BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL LODGE 1855

and

KRC (HEWITT), INC.

Case 54
No. 55530
A-5614

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Frederick Perillo** and **Attorney Jill M. Hartley**, appearing on behalf of the Union.

Godfrey & Kahn, S.C., by **Attorney Dennis W. Rader**, appearing on behalf of the Employer.

ARBITRATION AWARD

International Association of Machinists and Aerospace Workers, Local Lodge 1855, hereinafter referred to as the Union, and KRC (Hewitt), Inc., hereinafter referred to as the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the Employer, that the Wisconsin Employment Relations Commission designate a member of its staff to act as the sole Arbitrator to hear and decide a grievance over a suspension. The undersigned was so designated. Hearing was held in Neenah, Wisconsin, on January 13, 1998. The hearing was transcribed and the parties filed post-hearing briefs and reply briefs, the last of which were exchanged on March 24, 1998.

BACKGROUND

The Employer services and re-covers rolls used in the paper industry. Rolls are serviced by grinding the surface of the roll to a certain diameter using a Farrell grinder. The Employer has a number of such grinders designated as F-3, F-5, F-6, F-8, etc. The rolls are placed on the grinder and are ground with a grinding wheel while the roll is turned. The

amount of material that is taken off a roll depends on whether it is a rough grind or a finish grind as well as the type of roll. A rough grind removes more material and a finish grind removes less. There is little debris from a steel roll, more but a fine powder from a top tech roll and a polyurethane roll has a large amount of material removed. A liquid is used during the grinding process to cool the grinder and roll, to wash away the material that is ground off and, if necessary, to lubricate the roll. The coolant comes out of a spigot above the location of the grinding wheel and cools and washes the roll during the grinding process. The coolant flows into a basin under the grinder and into an area called the pit where the coolant is filtered through a paper filter and then flows into a tank. If the coolant level in the tank drops down, a float signals that more water should be added and a solenoid opens a valve and adds water until the float rises enough to signal the value to close. A green light on the machine indicates when the level is low. The pit also contains a motor, pump and a hydraulic tank reservoir to provide spindle oil to lubricate the spindles on the grinder. The pit must be checked to make sure the paper filter is working properly and does not clog up. There is no written rule on how often or when the pit must be checked by either the grinderman or his helper or trainee but generally it is checked at the beginning and end of the shift. Where the grinding creates a lot of debris, the filter can clog up resulting in an overflow of water in the bottom of the pit. If there was a lot of waste stock coming off a roll, the pit must be checked more frequently to make sure the paper filter is not clogging up or to make sure there is still filter paper in the filtering device. The pit under F-8 is 50 inches deep and it may be checked by going down a ladder into it or by looking down the access hole using a flashlight. A light also indicates whether the filter paper is moving or cycling.

On June 25, 1997, the grievant was working the second shift as a grinderman on both the F-6 and F-8 grinders. Greg Maltbey, a trainee, was assigned to assist the grievant as well as another grinderman on F-5. The grievant set up F-8 to finish grinding a top tech roll with Maltby's assistance. Maltbey checked the pit under F-8 at around 5:00 p.m. and told the grievant that it was all set for the night. At 5:15 p.m. the grievant started finish grinding the top tech roll on F-8 and was grinding a steel roll on F-6. Sometime during the shift, the solenoid on the water supply stuck in the open position which filled the coolant tank and then overflowed into the pit. At approximately 10:45 p.m., the F-8 grinder shut down. The grievant told his supervisor that the machine shut down. The third shift grinderman came on the scene and reset the breaker on the electronic console of F-8 and the machine started up. The grievant helped to restart the roll and the grinding wheel and then left when his shift ended. Neither he nor Maltby checked the pit at the end of the shift. F-8 shut down completely at midnight when it lost spindle pressure and at that time, the water level was at 48 inches in the pit or 2 inches from the top.

