

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**UNITED STEELWORKERS OF AMERICA,
LOCAL UNION 1610**

and

MOTOR CASTINGS COMPANY

Case 2
No. 59190
A-5876

(Philip McKinnie Grievance)

Appearances:

Mr. William C. Breihan, Staff Representative, District No. 2, United Steelworkers of America.

Lindner & Marsack, S.C., by **Mr. Dennis G. Lindner**, 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 West Allis, Wisconsin, on October 4, 2000. The hearing was transcribed and the parties there agreed I should retain my jurisdiction if the grievance is sustained. The parties subsequently filed briefs that were received by November 16, 2000.

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

ISSUE

The parties have agreed to the following issue:

Was grievant Philip McKinnie discharged for just cause and, if not, what is the appropriate remedy?

BACKGROUND

The Company produces motor castings at its West Allis, Wisconsin, facility.

Grievant McKinnie was hired in September, 1997. He received a three-day suspension in April, 1998, for threatening a supervisor and he was then warned: “any further threatening remarks would result in immediate termination. . .” (Company Exhibit 7). He did not grieve that suspension. He received a verbal warning in 1999 for sleeping on the job (Company Exhibit 10), and he did not grieve that suspension. He received a written warning for sleeping on the job on April 14, 2000. He did not grieve that warning because, as related below, he was already suspended.

McKinnie injured his foot on the job in February, 2000, which caused him to miss work for about ten days. He returned to work on light duty status, at which time he was assigned to Pattern Shop where he punched out pads and bent rods.

Safety Coordinator Ken Crous testified that security guard Roman Antonov, who worked for Merchants Police - which provides plant security services to the Company - asked him at about 6:00 a.m. - 7:00 a.m. on April 13, 2000 (unless otherwise stated, all dates herein refer to 2000), what would happen to him if he got into a fight with a Company employee. Crous replied that he either would be fired, removed on the spot, or probably arrested. Antonov then told Crous that “the guy with the bad foot” (i.e. McKinnie), got into an argument with him that morning over providing work gloves; that McKinnie said he would “Beat the shit out of him. . .”; that Antonov replied, “Any time”; that McKinnie said, “How about now, motherfucker?”; and that another employee then grabbed McKinnie and walked away with him.

After reporting the incident to plant manager John Wasilowski, Crous obtained Antonov’s written statement (Company Exhibit 5). Crous added that production worker Peter Brunner approached him on the plant floor shortly thereafter to report that McKinnie and Antonov had argued; that McKinnie told Antonov he was going to “beat his ass”; and that Antonov replied “Any time.” Crous later that morning spoke to McKinnie who denied any altercation had taken place. McKinnie was then suspended pending further investigation.

Crous and others met with McKinnie on April 25, at which time McKinnie claimed that Antonov had pushed him and that Brunner had witnessed the altercation. Crous replied that he had spoken to Brunner an hour or so after the April 13 altercation and that he then did not say anything about Antonov pushing McKinnie. McKinnie was discharged on April 25.

On cross-examination, Crous testified that Pattern Shop employees are the only employees who can receive gloves without receiving the approval of their supervisors and that all other employees need such approval before they can receive gloves from security guards pursuant to a note on the Safety Office's door which reads: "You must have a supervisor to receive safety equipment" (Company Exhibit 4).

Security guard Antonov, who received a written warning over the incident from his employer Merchants Police, testified that McKinnie on April 13 asked him for gloves; that he refused to give gloves to McKinnie because no supervisors had okayed it; that McKinnie called Antonov a "fucking asshole" under his breath as he walked away; that McKinnie then asked supervisor Dave Mulhorn – who was standing about 25 feet away – for gloves; and that "Mulhorn gave me an OK to give him gloves." Antonov added that he opened the door to the Safety Office where the safety equipment is located and that "I gave him gloves", at which point McKinnie "started cursing me out again with foul language." Antonov stated that McKinnie said he "wishes he could beat the shit out of me"; that he replied, "Any time"; that McKinnie replied, "How about now motherfucker"; and that Brunner (who he did not know), at that point pulled McKinnie away. Antonov also said that he never pointed his finger at McKinnie; that he never touched him; that he never raised his arms "Because I'm not looking for a fight"; and that he would not start a fight with McKinnie who weighs about 60 pounds more than he does because "I'm not stupid."

