BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 18

and

KEES, INC.

Case 2
No. 58166
A-5810

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Jill M. Hartley**, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

Michael, Best & Friedrich, LLP, by **Attorney Eric H. Rumbaugh**, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin 53202-4108, appearing on behalf of the Employer.

ARBITRATION AWARD

Sheet Metal Workers' International Association, Local Union No. 18, herein Union, and Kees, Inc., herein Employer or Company, are parties to a collective bargaining agreement which provides for final and binding arbitration of certain disputes. On December 16, 1999, the parties advised the Wisconsin Employment Relations Commission they had selected Thomas L. Yaeger from its staff as arbitrator to hear and decide a grievance alleging the Employer violated the collective bargaining agreement by discharging R.K. A hearing in the matter was held in Manitowoc, Wisconsin, on August 2, September 6 and October 11, 2000. Briefing was completed on January 4, 2001.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The parties were unable to stipulate to a statement of the issue. The Employer proposed the issue should be stated as "whether the grievant was properly terminated." The Union proposed the issue should be framed as "was the grievant discharged for just cause." The parties did agree that if the Arbitrator finds the grievant should not have been discharged and orders reinstatement and back pay that the Arbitrator should retain jurisdiction in the event the parties are unable to agree on the extent of remedy ordered.

The undersigned frames the issue as follows:

Did the Company have just cause to terminate the grievant, R.K.? If not, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE IV

MANAGEMENT RIGHTS – PLANT RULES

SECTION 1. – Nothing in this Agreement is intended to limit the company's right to supervise and direct its work force, including the right to establish new jobs, increase of decrease the number of jobs, change materials or equipment, schedule and assign work to be performed, hire, re-hire, re-call, transfer, or layoff (sic) employees according to production needs, all subject to limitations imposed in this Agreement. The Company shall have the right to discipline or discharge employees for just cause, it being understood that the Company shall not discriminate against any employee under this Section. If it is determined that any employee has been discriminated against under this Section, said employee shall be offered reinstatement to his job with full compensation for any lost earnings.

The company has the right to adopt and maintain reasonable plant rules and safety regulations. The Union is to be notified immediately of any changes in company rules.

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ARTICLE XXIV

JOB STANDARDS

SECTION 1. – It is expressly understood and agreed that the Company will not request and the Union will not be required during the course of this Agreement to negotiate any other system of wage payments other than that expressly agreed upon in Article VI.

SECTION 2. – It is understood that foregoing shall not bar the Company from establishing and/or maintaining reasonable standards of production provided that the Union reserves the right to make its own independent study of such job standards if they are used as a basis for discipline or discharge and subject such job standards to the grievance procedure.

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FACTS

R.K. began working for Kees, Inc., in January 1996. R.K. was hired as a welder; however, he did not immediately start welding when he began with the Company. R.K. worked in the Air Trougher Department on the punch press and other jobs within Kees for approximately his first year, then moved to welding. R.K. welded for a couple of months, then injured his shoulder and was placed on light duty by the former owner of the Company. At the end of 1998 or the beginning of 1999, R.K. went back to welding full time.

Within a few months of returning to full-time welding, R.K. sustained a shoulder injury on the job. The parties dispute when this injury occurred. The injury report submitted by R.K. indicated he was injured on March 21, 1999, but that was a Sunday and he was not scheduled to work that day. His supervisor signed the injury report on Monday, May 24, and R.K. advised the Unemployment Compensation Examiner, Dr. Brown, and his own physicians that he that he injured himself on Friday, May 21, 1999. Also, he testified he was injured while welding, but from March 18th through the 24th he was assigned to punching core blades and not welding. While R.K. had been experiencing pain in his shoulders dating back to February 1999, he injured his shoulder when he and a co-worker were trying to lift a large jail grill. R.K. completed an accident report at the time of the accident and submitted it to the Company. Following his injury, R.K. saw his doctor who diagnosed the problem as a rotator cuff injury and placed him on prescription medication.

The Company began a time study in mid to late February 1999. With the advent of the time study, the Company held a meeting with the welders and informed them that the study

was for the purpose of determining pricing for parts. In connection with the time study, the welders were required to complete time sheets specifying the times it took them to complete their assigned jobs.

Initially R.K. did not have any work restrictions as a result of the injury; however, his shoulders continued to bother him and the injury did not seem to get better so his doctor referred him to an orthopedic surgeon. R.K. first saw the surgeon, Dr. Northrup, on June 2, 1999. Dr. Northrup reaffirmed Dr. Peschke's diagnosis of a rotator cuff injury, gave R.K. a 50 pound weight restriction and indicated that he needed to watch what he was doing so that he would not continue to irritate the injury. In addition, Dr. Northrup restricted R.K. from reaching and lifting at the same time. R.K. brought his work restriction into the Company the following work day and presented it to his supervisor.