The electric motor for the oil pump, which is located a foot to one and one-half feet off the pit floor, was flooded and repaired at a cost of $311.00. The Employer pulled the spindles out of the grinder and inspected them for damage, cleaned out the oil tank and flushed out the oil lines and did some other repairs and the Employer, figuring loss of production and maintenance work, estimated a loss of $36,000. The grievant was suspended for ten days for violating Work Rule Level 2, #2 and #3. The suspension was grieved and appealed to the instant arbitration.

ISSUE

The parties stipulated to the following:

Was there just cause for the grievant's ten day suspension, and if not, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS AND WORK RULES

ARTICLE XI
Discharge

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

Section 2. . . . If it is determined that the employee has been disciplined too severely, payment of back pay, if any, for time found excessive shall be made.

. . .

WORK RULES

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 basis.

. . .

Level 2 - Violation will result in suspension and/or termination.

. . .

2. Disobedience or gross insubordination.
3. Willful or reckless destruction or damage to company or customer property.

. . .

EMPLOYER'S POSITION

The Employer contends that it disciplined the grievant according to the work rules and arbitral precedent. It cites HESS OIL VIRGIN ISLAND CORP., 91 LA 1284 (HUNTER, 1988) for the proposition that regardless of the existence of a specific rule on checking the pit, the grievant should have been aware of his duty to check it to determine that everything was running properly. It cites UNITED STATES STEEL CORP., 94 LA 979 (BEILSTEIN, 1990), asserting that even if there is a legitimate reason for not following Company procedures, a discharge pursuant to the contract's specifically stated rules and procedures will be upheld. It submits that the parties agreed that a grinderman operating two machines is subject to Level II, No. 3 discipline if an operator error occurs. It asserts that the grievant was responsible for checking the pit area and his failure to do so which resulted in damage to equipment justifies the ten-day suspension. The Employer submits that HESS OIL VIRGIN ISLAND CORP., 72 LA 81 (BERMAN, 1978) and BYERLITE CORPORATION, 12 LA 641 (DAY, 1949), provide that the failure to follow a simple procedure justifies discharge and in the instant case the grievant was responsible to perform a simple task, which he failed to do, checking the pit. It also cites NORTH AMERICAN AVIATION, INC., 19 LA 529 (KOMAROFF, 1952) and MARINETTE COUNTY, UNPUBLISHED (BIELARCZYK, 1990) where discharge was held proper for failing to perform a duty up to standard, without any explanation for failing to do so. The Employer notes that a suspension for negligence resulting in bodily injury was upheld in BELL FOUNDRY, 92 LA 1214 (PRAYZICH, 1989) to show the grievant the seriousness of his actions. It states that the failure to check the pit is a serious infraction and a verbal or written warning would not suffice. The Employer cites INGALLS SHIPBUILDING CORPORATION, 37 LA 953 (MURPHY, 1961) where a discharge was reduced to a suspension where the grievant admitted he made a mistake. It argues that in the instant case the grievant does not admit to any error but says it was an "act of God." It argues that the grievant failed to check the pit and his not owning up to his responsibility deserves more than a slap on the wrist. The Employer also relies on ASHLAND OIL, INC., 86 LA 855 (FLANNAGAN, 1986) and on CONOCO, INC., 99 LA 63 (CIPOLLA, 1992) for the proposition that imposing no discipline can lead to similar conduct in the future. It insists that the failure to check the pit cannot be condoned.

The Employer argues that the grievant was responsible to check the pit or to make sure Maltbey checked it. It insists that the grievant was responsible to train Maltby and cannot shift the responsibility to check the pit to Maltbey. It asserts the grievant's claim he was "too busy" is no excuse. It points out that the grievant was not so busy he couldn't get coffee, lunch or a bathroom break when it takes only 10 seconds to look down the hole into the pit.

The Employer argues that the decision to check the pit does not depend on the type of roll being serviced as many things can go wrong, such as a broken hose, a sticking float, a rusted tank or a plugged drain which requires periodic checking of the pit. It submits that because the pit under F-8 is smaller and shallower with equipment close to the floor, it should be checked even more frequently. It observes that the grievant reluctantly agreed that other things could go wrong in the pit besides the paper filter system and low water, but except for these two, they were of no concern to him. It insists that the grievant's irresponsible attitude

will only be reinforced if he prevails. The Employer does not hold the grievant responsible for the failed solenoid but does for his failure to check the pit after 5:00 p.m., so the problem could be averted.

