BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LODGE NO. 1855

and

SCAPA ROLLS NEENAH, L.P.

Case 54
No. 57589
A-5768

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Frederick Perillo**, 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 Scapa Rolls Neenah, L.P. and its successor, Voith Sulzer, 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 discharge. The undersigned was so designated. Hearing was held in Neenah, Wisconsin, on July 21, 1999. The hearing was transcribed and the parties filed post-hearing briefs. The parties reserved the right to file reply briefs. The Union chose not to file one and the Employer filed a reply brief which was sent to the Union on September 15, 1999.

BACKGROUND

The basic facts underlying the grievance are not in dispute. The grievant had been employed by the Employer starting June 5, 1995, and held the job of Extruder Operator in the

Cover Shop. The Employer recovers rolls used in the paper industry. On April 10, 1999, the grievant was working on a big roll and put a new rubber coat on it. The roll has to be placed in an autoclave or oven where pressure and steam is introduced which vulcanizes the rubber to the roll. In order to put the roll in the autoclave, the roll is placed between two carts, one at each end, and each cart has a support or saddle into which the journal at each end of the roll rests. The length of the roll determines how far apart the carts must be placed so each end or the roll is supported. The two carts are connected by a pipe, or a series of pipes, which are pinned together so the roll and carts will move as a unit. The carts have wheels which ride on tracks in and out of the autoclave.

On April 10, 1999, the roll was long enough such that the carts had to be connected by three pipes. The pipes have holes in them about every six inches. A small diameter pipe from each cart fits into a larger diameter pipe and the pipes are held together by bolts which go through the lined up holes of the larger and smaller pipes. After the carts were lined up to accept the journals, the grievant put a bolt in a hole that he thought was lined up with the inner and outer pipes. In fact, the grievant put the bolt in a hole that was just beyond the end of the inner pipe. The carts on which the roll rested were pushed into the autoclave and as the bolt was near the end of the inner pipe, the inner pipe contacted the bolt when it was pushed together so it was not noticed that the pipes were really not connected. On April 11, the roll was pulled out of the autoclave by connecting a fork lift to the front cart. Because the pipes were not connected, the front cart moved and the rear cart did not so the roll dropped damaging the carts as well as the roll's cover and shell. On April 16, 1999, the grievant was terminated. The termination was grieved and proceeded to the instant arbitration.

ISSUE

The parties stipulated to the following:

Did the Company have just cause to terminate Chue Lor?

If not, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISION

ARTICLE XI
Discharge

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

Section 2.

. . .

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 back pay, if any, for time found excessive shall be made.

. . .

WORK RULES

. . .

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

. . .

3. Willful or reckless destruction or damage to company or customer property.

. . .

Level 3 – Any work rule violated in this category will result in disciplinary action:

1. First offense – written/verbal warning.
2. Second offense – written warning.
3. Third offense – one day suspension.
4. Fourth offense – employee subject to suspension or termination.

Rules falling into this classification are as follows:

. . .

4. Negligence resulting in substandard products, inferior work, the breaking of tools, damaging of equipment or wasting of supplies.

. . .

EMPLOYER'S POSITION

The Employer contends that the grievant's prior discipline involving reckless damage to customer property supports the Employer's decision to terminate him. It points out that the grievant was given a warning on December 15, 1995, for a Level 3, Section 4 violation for damaging equipment and the grievant was suspended for three days on April 10, 1998, for violating Work Rule Level 2, Section 3 for damaging a customer's shell by pushing a cart into a pipe resulting in the roll dropping on the lower portion of the cart. It submits that the grievant's actions on April 10, 1999, are part of a pattern of careless and reckless behavior so the decision to terminate the grievant must be upheld. The Employer observes that the prior disciplines were not grieved.

The Employer insists that it is not required to follow progressive discipline in this case. It notes that Level 1 and Level 2 offenses do not have a progressive discipline procedure. The Employer argues that the nature of the infraction as well as a similar Level 2 infraction which was not grieved requires this case be decided on the specific language in Level 2. It cites arbitral authorities that not all misconduct requires progressive discipline and serious misconduct with regard to violation of safety regulations provide for immediate termination. It insists that the grievant violated Level 2 for which he had previously received a three-day suspension and this should be considered in deciding the proper penalty in the instant case.