When, however, R.K. brought in his first set of doctor's restrictions on or about June 3, 1999, Norman and supervisor Ken Evrats met with R.K. and Union steward Tim Krupp and informed R.K. that they intended to start monitoring his production and that if it went down, they would start disciplinary action. 1/

1/ Norman testified that he and Evrats spoke with R.K. prior to June 3, 1999, regarding his production on an informal basis.

R.K. received his first disciplinary warning on June 28, 1999. Norman and Evrats met with R.K. and Union steward Krupp over the discipline.

The next event which precipitated discipline occurred on July 19, 1999. R.K.'s supervisor, Evrats, came to his bench at approximately 6:30 a.m. and gave R.K. a job. The job required R.K. to weld sleeves. R.K. explained to Evrats that his shoulder was really bothering him and that the job did not fit within his work restrictions.

The two got into an argument regarding the extent of the doctor's restrictions and as a result, Evrats brought over a platform and told R.K. to stand on it to weld the sleeves. R.K. complained that standing on the platform took a lot longer and when Evrats told him that he didn't care, R.K. asked to speak with the Union steward.

On his time sheet for the morning of the 19th, R.K. indicated that he spoke with Evrats and Krupp from 6:00 to 6:40 and spoke with Norman for fifteen minutes regarding the work restrictions and job assignment. The following day, R.K. received a second written warning for falsifying his time sheet "by overstating the time he spent on various exempt items" and "talking to the Union steward without permission."

R.K.'s third disciplinary warning and corresponding three-day suspension occurred on August 24, 1999. The August discipline was issued for alleged continued failure to perform below expectations.

On November 17, 1999, R.K. was called in to meet with Norman, Evrats and Krupp. At the meeting Norman and Evrats criticized the manner in which he was putting parts in his sleeve jig, saying that it was inefficient. Norman also accused R.K. of wasting time by using a fork lift to lift skids onto his table. Norman also accused R.K. of walking around talking with people to waste time and using the restroom further away from his work station every hour on the hour.

The following day, November 18, 1999, R.K. was called into the office at the end of his shift. Norman, Evrats and Krupp were present and Norman informed R.K. that they had decided to terminate him because he was not getting enough work done.

POSITIONS OF THE PARTIES

Employer

R.K. was an unacceptably slow welder. R.K. has admitted he was a slow welder. The time study showed that R.K. was by far the slowest welder at Kees. Throughout the grievance and progressive discipline process, neither R.K. nor the Union ever suggested that Kees was studying the wrong jobs, or that if more jobs were studied, R.K. would not appear to be so slow. Co-workers complained about R.K. and testified that R.K. worked very slowly, before and after his claimed injury. R.K. was observed simply standing around and not working. There are no flaws with the time study. R.K. was progressively disciplined for poor productivity.

Staring in March 1999, R.K. was verbally counseled regarding his productivity, with discipline. R.K. received a verbal waning for poor productivity on June 3, 1999. On June 28, 1999, R.K. received a written warning for poor productivity. On July 20, 19999, R.K. received a second written warning for falsifying his time sheet. On August 24, 1999, R.K. received a three-day suspension for poor productivity. On November 18, 1999, R.K. was terminated. Visual observation of his work and time study reports both confirmed that R.K.'s work continued to be far below an acceptable level.

R.K. was an unacceptably slow welder prior to his claimed injury. Kees did not "make up" the problem of R.K. being a slow welder. Mr. Norman explained that, in retrospect, he should have disciplined R.K. earlier than he did. Mr. Norman fully explained the timing of R.K.'s discipline – Kees did not know how slow R.K. was, or have the graphic evidence of that slowness, until the time study in early 1999.

R.K. has no medical justification for his slow work. Dr. Brown testified that there was no limitation on R.K. welding. R.K.'s RTW slips do not limit him from any of the welding he did at Kees after his claimed injury. R.K.'s doctors would have testified adversely to him. Welding sleeves was fully within R.K.'s restrictions.

Kees otherwise followed R.K.'s restrictions – the issue is whether welding sleeves in general was within R.K.'s restrictions. R.K. admits that welding sleeves was within his restrictions. The only and unrebutted medical testimony in this case is that R.K. was fully able to weld within his restrictions. R.K. has admitted that welding generally – and welding sleeves while standing – did not violate his restrictions. Dr. Brown testified that "holding a welding gun" to weld does not constitute "reaching."