The Employer maintains that the grievant's attempt to excuse his neglect is incredible. It asserts that the failed solenoid was no "act of God" as defined by arbitrators because the problem could easily have been prevented by the mere use of reasonable foresight, i.e., a look into the pit. It suggests that while not anticipated, any damage could have been prevented and the grievant's excuse is unacceptable. The Employer contends that the grinderman is responsible to check the pit more than once a shift. It notes that this duty takes minimal time and effort and given the grievant's 11 year history, he knew it was his responsibility to check the pit.

The Employer asserts that prior incidents of pit flooding are distinguishable from the instant case. It claims that there has never been an overflow comparable to the instant case and none that cost approximately $36,000 as no one was so reckless to allow a pit to fill to the point of shutting down a machine. The Employer rejects the grievant's reasoning that this was an "act of God," wasn't his concern, was out of his control, no one told him to check the pit, it was a maintenance problem not the grievant's and he was too busy to check. It concludes that a verbal or written warning is not sufficient given the grievant's attitude and excuses and it requests the discipline be upheld.

UNION'S POSITION

The Union contends that the grievant did not disobey a direct order to check the pit nor was he insubordinate in failing to instruct Maltbey to check it. The Union defines insubordination as a refusal to carry out an order. It states that the grievant never received an order to check the pit on June 25, 1997, nor was he instructed to direct Maltbey to check it, so he cannot be guilty of gross insubordination or disobedience. The Union maintains that no supervisor gave the grievant an order that he refused to carry out and there is no evidence of any policy which states the pit must be checked a certain number of times per shift. It insists that no one ever directed the grievant to instruct Maltbey to check the pit at least three times during a shift. It notes that nothing in the list of duties of the grinderman trainee lists this duty. It claims that the accepted practice is to check the pit according to the type of roll being ground and the amount of stock being removed from the roll. The Union insists that the grievant complied with this practice and it is unjust to discipline the grievant for non-compliance with a policy that was never communicated to him. It also asserts that even if there was a policy, failure to adhere to it is not insubordination as insubordination requires defiance and disregard for managerial authority. It concludes that the evidence failed to show any disobedience or gross insubordination by the grievant and there was no just cause to suspend him for this.

The Union submits that the grievant did not cause damage to Company property by willful or reckless conduct. It argues that the Employer failed to prove that the grievant's conduct was willful or reckless. It takes the position that "willful behavior" requires knowledge and notwithstanding that knowledge, intentional engagement in prohibited conduct. It defines reckless conduct as intentional disregard or indifference to a known risk. It maintains that the grievant was not aware of any danger in the F-8 pit, so he lacked the intent required for a finding of willful or reckless conduct.

The Union states that the pit flooded due to an unpredictable solenoid failure which was beyond the grievant's control. It asserts mere flooding does not imply any fault on the grievant's part but the Employer must show that the grievant knew the pit was flooding and ignored it or knew there was a possibility of flooding and disregarded the risk. It cites DIETRICH INDUSTRIES, 83 LA 287 (ABRAMS, 1984), and PEPSI-COLA BOTTLING CO., 79 LA 597 (HANNAN, 1982) in support of its position that an accident which involves significant property damage must be shown to be the grievant's fault in a clear and convincing fashion. It observes that the grievant was unaware the pit was filling with water and was unaware that damage was taking place so he cannot be charged with willful or reckless damage to the F-8 motor. It submits that as he was merely polishing the roll, the small amount of stock would not cause the filter paper to move so the failure to check the pit was not disregard of a known risk but rather a sound judgment call. It claims that no one knew the risk of a solenoid failure so there was no cause for concern and disregarding an unsuspected risk cannot be recklessness. The Union argues that checking the pit is to determine proper operation of the filtering system. It states that there is no prevailing practice of checking the pit three times a shift. It insists that the grievant was not careless as the solenoid failure caused the flooding and it would be unfair and irrational to hold the grievant responsible for failing to predict this failure. It urges that no discipline is appropriate as the grievant took ordinary precautions. It cites a number of cases where discipline was overturned where the grievant acted reasonably under the circumstances.