The Employer asserts that the grievant's conduct on April 10, 1999, was not mere negligence, but was reckless conduct. It insists that the grievant's conduct meets the definition of reckless behavior, citing the undersigned in a prior arbitration between the parties; Case 54, No. 55530, A-5614 (1998). It argues that the grievant failed to exercise any care when he did not take the time to insure the pipes were properly connected and the grievant understood that if the pipes were not connected, the roll could fall down and be damaged. It claims that it has expended over $30,000 in the two incidents caused by the grievant and it would be unreasonable to require the Employer to continue an employment relationship which has been financially detrimental to it without any indication of a reprieve. It maintains the procedure was simple, the grievant having done it 400 to 500 times, so the grievant was reckless in not making sure the bolt was inserted in the proper holes. The Employer cites arbitral authority in support of its contention that the grievant was reckless. It points out that the grievant observed the smaller pipe going into the larger pipe and obviously knew the length of the inner pipe but failed to insure the bolt went through both pipes. It notes that the grievant never checked to make sure the bolt went through both pipes and a virtual fail-safe method would be to put the bolt in the hole closest to the end of the larger pipe but the grievant put it in the fifth hole just short of the inner pipe. It observes that the grievant is an experienced worker having performed this procedure 400 – 500 times and on those instances did not miss the inner pipe. It insists that if he used the same level of care as he did in this situation, the Employer should be very concerned about the future employment of the grievant.

The Employer takes the position that as the grievant had to put the nut on the bolt, he was close enough to visually observe whether the bolt properly engaged both pipes but he never took the time to check the most essential part of connecting the two pipes. It insists there was nothing obstructing his view in looking into the pipe holes and had he done so, he would be able to observe the inner slide through the exterior pipe. It concludes that the grievant was clearly reckless and did not exercise any care under circumstances he knew could result in a high probability of serious damage to customer and Employer property.

The Employer contends that there are no extenuating circumstances that shift the blame in this case. It insists that his conduct cannot be blamed on the 12-hour shift which the grievant voluntarily worked on April 10, 1999. It points out the grievant never claimed he was exhausted and he had worked quite a bit of overtime in the past so this was not new to him and looking through a hole in a pipe to see if two holes are lined up takes very little capability. The Employer maintains that the testimony on greasy wheels is not a relevant factor nor are the short journals. It notes that the grievant admitted that he was properly trained and is a short-term employe of only four years with a poor disciplinary record and therefore, the Employer's decision to terminate him was justified under the circumstances. It seeks denial of the grievance.

UNION'S POSITION

The Union contends that the grievant did not willfully or recklessly damage Company or customer property. It asserts that the Employer must prove that the grievant acted intentionally or recklessly, not merely that he was negligent or made an error. It submits that recklessness or willfulness is far more than ordinary negligence and it must be shown that the grievant intentionally disregarded a known risk or that he acted utterly without regard to the consequences or with conscious indifference to them or failed to exercise any care at all in the face of great and obvious harm. It argues that to be reckless, the conduct must be such to evince disregard of or indifference to consequences under circumstances involving danger to life or safety of others. It notes that willfulness requires an intent that the result actually come to pass and requires a finding that the grievant acted with the knowledge that the conduct that resulted in discipline was prohibited conduct and with the intention to go forward notwithstanding that knowledge. It states that since 1996, the parties have arbitrated the standard that applies to Level 2, a total of five times and in each case the arbitrators defined "reckless" conduct in a manner as to preclude a finding that the grievant violated the rule. It cites cases involving the failure to check the tightness of bolts on a tail stock, the failure to check an underground pit and the use of an undersized beam to lift a heavy roll where the conduct was held to be negligent, not reckless.