R.K. claims that his welding table was 41 or 42 inches high, because he had it up on 6 or 7 inch high blocks. Mr. Southworth confirmed on cross examination that he was "sure" that R.K.'s table had no blocks under it while R.K. worked at Kees. Mr. Buss has admitted that, even with a welding table on the highest blocks, and even holding a completed sleeve from the top, and not on the sides, to remove it from a jig, a welder would never get his hands above chest level, much less above shoulder level or heard level. Thus, it does not matter if R.K.'s welding table were on blocks – his restrictions would not have been violated. Further, it is uncontroverted that welders at Kees control the height of their own welding tables; and that, if a welding table is on blocks, making the table higher, it is a simple task, well known to Kees' welders, to remove the blocks and lower the height of the welding table. R.K. never complained about the height of his table.

R.K. has advanced this syllogism: after his claimed injury, he had to switch from welding while seated to welding while standing in order to comply with his restrictions; and this change from sitting to standing made him weld more slowly. As Mr. Stenson testified, "if anything, standing would be fasted." The other welders agreed. So, even if the "I wasn't used to welding standing up" explanation was a good excuse for awhile after the May 21, 2000 injury, it certainly would not have explained R.K.'s poor productivity through his termination, six months later. So, R.K.'s "I was slow because I had to change my welding position" argument must be rejected for three reasons, each of which, separately or together, reveal the argument as disingenuous: (1) He was familiar with welding while standing prior to the injury; (2) He was slow long before his injury; and (3) Even if there was some time needed to "adjust" to welding while standing, even R.K.'s witness concedes that it would be a short adjustment time.

R.K.'s restrictions were not violated when he lifted completed sleeves off of a jig. As Mr. Sander explained, there is just no way a welder could get his hands above the level of his chest removing a ten or twelve inch sleeve from a jig. The other welders who work with R.K., including Mr. Buss, his own witness, testified that a sleeve can be lifted from the side, as shown in Exhibit 28; and Mr. Buss testified that he normally lifts completed sleeves from a jig grasping them from the sides.

Mr. Buss' testimony is fatal to R.K.'s case. Although all of his other co-workers had testified that there is no operation in welding sleeves (of the type R.K. welded after his injury) that would require work above chest level. R.K. argued that his table was on blocks. R.K. lied on this point, as well. His table was not on blocks. "I never measured it. How would I know that?" On September 6, 2000, however, he testified that his table was "41 or 42 inches high." Why was R.K.'s table so high? R.K. on September 6, 2000, ventured for the first time that he needed a high table because he wears bifocals, and he needs to have a higher table to see. And, R.K. explained, having a lower table caused him to hold his head over his welding arc, and in the "carcinogenic" smoke.

The illogic of R.K.'s explanation exposes it as disingenuous. In his own contemporaneous notes, R.K. twice offered an explanation different than his bifocals or "carcinogenic smoke" – his back. R.K. wrote that the problem with standing higher (on a platform) was not bifocals, it was that: "Now I risk a back injury having to bend over to lift these parts off of the sleeve jig. Now I have sore shoulders and sore back from lifting parts off of sleeve after getting on platform and having to bend over to get them off sleeve jig." These two quotes, handwritten by R.K., tell us two things: (1) When not standing on a platform, lifting sleeves would never have been above chest level, if he had to bend over to lift them when standing on a platform; and (2) R.K. was making up this business about needing a high table because of his bifocals or fear of carcinogens.

Welding standing on a platform is common at Kees, and welding standing on a platform would not cause a welder to weld more slowly. One of the several accommodations offered to R.K. by Kees was the use of a platform to stand on while welding. R.K. objected to the use of a platform; indeed, he has literally mocked the use of a platform, suggesting that it was an outrageous idea. The record evidence is uncontroverted that welding while standing on a platform would not cause a welder to weld more slowly.

After R.K.'s claimed injury, it is uncontroverted that he worked part-time, according to his doctor's restrictions, and he was given smaller, lighter jobs. After R.K.'s claimed injury, Ken Evrats, his supervisor, did much of R.K.'s set-up work for him.

R.K. has been consistently misleading in his testimony. R.K. regularly used a bathroom far from his workstation, several times per day, instead of the one near his workstation. His co-workers watched R.K. "walk by" the near bathroom and walk to the far bathroom, or "walk laps" around the shop, for "no apparent reason." As Mr. Sanders observed: "On the hour he would go to the bathroom. On the hour. It would – just like clockwork."

R.K. has also suggested that, when it appeared he was "wandering," he might not have been going to the bathroom, he might have been looking for his supervisor. At all relevant times, Kees had in place a paging system. Employees need only have gone to the office and ask to have an individual paged. The office was immediately next to the welding area.

R.K. testified that he had to stop between each piece because his table was too small. Kees' welders – except for R.K. – "filled" their tables with completed sleeves before stopping work to clear the table. But, R.K. did not – he would weld one or two parts, and then move them to a pallet.