The Union contends that the grievant's failure to check the pit more than once and discover the overflow is, at most, mere negligence. It maintains that the grievant should not have been suspended as he was operating two machines and absent proof of reckless or willful damage to property, there can be no punishment. It claims that the grievant followed accepted shop practices on the assumption that there was little risk of flooding and because his schedule was busy and he reasonably relied on the filtering system, thus he lacked any culpable intent to justify suspension for reckless conduct. The Union alleges that the Employer failed to prove that the grievant's alleged negligence caused the damage. It points out that the flood caused the damage and the grievant did not cause the flood. It states that the grievant did not even restart the F-8 grinder, so even if there was negligence, it was not the proximate cause of the damage and the grievant does not deserve any punishment.

The Union notes that pit floods are common, occurring three to four times a year, yet no employe before the grievant was disciplined for a pit flood. It observes that the Employer justifies the difference in treatment on the lack of damage in the past. The Union argues that

greater damage does not imply greater fault and the amount of damage does not establish the extent or existence of negligence. It observes that every pit flood has the potential to cause damage, but the grievant was no more negligent than others, just unlucky in that the solenoid failed causing the pit to quickly flood and he should not be punished merely because others, through sheer luck, avoided the damage here. It concludes that the Employer suspended the grievant without just cause and he should be made whole.

EMPLOYER'S REPLY

The Employer contends that the grievant was guilty of reckless conduct. It submits that he admitted not following the correct procedure of checking the pit two to three times during the shift. The Employer insists that the Union's arguments on insubordination and the failure to receive a direct order are not on point. It believes that some duties are obvious and are required by common sense, and therefore no specific order is required. The Employer states that the Union's argument that the frequency of pit inspection depends on the type of roll and the amount of stock being removed is not the accepted practice nor is it realistic. It alleges that there are many other things which can cause flooding and the pit needs to be checked more than once an evening to avoid damage. The Employer rejects the Union's argument that the grievant was so busy that he didn't have time to check the pit, noting it takes only ten seconds to check it. The Employer maintains the grievant is responsible for the damage caused to F-8. It distinguishes the cases cited by the Union on the grounds the grievant's checking the pit would have prevented the damage. The grievant made no attempt to check the pit and failed to act reasonably. It asserts the non-action by the grievant caused the damage.

The Employer insists that the Union's attempts to blame everyone but the grievant have failed. It notes that besides blaming God, maintenance, management, it blames the next shift but the grievant didn't check the pit and it flooded on his shift forcing the Employer to repair the damaged equipment. The Employer emphasizes that the grievant was not disciplined for failing to check the solenoid valve; rather, it was because of his reckless conduct in not checking the pit to see if there was water on the floor. It asserts the pit should be checked more than once per shift and not doing so can result in damage to equipment.

The Employer takes the position that the grievant was properly disciplined. It admits that pits have flooded in the past and employes were not disciplined, but it insists the facts here are different in that it was the grievant's recklessness and total lack of responsibility that caused the damage, the amount of which was not shown to have been inaccurately calculated. The Employer denies that it takes the position that the greater the damage, the greater the fault or discipline. It states that in past cases there was no damage when flooding occurred because the prior incidents were caught before damage occurred by employes checking the pits more than once. It claims that it was the grievant's failure to check the pit for water on the floor. It submits that the grievant's failure to do so resulted in damage to the equipment and this reckless conduct warrants suspension. It seeks dismissal of the grievance.