It notes that the grievant admittedly put the pin in the wrong hole but clearly did not intend to damage property and as he did not know that he put the pin in the wrong hole, he did not know he would cause the consequences of the roll falling, and therefore, he is not guilty of

willful misconduct. It argues that the grievant was not reckless. It submits there was no conscious indifference to the consequences as he simply put the pin in the wrong hole under circumstances that increased the chance of error and he had no reason to expect that an accident might occur. It claims the mere fact that damages are great, by itself, does not establish intent. It maintains that the grievant's mistake, even if negligent, was barely so. It asserts there was no effective method to check that there was a secure bolt connection between the pipes and any effort would be elaborate and not minimal and could have caused a more dangerous situation. It concludes that the grievant was not negligent and did not ignore any safety appliance known to him. It asserts that his failure to peer through the holes was reasonable given the fact that a 22½ ton roll was hanging overhead and he was primarily responsible for aligning it with the saddles. It argues that it might be negligent or reckless not to place the pins at all, but the grievant attempted to properly place the pin and, at most, made an error in judgment. It insists he used ordinary care and was not negligent. It submits that the grievant did not exhibit an intent to cause harm, a conscious indifference to an obvious and great risk or a failure to exercise any care at all in the face of a great probability of harm. It observes that he followed the usual procedure and at the end of a long shift, he merely failed to judge a small distance correctly.

The Union contends that the grievant's receipt of warnings in 1998 and 1995 do not prove willful or reckless conduct in the instant case. It notes that neither involved a misplaced pin and they do not suggest that he is accident-prone or reckless by nature. It insists that prior warnings are not relevant to the issue of guilt and the commission of an error in the past is not proof that the grievant acted recklessly in this specific case.

The Union argues that the Employer based its decision to discipline the grievant purely on hindsight. It points out that only in hindsight do alternatives look better than the one chosen. It rejects the Employer's argument that pins should be placed in the very first hole and such procedure would be foolproof. It terms this argument as a classic and unfair use of hindsight to place unwarranted blame on the grievant. It observes that the Employer drilled the holes and never trained any employe to put the bolt in the first hole and there is no policy to that effect and no one thought of it until the hearing date. It claims that the Employer cannot reasonably argue that something not obvious to itself or to other employes should be obvious to the grievant.

The Union insists that this case is merely the latest in a series of employes who have been discharged for minor mistakes in judgment. It claims that the Employer overcharges employes with offenses, therefore negligence no longer exists and every offense is elevated automatically to "recklessness." It asserts that people make mistakes and judging small mistakes harshly in hindsight is unjust. It concludes that the grievant was discharged without just cause and he should be reinstated and made whole.

EMPLOYER'S REPLY

The Employer contends that the facts of the instant case distinguish it from the five arbitration awards cited by the Union. It insists that the facts of these other cases are all very different, the employes did not have the same disciplinary record and, in two cases, the employes were very senior.

The Employer claims that the Union misses the point by suggesting the grievant followed the standard procedure by placing the pin as he did because simply placing the pin in the pipe is not the point, but rather, placing the pin to engage both pipes is the standard procedure. It also dismisses the Union's claim that the grievant had no effective opportunity to check the bolt connecting both pipes and refers to the testimony of the Union's own witness who testified that it can be done visually.

The Employer argues that the grievant's prior discipline for reckless conduct establishes what the parties consider to be reckless conduct. The Employer rejects the Union's argument that prior acts of reckless conduct cannot be considered in determining penalties for subsequent reckless acts unless there is a repeat of the same infraction as such a requirement would lead to a ridiculous result. It submits that in 1998, the grievant was disciplined for reckless conduct and the instant case is not any less reckless than the prior incident which defined recklessness, and under these circumstances, the grievant was clearly reckless.

The Employer asserts that the grievant was aware of the risk of damage by not correctly placing the bolt. It maintains that it does not take four years to learn, or become aware of, the risk of damage if the bolt is not inserted properly and the carts pull apart. It states that no fancy mental gymnastics are involved and it is as simple to understand as the law of gravity plus the grievant admitted he understood that failure to properly locate the pin could result in a roll falling and being damaged. It claims that the grievant's conduct was very unreasonable, in disregard of a high and excessive degree of danger known to him, an essential element in the definition of recklessness.

