that Pingel did not tell him which beam to use on June 25th. Although it was part of Novak's job description to move rolls through the factory, and he was paid at a higher rate of pay than Mabry, Novak insisted that it was Mabry's job to move rolls. Contrary to his testimony on direct examination, Novak admitted on cross-examination that Pingel never told him to get Steve Mabry to help him on June 25th, and that he (Novak) decided to get Mabry to help him because Mabry was a "helper". Thus, in my view, Novak's assertions in this area undercut his credibility and amounted to attempts to side-step his specific responsibilities and his job assignment on June 25th.

Other instances where Novak's own statements undercut his credibility are as follows: Novak's statements that the scales on the yellow beam had not worked for approximately two weeks yet he did not mention this fact to any Maintenance department employee although he knew that it would have been important to do so; Novak's statement that he was unsure whether or not he used the yellow beam to lift rolls during the two-week period after he knew that the scale was not functioning; Novak's statement that he never reported any non-functioning scales to the Maintenance department during his 13 months of employment at the Company; and Novak's admission that on the evening of June 25th, he lifted the first roll he had to move that evening with the yellow beam without attempting to weigh it. The fact that Novak, after having made all of these various admissions and inconsistent statements, proceeded to deny that it was standard procedure to weigh rolls at the Company before lifting them, also undercut Novak's credibility, in my opinion. Thus, the Union's assertions that Novak was simply carrying out orders he had received from Supervisor Pingel regarding the AP roll and that Mabry should be held solely responsible for the June 25th incident, do not withstand scrutiny.

I agree with the Company that the evidence proffered by the Union failed to demonstrate that there was essentially a practice in the plant, condoned by supervisors, whereby employees regularly lifted rolls which exceeded the yellow beam's capacity. In this regard, I note that the evidence clearly demonstrated that when customer rolls arrive in the plant, even if they are weighed upon arrival, their weight often varies as they move through the facility and are serviced and prepared to be shipped back to the customer. The fact that rolls did not regularly have weights placed on them upon their arrival at the factory would also indicate that it is very important for employees to weigh rolls whenever they begin working on them. It is significant that all of the employees who testified herein stated that if they are not sure of a roll's weight, they should not lift it and that none of the employees who testified stated that supervisors actually knew employees were lifting heavy rolls with the yellow beam and condoned such conduct.

In addition, I note that Novak admitted that on an ordinary evening shift, he might be assigned to lift one or two rolls, or perhaps a total of 260 or 580 rolls during his employment at the Company. There was also significant evidence that various training methods had been employed by the Company with Novak as well as all other employees, including training by in-house employees as well as outside entities (such as Fox Valley Tech and US Sling) and that Company managers had rated Novak as adequately trained in all areas of the job by August, 1996. Novak admitted that he knew that if the scale on a beam was inoperable, he should call the Maintenance department to troubleshoot the problem. Novak also admitted herein that if he had a question regarding what he should do to accomplish a task, he should ask someone with experience. These facts show that the Company should have been able to rely upon the fact that Novak was aware of Company lifting policy that he should weigh a roll before attempting to lift it and that if a scale is inoperable, he should call Maintenance.

The Union argued that Novak's conduct on June 25th amounted to mere negligence at most, not willful or reckless conduct. On this point, I note that conduct, in order to be willful, must be voluntary, intentional or deliberate. I do not believe that Novak deliberately, voluntarily or intentionally set out to damage the Company's property or the customer's property on June 25th. 12/ However, on June 25th Novak set a chain of events in motion by his conduct which endangered life and property when the AP roll fell to the floor after the attempted lift thereof. On this point, I note that it was Novak's assignment to lift and service the AP roll, that it was Novak's decision to use the yellow beam to lift a different roll out of the wash saddles to make way for the AP roll; that it was Novak's decision to seek out Steve Mabry to assist him in lifting the AP roll; and that it was at Novak's request that Mabry used the yellow beam to begin lifting the AP roll. Even after Mabry punched the scale button twice and found that the scale was inoperable, Novak could have intervened and insisted that the roll be weighed prior to lifting, yet he did not do so. In these circumstances, I am of the opinion that Novak did not make a "simple mistake" as the Union claims. Rather, his conduct showed a disregard and indifference to the consequences of his actions when he knew that danger to life and/or the safety of others was involved. 13/

The fact that the Weightronic scale was inoperable on June 25th does not excuse Novak's actions in failing to call Maintenance to inquire regarding the scale. Indeed, I note that it appears from the June 25, 1997 work list, that Novak had only one assignment for his shift that evening, while Mabry had two assignments, which would tend to demonstrate that Novak was not particularly pressed for time that evening. 14/

That Novak was unable to "eyeball" the AP roll is not relevant, as the overwhelming evidence in this case indicated that "eyeballing" is frowned upon by the Company and that employees, including Novak, knew that "eyeballing" is not a substitute for knowing the exact weight of the roll by use of a scale. The fact that several employees testified that they or other employees had lifted rolls with the yellow beam that were in excess of that beam's capacity simply indicated that other employees had disregarded the Company's lifting policies at their peril in the past.