UNION'S REPLY

The Union claims that there are four fundamental flaws in the Employer's argument. The first is that it assumed there is a rule requiring the pits be checked for flooding a set number of times per shift and the grievant recklessly disregarded the rule. It notes the absence of any rule. The Union distinguishes the cases cited by the Employer in that in those cases, actions by employes caused the damage but here the grievant followed accepted practice and the failed solenoid caused the damage. The second flawed argument is that the grievant had extra time to check the pit. It notes that the Employer offered no evidence to contradict the grievant's testimony that it was a busy night and he was continuously occupied with the work on the F-6 and F-8 machines. It asserts the Employer relied on pure speculation to support its assertion. The third flaw, according to the Union, is that the Employer tried to show that the grievant simply did not care about checking the pits and failed to instruct Maltbey to do so. It argues that the grievant checked the pit and trained Maltbey to check it according to accepted shop practice. It asserts that mindless repetition of an unnecessary task is not safety but wasting time. It submits that the grievant did not act recklessly when he acted on belief gained through experience that little danger of filter clogging meant little danger of flooding. It states that the grievant's statements were simply that there were rare possibilities of flooding from other factors and the stuck solenoid was out of his control and merely because the unpredictable mechanical failure proved his belief wrong in hindsight does not make his conduct reckless or willful or even negligent. It claims the Employer never had a rule on pit checking and is using the grievant as a scapegoat for its own failure. The final flaw asserted by the Union is that the extent of damages is equated with the degree of fault. The Union insists that the Employer greatly inflated the amount of damages but this does not have a proper basis for concluding fault on the grievant's part nor is it a proper basis to distinguish between employes guilty of the same offense. It concludes that the suspension was without just cause and the grievant should be made whole.

DISCUSSION

The sole issue is whether the Employer had just cause to suspend the grievant for ten days for failing to check the pit under the F-6 and F-8 grinders frequently enough to discover flooding which damaged an electrical motor and resulted in water getting in the oil to the spindles requiring they be disassembled to check for damage resulting in lost production time and maintenance costs. The evidence established that there are no written rules on how frequently the pits are to be checked. The testimony of a grinderman and grinderman helper was that the general practice is to check the pits at the beginning and end of the shift and more frequently depending on the type of roll being ground and how much stock is being removed. (Tr. 96, 105, 111, 115-116, 120, 123-124, 127, 129) The pit may be checked by the grinderman or his helper or trainee. On June 25, 1997, the grievant was operating both F-6 and F-8 grinders. Toward the beginning of his shift, the grievant finished up a steel roll on F - 8 and removed it to work on a top tech roll and just before the grievant started to grind the top tech roll his trainee checked the pit and everything was okay. It is undisputed that neither

the grievant nor his trainee checked the pit a second time during the shift. Sometime after 5:00 p.m., the solenoid which allows water to be added to the coolant failed to close and the coolant tank filled with water and then overflowed into the pit. (Tr. 33-34) The pit continued to flood until the discovery at midnight that water was 2 inches from the top of the 50 inch pit. (Tr. 36) There is an electric motor that is a foot to a foot and one-half above the floor of the pit which runs the pump for spindle oil for the grinder. (Tr. 31) The electric motor had to be repaired due to water damage. The spindles on the grinder were removed and checked for contamination but there was none. (Tr. 137)

The grievant was given a ten-day suspension for a violation of Work Rule Level 2, #2 and #3. (Ex. 3) Level 2, #2 provides for a suspension and/or termination for disobedience or gross insubordination. The Union argued that failure to follow the unwritten general practice was neither disobedience nor insubordination. The Employer argued that the Union's argument was not on point. The Employer never cited Level 2, #2 in its brief and essentially made no arguments with respect to the grievant's violating this rule. The evidence failed to establish any violation of the rule. The Employer argued that employes could be terminated or suspended for violating unwritten rules that are obvious, that are dictated by common sense or the employe should have been aware but only in the context of negligence or recklessness, not for gross insubordination or disobedience. Thus, the alleged violation Level 2, #2 has been abandoned and in any case was not proved by the Employer.