The Employer states that the number of holes in the outer pipe does not affect the result here. The Employer points out that there are a number of holes to be able to accommodate rolls of different lengths. The extra holes also allow the employee to see how far into the outer pipe the inner pipe is actually proceeding.

The Employer contends that the Union omitted an alternative definition of recklessness from a prior award of the undersigned involving the parties. It notes that the following definition was omitted by the Union:

> 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.

It insists that the grievant's failure to check that the bolt was properly inserted was very unreasonable given the high degree of danger of damaging property. It notes that the grievant admitted he watched the inner pipe go into the outer pipe and his face had to be less than two feet away when he placed the bolt in the hole and turned the nut.

The Employer claims the Union concocted a "punishment in hindsight" argument against the Employer's suggested fail-safe method of simply placing the bolt in the first hole. The Employer argues that it was the Union who first brought up this notion of a fail-safe mechanism and the Employer does not claim this is a fail-safe method, the point is to engage both pipes. It alleges that the issue is not whether the grievant used the fail-safe procedure but is whether the grievant was reckless in not engaging the bolt in the two pipes. The Employer insists that putting the bolt in the first hole was a simple explanation of how absurdly simple a task it was to properly engage both pipes. The Employer maintains that it does not have to train employes to do something that is self-evident and the employes admitted that use of the first hole was as close to a fail-safe procedure as was possible and it did not take them years to figure this out. It claims that the obvious first hole option merely proves the Company's point of how simple the procedure was and how, accordingly, the grievant was reckless in not properly engaging the pipes with the bolt.

DISCUSSION

The first issue to be determined is whether the grievant's conduct in not bolting the two pipes together and therefore securing the carts properly is conduct which is reckless, negligent or neither. Negligence is the failure to exercise the care of an ordinarily prudent person in the same situation. Intentional conduct is conduct with the intent to cause a result or to proceed with knowledge that the result will occur. Reckless conduct falls between negligence and intentional conduct. "Reckless" has more than one meaning. CELANESE TRUCKING DIVISION, 90 LA 819 (NOLAN, 1988) AT 820. See also KRC (HEWITT), INC., CASE 54, NO. 55530, A-5614 (CROWLEY), UNPUBLISHED, 1998) AT 9.

The Employer has argued that because there was no grievance filed over the grievant's three-day suspension in April, 1998, the parties have defined reckless conduct. The mere fact there was no grievance filed over this suspension does not establish recklessness. There might be a variety of reasons no grievance was filed including the grievant's acceptance of the suspension because he had made an error or mistake or that this was a one-time incident which would not recur or he simply did not wish to pursue it or the Union did not for cost reasons or

lack of interest by the grievant. In any event this prior incident is not sufficient to establish a standard for reckless conduct which is an objective standard. This prior discipline may be considered for purposes of determining an appropriate penalty for misconduct.

The grievant testified that he did not intend to misplace the pin or bolt. (Tr. 72-73) If he had, the grievant would be guilty of intentional conduct and so the issue presented here would be moot. The evidence did not establish intentional conduct or willful destruction of property.

The issue here is whether the grievant's failure to properly place the bolt is reckless conduct or mere negligence. As noted above, there are a variety of definitions of recklessness which could be careless, inattentive or negligent or "highly unreasonable" conduct in a situation where a high degree of danger is apparent. CELANESE TRUCKING DIVISION, SUPRA. In the instant case, recklessness can also be defined as the wanton disregard to do an act which the grievant has a duty to do, knowing or having reason to know facts which would lead a reasonable man to realize that such would create an unreasonable risk of harm. This legalistic definition can be restated into three factors: (1) the burden of taking adequate precautions or the amount of effort taken to prevent a loss; (2) the probability that damage will occur if the burden is not met; and (3) the gravity of the damage if it does occur.

