BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 494, AFL-CIO

and

MANNING LIGHTING COMPANY

Case 2
No. 59261
A-5881

(Steven Schelk Termination)

Appearances:

Mr. Andy Manning, 1810 North Avenue, Sheboygan, WI 53082-1063, appearing on behalf of Manning Lighting Company.

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., by **Attorney John J. Brennan**, P. O. Box 12993, Milwaukee, WI 53212, appearing on behalf of IBEW Local 494.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, International Brotherhood of Electrical Workers Local 494 (hereinafter referred to as the Union) and Manning Lighting Company (hereinafter referred to as the Company) requested that the Wisconsin Employment Relations Commission designate the undersigned as arbitrator of a dispute over the termination of Steven Schelk. A hearing was held on December 15, 2000, at the Company's offices in Sheboygan, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. The parties submitted the case on oral arguments at the end of the hearing, whereupon the record was closed.

Now, having considered the testimony, exhibits, other evidence, contract language, arguments of the parties and the record as a whole, the undersigned makes the following Award.

ISSUES

The issues before the Arbitrator are:

1. Did the Employer have just cause to discharge the grievant? If not

2. What is the appropriate remedy?

COMPANY POLICIES

Personal Conduct

Personal performance, attitude and behavior create an image within the community and in the eyes of our customers. We expect that all of our employees will adhere to strictest levels of confidentiality, accuracy and professional personal behavior at all times.

It is our firm desire to be fair in the administration of work rules. Certain rules and regulations are essential and have been developed for the overall efficiency of the Company and well being of all employees. We ask that all members of this organization cooperate in the observance of these rules to insure our common protection and benefit.

It is impossible to list all unacceptable behavior. The following offenses are advisory only but should provide a guideline as to what is considered unacceptable behavior. Manning Lighting reserves the right to exercise discretion in penalizing violations and to impose penalties for acts not specifically identified within the following. Misconduct in any of these areas will be considered a violation of Company policy serious enough to warrant disciplinary action up to and including termination. Serious misconduct may result in immediate discharge without warning.

. . .

- Refusal to comply with instructions from supervision or refusal to follow work rules or policies. Disobedience and/or insubordination.

. . .

- Repeated failure to be at a specified workstation ready to begin work at scheduled start times and after breaks. Leaving a specified workstation without the permission of a supervisor. Stopping work before the specified quitting time.

. . .

BACKGROUND

The Company manufactures lighting fixtures at its Sheboygan, Wisconsin plant. The Union is the exclusive bargaining representative of the shop, production and maintenance employees of the Company, including those in the classification of Fixture Maker. The Grievant, Steven Schelk, was employed as a Fixture Maker for two years, until he was discharged in August of 2000. He was discharged for walking off the job.

In March of 2000, the Company introduced a set of shop rules and a no-fault attendance policy. The policy is based on assessing points for occurrences and it treats a tardy as worth the same number of points as a full day's absence. On August 25th, the Grievant arrived at work and punched in about a minute late. He went into Supervisor Chari Perl's office, told her he punched in one minute late and asked if he would be charged for an occurrence. She said that he would be.

According to Perl, when she told the Grievant he would be assessed an occurrence, he turned and walked towards his work station and out of sight. She went back to doing paperwork and shortly thereafter, heard the Grievant's voice yelling "Well, that's gotta change." She looked up, but could not see him. A few minutes later, the Company's delivery person came into her office and asked what that was all about. She asked what he meant and he said the Grievant had just come into the locker room, said "Well I told her ass off" and then punched out and left.

According to the Grievant, when Perl told him there would be an occurrence assessed, he told her "In that case, I'm gonna leave." He went to his work station, turned out the light and went to punch out. As he did so, he said loudly "That policy is bullshit." As he went out he saw the delivery person and told him the attendance policy was bullshit and had to be changed.

The next day was a Saturday, and the Grievant was scheduled for overtime work. He came to work on time, but his time card was missing. He asked Perl why he had no time card and she told him he should take it up with his steward on Monday, but that there was no work for him that day. He asked why and she told him he had walked off the job. He replied that he had told her he was leaving and she said he hadn't. He then left.