Work Rule Level 2, #3 provides for discharge and/or suspension for willful or reckless destruction or damage to company or customer property. The crux of the Employer's argument is that the grievant was reckless in not checking the pit and this failure caused the damage to company property. Recklessness must be distinguished from mere negligence. Negligence is the failure to exercise the care of an ordinarily prudent person in the same situation. The greater the risk, the greater the care that must be taken. Recklessness can also be distinguished from intentional conduct which is the intent to do damage or to proceed with conduct with knowledge that damage will occur. Recklessness falls in between a failure to exercise ordinary care and intentionally doing damage. Usually a "quasi-intent" is applied to the actor's state of mind. It is conduct which is so far from negligence that intent is imputed or is treated as "constructive intent." It can be described in a number of ways such as the failure to exercise any care under circumstances when there is a great probability that harm will result. It can be an intentional act of an unreasonable character in disregard of a known or obvious risk that is so great as to make it highly probable that harm will follow and this is usually accompanied by a conscious indifference to the consequences. It can be very unreasonable conduct in disregard of a high and excessive degree of danger, either known to him or apparent to a reasonable person in his position. The mere failure of the grievant to check the pit or have it checked does not rise to the level of rashness set forth in the above definitions. If there had been a problem with the solenoid frequently sticking and the grievant knew this so that it would be prudent to check the pit regularly for an overflow because of this problem and the grievant decided not to check it knowing that there was a very high possibility that flooding and damage would occur, then his conduct would be reckless. If he saw the pit

flooding but did nothing to correct it in spite of the high probability of damage, again his conduct would be reckless. Recklessness requires a conscious disregard of a known risk. Here, the possibility of a solenoid failure seems quite remote or a very minimal risk. The evidence established that flooding is infrequent so the mere failure to check the pit does not evince a conscious disregard of a known risk. Rather, the failure to check the pit seems to be nothing more than ordinary negligence, that is, the failure to exercise care of an ordinarily prudent grinderman. Here, the grievant should have checked the pit or had the pit checked just like other grindermen but failed to do so. Flooding can happen, as it occasionally does for a variety of reasons, so the pit needs to be checked, however the probability that it will flood is low and the mere failure to check it does not establish that the grievant was reckless, just negligent.

When the grievant was given the ten-day suspension, he made no comment. (Ex. 3, Tr. 53) At the hearing the grievant stated the solenoid failure was an "act of God" and that although a number of things could go wrong in the pit, these were nothing that concerned him. (Tr. 186, 190) While this sounds like the grievant was indifferent to what could occur in the pit and appears to show a mental state which is unreasonable, the Employer never relied on this when it meted out the ten-day suspension. In addition, recklessness is measured against an objective standard just like negligence. The solenoid failure was not an "act of God" and the grievant had a duty to check the pit because a lot can go wrong, albeit infrequently. However, the evidence taken as a whole does not establish the grievant acted in a willful or reckless manner but he was negligent.

Even assuming the grievant was reckless and surely he was negligent, an element of proof required is that his conduct or failure to act caused the damage. Had the grievant checked the pit at 10:46 p.m., he would have discovered the flooding and arguably followed the general practice established by the evidence of checking the pit at the beginning and end of the shift. Because he would have followed the practice, he would be blameless, yet at 10:46 p.m. the electric motor would undoubtedly have been totally submerged under water as it is only a foot or a foot and one-half above the pit floor. (Tr. 31) Thus, it is concluded that the motor was damaged by water before the pit was required to be checked by the grievant. The additional hour that the solenoid failure was not discovered allowed another 1,200 gallons to be added to a 7,262 gallon (Ex. 25) or 9,450 plus gallon pit. (Tr. 204) The motor was thus submerged long before the time to check the pit arose and it follows that the grievant's conduct was not the proximate cause of the damage to the electric motor or the accompanying maintenance.

As the grievant's failure to check the pit was negligence and not willful or reckless conduct and the grievant's failure was not the proximate cause of the damage, he did not violate Work Rule Level 2, #3 and there was not just cause for his suspension. The grievant did violate Level 3, but inasmuch as he was operating two machines at the same time on his shift, the proof required is not of mere negligence, but willful/reckless conduct which the evidence failed to establish.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

There was no just cause for the grievant's ten-day suspension. The Employer shall remove the suspension from the grievant's file and make him whole for the losses due to the ten-day suspension. The undersigned will retain jurisdiction for a period of thirty (30) days from the date hereof solely for the purpose of resolving any dispute with respect to the remedy herein.

Dated at Madison, Wisconsin, this 29th day of May, 1998.

Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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