On cross-examination, he testified that one of the employees in the Pattern Shop had special permission to get gloves whenever he wanted.

Brunner testified that he really does not know McKinnie and that he only spoke to him once before the April 13 incident; that he on April 13 was working near the Safety Office when he "heard a loud commotion coming out of the Safety Office"; that when he entered the office, he heard McKinnie ask Antonov for gloves; and that Antonov went to get the gloves out of the cabinet, at which point Antonov turned around and told McKinnie: "You guys at Motor Castings, you think you are hot shit, you can come in here and get stuff whenever you want and take whatever you want." Brunner added that Antonov told McKinnie he needed permission from a supervisor "after Mulhorn already told him to give him gloves", and that "He still didn't want to give [McKinnie] gloves."

Brunner also stated that the "commotion" started by the guard shack; that Antonov told McKinnie "he was going to break his other fucking leg"; that McKinnie replied, "If you are going to do that, then I'll see you after work, after 3:00"; that Antonov pushed McKinnie when they were "standing nose to nose"; and that McKinnie grabbed the counter and then wheeled back to hit Antonov, at which point Brunner grabbed his arm and led him out of the Safety Office. Brunner a short time later told Crous they had an argument without giving its details "because I really didn't want to get anybody into any trouble."

Brunner also said that both McKinnie and Antonov walked down to near the guard shack where McKinnie asked Mulhorn for gloves; that Mulhorn gave such permission; and that Antonov and McKinnie walked back to the Safety Office. There, said Brunner, Antonov opened the door to get gloves, but then closed it; that Antonov "got in this gentleman's face" and pushed him; that McKinnie asked Antonov why he did that and Antonov replied, "I'll break your other fucking leg"; and that McKinnie said: "Well, I'll kick your fucking ass after work." Brunner added that he told Plant Manager Wasilewski three-four days later that Antonov had pushed McKinnie and that Wasilewski replied that he should "watch out for that guard, because he's a third-degree black belt and he'll kick my ass." Brunner said that Wasilewski told him the next day that McKinnie had been fired.

On cross-examination, Brunner testified that he was standing behind McKinnie when he and Antonov were arguing; that he saw Mulhorn point to Antonov to get gloves; and that "it sure looked like to me the guard was trying to pick a fight with a guy with a broken leg."

Recalled as a witness after Brunner testified, Antonov testified that he had a third-degree belt in jujitsu; that the Safety Office door is "always wide open. That way I can hear the phone"; that he never refused to give gloves to McKinnie; that he followed McKinnie and "started walking toward the guard shack" when supervisor Mulhorn "pointed out to give him gloves"; and that he subsequently tried to do so by letting McKinnie enter the locked area where they were stored. He said that Brunner could not have seen him go "nose to nose" with McKinnie because McKinnie is much taller than Brunner, thereby blocking Brunner's view. He also said that McKinnie went into the safety closet and got a pair of gloves after which "he cursed me out". He denied Brunner's account of what then happened and said that he later saw McKinnie smoke a cigarette outside.

For his part, McKinnie testified that he told Antonov on April 13 that he worked in the Pattern Shop and that he needed gloves; that Antonov refused to give him any gloves; that McKinnie left the Safety Office, at which point he asked supervisor Mulhorn for gloves; and that Mulhorn then told Antonov, who was behind him, to give him gloves. McKinnie said that when they returned to the Safety Office, Antonov refused to give him the gloves; that Antonov then pushed him in the chest and said that he, Antonov, would break McKinnie's other leg; and that he, McKinnie, became angry and said "I'll be out there at 3:00 p.m.", at which time Brunner grabbed him and pulled him away. McKinnie flatly denied Antonov's claim that he was smoking that day, saying that he does not smoke.

On cross-examination, McKinnie testified that he never grieved his April 14 written warning for sleeping; that he on April 13 had his first conversation with Antonov in the Safety Office and that he may have called him "fucking stupid"; that he was near the sink and not the door, when Antonov pushed him; and that he, "might have" told Antonov to "meet me outside" during their second encounter. He also said that he never entered the locked cabinet

room to get the gloves. McKinnie denied ever discussing this matter with Brunner after the day of the incident.