In this case, if the two pipes are not connected by the bolt, it is almost a sure thing that damage will occur, especially when a roll weighs 45,000 pounds. The grievant admitted that he understood this. (Tr. 73) The grievant also knew that some of the rolls were very expensive. (Tr. 73) Thus, items 2 and 3 have been clearly proved. The effort needed to prevent the damage in this case is not great. The Union's assertion that the only way to check that the bolt has connected both pipes is to pull the carts apart is not well taken. The grievant testified that he lined up the pipe and put the bolt in (Tr. 72) and he saw the inner pipe slide in the outer pipe. (Tr. 79). He further testified that he believed the inner pipe was in far enough because the pin went in so he believed he had connected the two pipes. (Tr. 79) Essentially, he eyeballed the pipe and felt that it was in far enough that he had connected both pipes because the bolt went into the hole. If the grievant did not want to look and observe the inner pipe passing the bolt hole of the outer pipe, he could have easily measured the inner pipe which appears to be a little less than 3½ feet long. (Ex. 10) The inner pipe has holes 6 inches apart and there are six of them so 6 x 6 inches = 36 inches plus pipe before and after each hole. He could measure how much of the small pipe was visible and then would know how far into the larger pipe it went or he could count how many holes were showing and if two were, he would know that only four would match up and the fifth hole would not. All these take minimal effort and are common sense. Additionally, in this case he could have placed the bolt closer to the end of the larger pipe to insure that the pipes were connected. Just looking at the two pipes, it would appear that the fifth hole would only work where almost the entire inner pipe would not be visible. (Ex. 10) The grievant has done this simple pipe connection 400 – 500 times properly. (Tr. 72) Robert Gayhead, a 20-year employe, does this connection two to

three times a week (Tr. 54) and has never missed connecting both pipes. Tim Hautakker testified that he has not been made aware of any rolls damaged because someone didn't hook the pipes up correctly. (Tr. 35) The effort to make sure that the pipes are hooked up properly is very slight. Unlike the case of KRC (HEWITT), INC., CASE 53, NO. 55529, A-5613 (NIELSEN, UNPUBLISHED, 1998) where the effort was slight but the probability of damage was also very slight so that recklessness did not occur, here the effort is slight but the probability of damage is very high, in fact, almost certain. Thus, it was a simple task to make sure the pipes were properly connected and the facts here establish that the grievant's conduct of simply putting the bolt into a hole without any attempt to make sure the pipes were connected shows a lack of any care and evinces a wanton disregard for a known and almost certain probability of damage to property which could be substantial. This meets the definition of reckless conduct and is the type of "mistake" which would not occur absent reckless conduct. If the grievant had stopped at the same stop sign every day for 500 days and then ran through it, such would not be merely a mistake but reckless conduct. Thus, the grievant violated Work Rule Level 2, Section 3.

The work rules states that a violation of Level 2 can result in suspension and/or discharge. However, Article XI requires that no employe will be discharged, disciplined or suspended without just cause. Article XI, Section 2 also provides, in part, as follows:

> 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 back pay, if any, for time found excessive shall be made.

The concept of just cause requires that the punishment fit the crime and that discipline be corrective rather than punitive. While generally, the Employer's determination of punishment is honored, the language of the contract noted above, as well as the concept of just cause, give the Arbitrator the authority to overturn the Employer's determination where it is found excessive. In this case, the grievant had been suspended for three days a year earlier for reckless conduct and discharge appears too harsh for a similar offense. In other words, the discharge is excessive punishment. It seems that the discharge of the grievant in this case is more punitive than corrective and thus is too severe and should be reduced to a 30-work day suspension without pay.

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

AWARD

The Employer did not have just cause to discharge the grievant. The Employer shall immediately reinstate the grievant to his prior position and make him whole for all back pay and benefits except for a 30-work day suspension less any interim earnings or unemployment compensation received, if any. If the grievant received unemployment compensation which is offset from back wages, the Employer shall reimburse the Department of Workforce Development the amount offset. Any back pay shall not include any amounts attributed to established or averaged overtime that might have been worked by the grievant. 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 September, 1999.

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

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