BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

UNITED STEEL WORKERS OF AMERICA LOCAL 3740

and

NAVISTAR INTERNATIONAL TRANSPORTATION CORPORATION

Case 2
No. 58494
A-5821

(Grievance of Keith Clarke)

Appearances:

Mr. George F. Graf, Murphy, Gillick, Wicht & Prachthauser, Attorneys at Law, 300 North Corporate Drive, Suite 260, Brookfield, Wisconsin 53045, appeared on behalf of the Union.

Mr. Jonathan O. Levine, Michael, Best & Friedrich, Attorneys at Law, Suite 3300, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, appeared on behalf of the Company.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "Company", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Waukesha, Wisconsin, on February 15, 2000. There, the parties agreed that I should retain my jurisdiction if the grievance is sustained. The hearing was transcribed and both parties filed briefs that were received by April 11, 2000.

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

ISSUES

I have framed the issues as follows:

1. Is the grievance arbitrable?

2. If so, did the Company have just cause to terminate grievant Keith Clarke and, if not, what is the appropriate remedy?

BACKGROUND

Grievant Clarke, a Millwright, was employed by the Company for about 15 years before his June 4, 1999 termination for horseplay (unless otherwise stated, all dates hereinafter refer to 1999). Clarke previously was suspended for three days in 1997 for following a supervisor home and he received another three-day suspension in May, 1999, for abusive language directed at fellow employe Tom Harmon, who has been employed for about 27 years, and who has served as a Union shop steward for much of that time. Indeed, in his role as a Union steward, Harmon previously had represented Clarke on several occasions. (Since the first suspension occurred more than three years ago and since his second suspension has been grieved, the merits of those suspensions are not being considered herein. Hence, the Company's discharge decision stands or falls entirely on whether the Company had just cause to discharge Clarke over the June 3 incident described below.)

The facts leading up to the second suspension must be detailed because they center on what happened between Clarke and Harmon at a May 21 meeting where employes were discussing the quality of someone else's work. There, after Clarke complained about that person, Harmon stated that he had never experienced any problems with that other person and that he was a good employe. Clarke then became very angry, got up from his chair, and walked over to Harmon where he stood within a few inches of Harmon's face, at which point he yelled, "Shut the fuck up!" Harmon reported the incident to management who, in turn, suspended Clarke for three days. Clarke returned to work on June 3.

Harmon testified here that at about 1:15 p.m. on June 3, he was carrying a heavy metal cylinder on his left shoulder while passing through an outside aisle; that Clarke was driving a forklift in the aisle that was coming towards him from the opposite direction; that Clarke laughed at him and veered the steering wheel of the forklift towards him; that the forklift then accelerated and came right at him; that one of the forks of the forklift pinned his left ankle against a raised concrete pad; that he, Clarke, then said, "You son-of-a-bitch. You've gone too far this time"; that he started to walk away, but then returned to put the cylinder down; that he visited the Company's nurse who discovered a small bruise on his left ankle; and that he then reported the incident to management.

On cross-examination, Harmon said that the Company's Safety Handbook requires employes on vehicle roadways to walk on the left side of an aisle rather than the right side he was working on June 3; that he could have taken a different path on June 3; that even though his personal notes of the incident (Company Exhibit 3) state he went to the maintenance department before he went to the nurse's office, he in fact first went to the nurse's office; that he never before had any personal difficulties with Clarke; and that Clarke never threatened him on May 21.

For his part, Clarke testified that he first recognized Harmon when he was about ten feet away; that he "tried stopping the truck"; that when he was in a dip or rut in the aisle way, "the truck came out of neutral, the engine revved, and I came to a complete stop at that time"; that Harmon was about two feet away; that "As I'm trying to get out of the rut, I would be steering to the right"; that Harmon told him, "That's it, you son-of-a-bitch"; and that he, Clarke, then laughed as Harmon walked away.

On cross-examination, Harmon testified that he used the forklift's inching brake to slow down going through the dip and that his foot never came off the accelerator; that "When I'm in the dip, [Harmon] is right beside me"; that while "The forks and the front tire passed him", "I did not pass him"; that the dip "made the truck swerve"; and that, "When I was in the rut, that's when I turned the wheel so he would have enough room to – to walk beside it." He also said, "I didn't stop. I proceeded to go to my destination." (Tr. 205). He was later asked: "So you never came to a complete stop?", to which he replied, "Not a full stop, no." (Tr. 207).

POSITIONS OF THE PARTIES

The Union claims that the Company lacked just cause to discharge Clarke because "it is impossible to discern the absolute truth" as to what happened during the June 3 forklift incident and that the Company has therefore failed to meet its burden of proving that Clarke committed the misconduct alleged against him. It also contends that "Harmon's version of the events is so irrational, it cannot be credited"; that "Clarke's version of the events is more credible than Harmon's"; that there is "no real evidence to support the case. . ." against Clarke; and that the grievance should be sustained because a judge in Clarke's defamation case against Harmon ruled that it was impossible to determine whether Clarke or Harmon should be credited regarding the June 3 incident. As a remedy, the Union asks that Clarke be reinstated with full backpay.

The Company, in turn, contends that it had good cause to discharge Clarke because he knew he could be fired for aiming his forklift at Harmon; because such misconduct "is good cause for immediate discharge"; because Harmon's testimony should be credited over Clarke's testimony; and because Clarke's defenses are without merit.