The instant grievance was thereafter filed. It was not resolved in the lower steps of the grievance procedure and was referred to arbitration. At the hearing, in addition to the facts recited above, the following testimony was taken:

Cheri Perl testified that she was one of the two supervisors at the Company, but not the Grievant's direct supervisor. She consulted with the Operations Manager after the Grievant left on August 25th, and they agreed that he was guilty of walking off the job, which amounts

to a voluntary quit. The two determined that the Grievant should not be allowed to work on Saturday, pending a discussion with his steward on Monday. She also spoke with Steward Pam Straus and told her what had happened.

Perl said that she had had two prior instances in which an employee had not yet punched in for work and, upon being told they would be assessed an occurrence for being late, said they would leave, since an absence counted the same as a tardy. She said she was not aware of any prior case in which an employee left without advising the supervisor.

Steven Schelk testified that he arrived a few seconds late on August 25th. He waited while Perl finished a conversation with someone else, then went to her office. He was certain he told her he was leaving, although he did not know if she heard him and he denied telling anyone that he had "told her ass off." Schelk said he had twice before punched in late, discovered he was going to be assessed an occurrence, and told his supervisor, Drew Schickert, that he was leaving. He said he was not aware of any policy differentiating between someone who had punched in and someone who had not.

Jerry Keifenheim testified that he has been the Local's business representative responsible for Manning Lighting for nine years. He recalled an incident several years before this one in which the painter had become angry and stormed out of the building yelling. The painter was terminated, but the Union and the Company negotiated a settlement, reducing the penalty to a five-day suspension, with a last chance agreement. On cross-examination, he acknowledged that at the time of the incident with the painter, the Company did not have any written policies on attendance or walking off the job.

Andrew Schickert testified that he has been a supervisor at the Company for the past year. In that time, he had two incidents in which employees other than the Grievant found out they were going to be assessed occurrences and told him they were going to leave. One of these employees had already punched in and the other had not. He confirmed that the Grievant had previously left, with notice to him, after being told he was being assessed an occurrence. Schickert said he knew of no instance in which an employee left without telling his or her supervisor.

Additional facts, as necessary, are set forth below.

ARGUMENTS OF THE PARTIES

The Position of the Company

The Employer takes the position that the Grievant was discharged for walking off the job, in clear violation of the rules. Walking off the job is a serious violation and the Company is entitled to treat it as a voluntary quit. The Arbitrator should not accept the Grievant's claim

that he told Perl he was leaving. There is no reason for Perl to lie about this and it is very unlikely that, in a face to face discussion, she could somehow have missed him saying he was going to leave work. The Grievant's version does not make sense and the Arbitrator should accept Perl's testimony and conclude that he did, in fact, walk off the job.

The Company acknowledges that it handled the situation with the painter differently, but he was a different employee. He had 30 years with the Company and a good work record. Moreover, at the time there was no clear, written rule governing this conduct. The Grievant is a short service employee, who knowingly violated a clear, written rule.

The Position of the Union

The Union takes the position that there was not just cause for discharge and asks that the Grievant be reinstated. Although the Company introduced evidence that other employee had not punched in before they left, that is irrelevant. The key issue is whether the Grievant told anyone he was leaving. The Company bears the burden of proof on that point and it has simply failed to do so. This is one person's recollection pitted against another's and there is no way to say with certainty whose recollection is more accurate. The Grievant's claim that he told Perl he was leaving makes sense, since he plainly knew the rules and knew how to avoid violating them. Indeed, he had done exactly the same thing several times before and each time had informed a supervisor that he was leaving.

The Union also notes that, in the one prior case where an employee was accused of walking off the job without notice, the ultimate penalty was a five-day suspension. The Company's attempt to distinguish that case is not valid. It may be that there was no written rule against walking off the job at that time, but this is not some technicality that an employee would not realize was wrong. Whether there is a written rule or not, it is clearly wrong and the damage to the employer is the same. Thus, the penalty in both cases should be the same.

DISCUSSION

The issue here is whether the Company had just cause to discharge the Grievant. There are two basic elements to that issue. The first is whether the Grievant is guilty of walking off the job without notice. If so, he is clearly open to discipline under the Company rules and the question becomes whether discharge is the appropriate penalty.

Is the Grievant Guilty of Walking Off the Job?

The question of whether the Grievant walked off the job is one of credibility – either he said he was leaving work or he did not. I agree with the Company's argument that it is not plausible that Perl would have missed him saying he was leaving in the course of their

conversation. They were the only two people in her office and they were having a conversation. There is no reason to think that she was distracted or not paying attention. If it was said, she must have heard it, and she must be lying when she says he left work without notice. Further, she must consciously have done this to cause his discharge, since she immediately reported it to the plant manager and participated in the discussions leading to the termination decision. She also immediately related it to the Union Steward.