Recalled as a witness, Crous testified that Brunner approached him and spoke to him on April 13 after he had left Wasilkowski's office; that he and Wasilkowski subsequently met with Brunner when his story "started to change a little bit about what happened"; and that Brunner at that time said they "were pointing at each other or something like that" and that "their arms were raised." Crous also said that the April 25 meeting marked the first time Brunner ever stated that Antonov had pushed McKinnie and that the Company heard a rumor that the Union got to Brunner by having him change his story.

POSITIONS OF THE PARTIES

The Union asserts that the Company lacked just cause to discharge McKinnie because Antonov provoked him and pushed him. Hence, while stating that "the conduct of both employees was unacceptable", the Union points out that Antonov received a written warning from his employer and that, "The relative degree of responsibility for the incident in question suggests this was unfair and unequal treatment." The Union also claims that Brunner was the only unbiased witness to the incident and that his testimony in favor of McKinnie should be credited. As a remedy, the Union asks for a make-whole order consisting of McKinnie's reinstatement and a backpay award.

The Company contends that it had just cause to terminate McKinney because he violated that part of the employee handbook which prohibits employees from intimidating, coercing or threatening other employees and which also prohibits employees from fighting and using threatening, profane or abusive language. The Company thus claims that Antonov's testimony of what happened and his written statement to that effect (Company Exhibit 5), must be credited, and that Brunner's and McKinnie's contrary testimony cannot be credited. The Company also asserts that it has the right to adopt a "zero tolerance" policy against violence and threats of violence, and it points out that McKinnie was previously warned that any such conduct would lead to his termination.

DISCUSSION

Standing alone, it is difficult to determine whether McKinnie's or Antonov's testimony should be credited. Both appeared to give credible testimony at the hearing, and an examination of their testimony indicates that their respective accounts may be true.

As the Company correctly points out, McKinnie has not been a model employee. He received a three-day suspension in 1998 for insubordination and for threatening a supervisor and he was caught sleeping on two occasions. In addition, he failed to tell Crous the truth on

April 13 when he denied being in an altercation. In addition, the Company rightfully states that there was no motivation on Antonov's part "to deny the grievant gloves and physically assault him by pushing him off balance with the palm of his hand."

But, McKinnie and Antonov's testimony do not stand alone. As the only witness to at least part of the April 13 altercation, Brunner's testimony must be closely examined to determine whether his account must be credited. If it is, the grievance must be sustained because Brunner claimed that Antonov was the real protagonist in the incident.

The Company attacks Brunner's credibility by claiming that he erred in stating that he observed McKinnie and Antonov in a confrontation by the guard office; that he erred in stating that he opened the door to the Safety Office since it cannot be opened on the outside; and that he erred in stating that he could see Antonov "go nose to nose" with McKinnie when he, Brunner, was standing behind McKinnie who was taller than Brunner, thereby blocking his view. The Company also claims that "Brunner's claim that he purposely did not provide details to Crous on April 13 regarding the encounter made no sense whatsoever. . ." and that "It was only when the Grievant was terminated on April 25, 2000, that Brunner came up with the alleged supposed pushing scenario."

Evaluating Brunner's testimony is no easy matter since the door to the Safety Office must have been open for him to have entered, (it locks from the inside), and since it is difficult to understand how he could have observed Antonov when he was standing behind McKinnie. Nevertheless, certain key facts support his credibility.

Thus, I credit Brunner's testimony relating to the meeting he had with Plant Manager Wasilkowski before McKinnie was terminated. Brunner testified that he then told Wasilkowski exactly what happened on April 13 and that Wasilkowski replied that Brunner should be careful because Antonov was "a third-degree black belt and he'll kick my ass".

This part of Brunner's testimony must be true because it marked the first time that anyone at the hearing referred to Antonov's skills in the martial arts – a key fact that Antonov acknowledged only after Brunner testified and only after Antonov had been recalled as a witness.