DISCUSSION

The first issue to be decided is whether there is any merit to the Company's claim that the grievance is not arbitrable because the parties earlier agreed in the grievance procedure that Clarke would not be reinstated if he failed a drug test – which he eventually did. The record, however, is not so clear whether any such deal was ever struck. Hence, I find the grievance arbitrable.

As for its merits, this case turns entirely on the heads-on credibility clash between Clarke and Harmon over what occurred during the June 3 incident. If Clarke is believed, the grievance must be sustained because Clarke did not do anything wrong when his forklift hit the rut and when it just missed hitting Harmon. If Harmon is credited, the grievance must be denied because Clarke deliberately aimed the forklift at him in apparent retaliation for Harmon having previously complained about Clarke's conduct on May 21, which in turn led to Clarke's three-day suspension. In this connection, it must be remembered that the Company bears the burden of proving that Clarke, in fact, engaged in the misconduct alleged. If it fails to meet that burden and/or if the record is too murky as the Union suggests, the discharge must be overturned.

Since there is no independent evidence showing what happened other than the testimony of the two chief protagonists, particularly close attention must be paid here to any major inconsistencies and contradictions in their respective accounts. For if any such inconsistencies or contradictions appear, that would be a telltale sign that the protagonist is not telling the truth.

I have examined all of Harmon's testimony and have concluded that there are no contradictions within it to warrant discrediting his account as to what happened. The only possible basis for finding otherwise is the fact that Harmon's contemporaneous notes of the June 3 incident (Company Exhibit 3) state that he complained to management and then went to the nurse's station, when in fact he first visited the nurse. Harmon credibly testified, though, that he then wrote what he did because he was very upset and because he initially wanted to complain to management, but changed his mind. Given my ultimate finding as to what actually occurred on June 3, it is readily understandable as to why he made this error which goes to what he did *after* the incident, rather than to what happened during the incident itself.

The same is not true of Clarke's testimony, particularly his testimony at the civil defamation suit he brought against Harmon, a suit that was ultimately dismissed and then apparently appealed. The transcript of that court proceeding ("Ct. Tr."), which I have considered for the limited purpose of impeachment (Company Exhibit 6), shows the following exchanges:

Clarke was then asked:

Q. You stopped at 12 inches, or passed at 12 inches?

A. At approximately 12 inches yes, I passed him.

Q. Passed him and kept going?

A. Yes. (Ct. Tr. 18).

He later contradicted himself when he was asked:

Q. Did you come to an immediate stop when you saw the forklift was getting close to Mr. Harmon?

A. Immediate. As much as immediate as I could, yes. The brakes on the truck aren't so good, considering the momentum through the bump. I stopped as soon as possible, yes. (Ct. Tr. 37).

He thus contradicted himself in this proceeding when he said that he used the truck's inching brake to slow down, rather than the regular brakes that would have caused the forklift to stop sooner than it did. (Tr. 187, 208).

As for laughing at Harmon, Clarke said:

"The time that I did laugh was when he turned around and came back and went to the office." (Ct. Tr. 31).

Clarke was later asked:

Q. You laughed at him after you passed by him and because he was going to the office to report it?

A. Yes. (Ct. Tr. 31-32).

Clarke was again asked:

Q. Do you agree – you laughed at him when he appeared to go to the office to report such an incident?

A. Yes, I will agree to that. (Ct. Tr. 34).

He later contradicted himself when he said:

> "Twelve inches [which was the distance that Clarke claimed separated the nearest part of his forklift from Harmon] is when I laughed at him. He was right here beside me." (Ct. Tr. 35).

Asked what caused the forklift to swerve, Clarke first testified:

> "So I did hit the bump. But the result of hitting the bump made the truck swerve. . .I personally did not swerve that truck. When I hit the bump, yes, I didn't swerve. The forklift swerved." (Ct. Tr. 18).

He later contradicted himself when he said:

> "I swerved to avoid the bump." (Ct. Tr. 21).

He further contradicted himself when he said:

> "When I was in the bumps and seeing that it was Mr. Harmon, I applied the brakes because, when I seen him when I swerved, which put me directly in those bumps, I stopped. So when I stopped, he was directly right beside me 12 inches away." (Ct. Tr. 37-38).

Clarke therefore has given contradictory testimony as to: (1), whether he did or did not come to a complete stop; (2), whether he used the regular brakes or inching brake; (3), when he laughed at Harmon; and (4), whether he did or did not deliberately swerve the forklift to avoid hitting Harmon.

These self- contradictions make it impossible to credit any part of Clarke's testimony. As a result, I credit all of Harmon's contrary testimony and find that Clarke on June 3 laughed at Harmon when he first saw him in the aisle way; that Clarke then accelerated the forklift and deliberately aimed it at Harmon; and that the forklift hit Harmon's left ankle. Since Clarke's act was deliberate and so outrageous, and since Clarke knew that that kind of misconduct could lead to discharge, it must be concluded that he was guilty of the misconduct alleged and that the Company had just cause to terminate him pursuant to the Company's plant rules (Company Exhibit 5), which state:

> <u>FIGHTING OR HORSEPLAY</u>
>
> Fighting or horseplay will not be tolerated on Company premises and will be cause for disciplinary action including discharge.

In light of the above, it is my

AWARD

1. The grievance is arbitrable.

2. That the Company had just cause to terminate grievant Keith Clarke. His grievance is therefore denied.

Dated at Madison, Wisconsin this 5th day of July, 2000.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

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