The Union asserts that it makes no sense that the Grievant would have failed to tell her he was leaving, since he knew the rules and had given notice before when he left because of an occurrence under the absence policy. I agree that this would have been a poor decision, but I also note that the Grievant was, by his own admission, quite upset on the morning of the 25th. He was shouting about it afterwards and apparently made some strong comments to another employee as he left. Depending upon how upset he was, it is possible that he was not using his best judgment at the time.

Balanced against the question of how likely it is that the Grievant would have done this is the question of why Perl would lie. From the testimony of the two supervisors, employees have gone home in the past before starting to work when told they were being assessed an occurrence for being tardy, including the Grievant. None of those employees were disciplined and at this hearing, both supervisors seemed to feel that there was no basis for discipline in those circumstances, so long as the supervisor was notified before the employee left. Indeed, Schelker's initial reaction to the discharge, before he was told the Grievant did not give advance notice, was that he could not understand why the Company was making such a big deal out of the incident. Given an attendance policy that for some reason treats a tardy the same as a full day of absence, that point of view makes a certain amount of sense.

The Grievant has a motive to lie, in that his job is on the line, but that is not determinative. The denial of an innocent man sounds much the same as the denial of a guilty man and I cannot assume that he is guilty in order to resolve the credibility question. The more relevant point is that I can see no motive for Perl to lie or for the Company to want to frame the Grievant. Given this, and considering Perl's demeanor on the stand, I believe it is substantially more likely than not that she is telling the truth. That conclusion necessarily causes me to discredit the Grievant.

The Company's burden is to prove, by a preponderance of the credible evidence, that the Grievant failed to give notice before leaving on August 25th. While the evidence is not so clear-cut that I can say there is no doubt of what happened, I do find that Perl is the more credible witness, and that the preponderance of the evidence establishes the charge against the Grievant. As noted earlier, walking off the job without notice is grounds for discipline and the issue then is whether discharge is an inappropriate penalty.

Is Discharge an Appropriate Penalty?

The Company rules specify that "leaving a specified workstation without the permission of a supervisor" is grounds for discipline "up to and including termination." Walking off the job is generally considered a serious offense and in the absence of evidence that a more lenient disciplinary practice has been followed in the past, termination is not on its face a disproportionately harsh response. Here, however, the Union urges that the penalty is too severe in light of the only prior case. In that case, the shop painter stormed out of the building in the course of some type of dispute. He was fired, but the parties negotiated a settlement reinstating him with a five-day suspension and a last chance agreement. The Union suggests that this is a more appropriate penalty.

The prior case involved a negotiated settlement to return a long service employee who had been fired in the absence of any written rules on attendance and walking off the job. While the Union is correct that walking off the job is not some sort of technicality, and that with or without a written rule an employee who walks off might reasonably expect discipline, the issue here is the appropriateness of the penalty and the question is not whether there is cause for discipline. It is whether there is cause for discharge. On that point, the lack of a written rule, combined with the long service of the employee involved in the prior case, would have raised substantial questions about whether the painter had reasonable notice that his conduct could cost him his job. Neither the mitigating circumstance of long service nor the problem of lack of notice is present in this case. The Grievant is a short term employee and he walked off the job in the face of a written rule against leaving the work station without notice, and allowing immediate termination for serious misconduct. An argument of disparate treatment requires that the employees being compared be similarly situated. I conclude that the personal history of the Grievant is not similar to that of the long service painter and that both the rule violated by the Grievant and the penalty for violations are much clearer than they were when the painter was disciplined. Thus, the Grievant is not similarly situated to the only other employee disciplined for walking off the job and the prior case does not control the penalty determination in this case.

In conclusion, the preponderance of the credible evidence establishes that the Grievant left work without advising his supervisors, and thus, is guilty of walking off the job. This is a violation of the Company's work rules and those rules allow for termination as a penalty for this offense. Discharge is not, on its face, a disproportionately harsh response and while the only other case involving a walk off resulted in a suspension and a last chance agreement, the Grievant's case is clearly distinguishable from the prior case. Thus, I conclude that the Company was entitled to discipline the Grievant for his conduct and that the choice of discharge as a penalty was not an abuse of discretion.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The Employer had just cause to discharge the Grievant. The grievance is denied.

Dated at Racine, Wisconsin, this 4th day of January, 2001.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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