Secondly, Brunner was the very first witness at the hearing to point out that Antonov left the Safety Office after McKinnie left that room to get a supervisor's permission to get a new pair of gloves. Again, Antonov never mentioned that he had left the office when he first testified. He admitted to it only after Brunner testified and only after he, Antonov, had been recalled as a witness.

In addition, Antonov first claimed: “As I was closing the door to the Safety Room, I saw Dave Mulhorn give me an OK to give him gloves.” Antonov subsequently changed that testimony when he was recalled as a witness and when he then claimed that Mulhorn told him to give McKinnie the gloves “after I closed the Safety Room, after I started working toward the Guard Shack. I was right next to the lunchroom. . .” This latter testimony contradicts his initial testimony.

Furthermore, Antonov first testified: “I gave him gloves.” When he was recalled, he testified that he did not personally hand the gloves to McKinnie because McKinney entered the security room and got the gloves himself.

All these problems with Antonov’s testimony are at least as great as Brunner’s testimony.

Brunner’s credibility also is supported by one more important factor: since he barely knew McKinnie, and since there is no evidence of any kind showing that Brunner somehow colluded with McKinnie to concoct their joint testimony, there simply is no reason for Brunner to fabricate what he saw or heard in the Safety Office after McKinnie returned there with Antonov to get the gloves that Mulhorn had just okayed. There also is not one shred of evidence to suggest that the Union – or anyone else for that matter – got Brunner to lie.

In addition, I credit Brunner’s testimony that he on April 13 failed to give Crous the full details of what happened between McKinnie and Antonov because he did not want to get them in trouble. While the Company takes sharp issue with this part of Brunner’s testimony, I find that Brunner’s explanation is entirely plausible and that it should be credited.

Antonov, too, has no reason to fabricate his testimony – which is the single most important factor supporting the Company’s case. In the end then, this case turns on whether his testimony must be credited over Brunner’s testimony who also has no reason to lie.

Given the holes in Antonov’s own testimony and the truthfulness of Brunner’s other testimony which caused Antonov to change some of his prior testimony, I credit Brunner’s account that Antonov was the aggressor and that McKinnie only was trying to protect himself in his second encounter with Antonov. I therefore credit McKinnie’s testimony to that same effect since it was corroborated by Brunner – a disinterested witness. Hence, I find that the Company lacked just cause to terminate McKinnie.

In so finding, I am mindful of the Company’s claim that it is entitled to enforce a “zero tolerance” policy of violence and threats of violence under such cases as METROPOLITAN TRANSIT AUTHORITY, 108 LA 508 (1997), and the cases cited therein, wherein arbitrator Barry Baroni upheld the discharge of a bus driver who told a worker’s compensation adjuster:

“Do I have to come up there and kill someone to get something done?” The Company also cites PROCTER AND GAMBLE, 114 LA 1185 (2000), wherein Arbitrator Dale Allen ruled that the employer had just cause to discharge an employee who threatened to break a co-worker’s legs.

If Antonov had not provoked McKinnie to the extent that he did, I would agree that McKinnie’s termination should be sustained under the reasoning of the above cases. Antonov’s provocation, though, serves to distinguish the facts here from the facts there, which is why those cases are distinguishable.

In overturning McKinnie’s termination, I do not mean to suggest that the Company lacks just cause to terminate employees who threaten physical violence. Indeed, given McKinnie’s history, I would sustain his termination if the Company had met its burden of proving its version of what happened here. Since Brunner’s credited testimony casts substantial doubt about Antonov’s account, however, I find that the Company has failed to meet its burden of proof.

To rectify its contractual violation, the Company must make McKinnie whole by immediately offering to reinstate him and by paying to him that sum of money and benefits, including seniority, that he would have earned from the time of his initial suspension to the time of his reinstatement, minus any monies he received or could have received but for his suspension/termination. Pursuant to the agreement of the parties, I shall retain my jurisdiction to resolve any questions arising over application of my Award.

In light of the above, it is my

AWARD

1. That the Company lacked just cause to terminate grievant Philip McKinnie;
2. That to make him whole, the Company shall take the remedial action ordered above.
3. That to resolve any questions arising over application of my Award, I shall retain my jurisdiction for at least sixty (60) days.

Dated at Madison, Wisconsin this 13th day of December, 2000.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