The incident recounted by employe Van Handel wherein Manager Senecal allegedly told employees to continue using the yellow beam according to its use in the past, I find to be inconclusive evidence of any such past practice. I note in particular that this statement appeared to be taken out of context, and that it could just as easily have been made to indicate that employees should follow proper lifting procedures rather than to follow any "practice" to the contrary. Furthermore, I agree with the Company's assertion that evidence brought forward so late in the processing of the grievance has a prejudicial effect on the opposite parties' ability to defend against it, and I therefore have given it no weight in this decision. 15/

Finally, the Union pointed to a 1990 incident, in which a suction box was dropped from a crane and employes involved therein received no discipline, as evidence to show that Novak was harshly treated herein. The evidence surrounding the suction box incident was extremely sketchy. I note in this regard that there was no evidence regarding the type of danger to employes which was possible when the suction box was dropped; no evidence was submitted to show that lifting suction boxes was a normal part of employes' duties; and no evidence was proffered to show the extent of the damage done to Company and/or customer property when the suction box was dropped. In addition, there was no evidence that a beam was used in the suction box accident, as is the case herein. Based on the above, I believe the suction box incident is distinguishable on its facts from the instant case, and not relevant hereto.

Based upon the relevant evidence and argument in this case as well as my evaluation of the credibility of the witnesses, I issue the following

AWARD

There was just cause for the discharge of Robert Novak. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 4th day of May, 1998.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

ENDNOTES

- 1/ It should be noted that Van Handel first raised this incident on the date of the instant hearing.
 - 2/ Novak stated that his training with Riehl lasted about 10 or 15 minutes and that he also saw a videotape regarding the same information which lasted about 45 minutes.
 - 3/ Novak denied receiving such a booklet during his training.
 - 4/ The facts which appear in the body of this decision are the facts which I have credited and accepted as true for purposes of reaching the Award herein. I have not credited Novak herein as his story changed on cross-examination and it contained internal inconsistencies. I note that on direct examination Novak stated that Pingel specifically told him on the night of June 25 to take the Appleton Papers roll down to the wash room and that work on the roll had to be completed by the next morning or afternoon so that it could go back to the customer. Novak also stated that he went back to Pingel and asked him if the Appleton Papers roll had to be moved to the wash room and Pingel stated yes, that was the case. Novak stated that he then asked Pingel if it was okay for him to get someone to help him move it and Pingel told Novak to ask Mabry to help him move the roll.
 - 5/ Pingel confirmed that there is no rule or policy at the Company which allows employes to guess the weight of a roll rather than weighing it to be certain. Pingel stated that he had never heard that employes picked up 40,000 pound rolls with the 24,000 pound capacity "yellow" beam. Pingel stated that he had told his employes to ask him if they had any questions.
- Maintenance Leadman Jerry Riehl stated that although as a trainer of employes he did not train employes how to change the battery on a Weightronic scale, or how to troubleshoot what was wrong with it, but he did tell employes to call maintenance with any problem that might arise regarding the function of the Weightronic scale.
- 6/ Poss stated that the Appleton Papers roll was so heavy, it would have required two cranes to move it and the roll could not have been washed in the washroom but would have had to have been moved to the truck pit to be washed. Poss stated that he did not know whether Novak and Mabry were experienced enough to know of this option.
 - 7/ It should be noted that Steve Mabry, who was also discharged, did not testify in the instant hearing and that Scott and Lambert were not witnesses herein either.
 - 8/ The Union cited CELANESE TRUCKING DIVISION, LA 819, 823 (Nolan, 1988).

9/ MINNESOTA DEPARTMENT OF JOBS, 96 LA 777, 783 (Gallagher, 1990).

10/ The fact that the Safety Committee repeatedly recommended that beams be marked does not require a conclusion that no rule existed that employees should weigh rolls.

11/ As it is clear that the Company had an unwritten rule that employees must weigh rolls or call Maintenance first, it is unnecessary to determine whether a practice existed requiring employees to get supervisory permission to exceed a beam's capacity. Such a practice would not pertain here, as Novak and Mabry did not know the weight of the AP roll.

12/ I do not find Pingel's failure to carefully read the jobs list on June 25th before making assignments to Novak and Mabry is an error sufficient to change the outcome of this case.

13/ The Union argued that although Novak was assigned to move and service the AP roll, he relinquished those duties to Mabry and therefore that he should not be responsible for the outcome of Mabry's actions on his behalf. I disagree. It is clear on this record that Novak alone was assigned to move and service the AP roll. The fact that, at Novak's request, Mabry volunteered to assist Novak and that Novak essentially allowed Mabry to take over the lifting of the roll, does not require a conclusion that Novak was no longer responsible for the outcome of Mabry's action after Mabry volunteered to assist him.

14/ I do not credit Novak's account wherein he stated that Pingel told him that the AP roll had to go out the next day. I believe the job list for that evening does not demonstrate that to be the case. In this regard, I note that the dates that are listed on the job list could be dates upon which the Company had promised to complete work, although two jobs would have already been five days late were this the case. If the dates listed on the job list for that evening were departure dates, the Appleton Papers roll would not be due out of the factory until June 30, some five days after the accident occurred on June 25th. In addition, I note that there were no notations next to the AP roll job to indicate that the job was to be done quickly or for quick shipment, as appeared on two other entries on that list.

15/ I must question employee Van Handel's volunteering of this information at the instant hearing, after he had apparently previously testified in another arbitration hearing on this very subject, and had failed to mention this incident at that time. I note that Van Handel also admitted that he had failed to mention this incident at any other time during the processing of the instant grievance and he offered no excuse for his previous omission. This, I find suspicious, to say the least.

SAG/gjc
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