R.K.'s claimed injury occurred on May 21, 1999, not March 21, 1999. R.K. wrote on his "First Report of Injury" that he was injured on March 21, 1999. That was a Sunday – and he did not work that day. But, Ken Evrats, his supervisor signed the report on May 24, 1999. And, Ms. Weis, who processed the report, testified that she received it on May 24. It is her handwriting on Exhibit 25 that notes the errancy of March 21, and that the date should be May 21.

R.K. told Unemployment Compensation claims examiner Kathleen Flanagan that: "These problems began when I hurt my shoulder on 5-21-1999." R.K. told Dr. Brown that he was injured on May 21, not in March. Dr. Brown recorded twice that R.K. had told him that his injury occurred in May, not March. Dr. Brown is very confident that R.K. self-reported a May 21, 1999 injury date. R.K.'s own three doctors list his date of injury as May 21, 1999. It would have to be an incredible coincidence for Dr. Brown, Mr. Evrats, Ms. Weiss, Ms. Flanagan, Dr. Peshke, Dr. Northrup and Dr. Moreno to all be wrong when they write and recall "May 21," if the date was really March 21. But, the final nail in the coffin of R.K.'s argument is the fact that R.K. testified that he was welding when he was injured. But, from 10:30 on March 18, 1999 through March 24, 1999, R.K. was not welding – he was punching core blades in another area of the plant.

R.K. argued for the first time that his injury was in March, not May, after he heard Kees' opening statement in this case – pointing out that R.K.'s injury could not explain his poor productivity, because the poor productivity was documented months before the injury. R.K. falsely testified that, while welding, he held his hands in front of him, above chest level, with his elbows locked and his arms outstretched parallel to the ground. R.K.'s co-workers uniformly testified that no Kees' employee ever welds with his arms positioned as demonstrated by R.K.. This was another effort by him to make welding appear "higher" on his torso than it actually was – an effort to make it appear that his restrictions were implicated.

For all of the above reasons, Kees had just cause to terminate R.K.'s employment. Kees has proven that R.K. was an unacceptably slow welder, and his injury was unrelated to his poor performance. For the foregoing reasons, the Company believes the grievance should be denied.

Union

The Company has the burden of proving just cause for R.K.'s suspension and discharge. Discharge has been described as economic capital punishment. An employee's job seniority and other contractual benefits, his reputation and opportunities for future employment are all at stake. As a result, where, as here, a collective bargaining agreement limits an employer's right to discharge to circumstances in which there is just cause, arbitrators have consistently placed the burden of proving wrongdoing on the employer. These same principles of just cause apply to R.K.'s discharge for poor productivity.

In this case, the Company failed to meet its burden of proving that R.K. was suspended or discharged for just cause, or that it acted reasonably by terminating R.K.

The Company's time study was flawed and does not constitute just cause for R.K.'s termination. The Company contends that its time study demonstrates that R.K.'s production was consistently slower than the other welders in the shop and, therefore, his termination for poor productivity was warranted. There is no merit to the claim that R.K. was markedly slower than the other welders. Rather, all the Company's figures show is that R.K. failed to meet 100% of standard on the limited number of jobs on which he was time studied. Such "evidence" does not add up to just cause for termination.

Initially, although Norman testified that R.K.'s times were significantly out of line with those of the other welders' time studied, he also admitted that there were a number of jobs, other than R.K.'s, which exceeded 120% -- a level at which the Company became concerned and allegedly spoke with welders about their times. The Company failed to present evidence of any times other than those indicated on Exhibit 2, although apparently many more jobs were time studied through mid-November, the time of R.K.'s termination. Considering that there were numerous other jobs time studied, a number of which according to Norman exceeded 100% of standard, the Company has presented an incomplete picture of R.K.'s times compared to all other welders. There is, therefore, no basis upon which to conclude that R.K.'s times were particularly bad compared to all other welders.

The Company admittedly skewed the results by studying R.K.'s times more closely than other welders. Norman admitted that once it received feedback from R.K.'s jobs and determined that he was not meeting its desired percentage of standard, it evaluated more of his jobs than it did other welders. Had other welders been studied to the same extent R.K. was, there is no telling what the results would have been. They too may have experienced times like those R.K. demonstrated on Exhibit 2.

In addition, the credible evidence at hearing demonstrated that other welders often went weeks without turning in time sheets for their work. Even welders the Company called as witnesses admitted that they had not always filled out their time sheets on a daily basis. Thus,

each of the welders who testified at hearing admitted that they did not consistently complete time sheets during 1999, some for only a few hours or a day or two at a time and some for weeks at a time. Without full participation in the time study, it cannot be said that R.K. was any slower than all other welders in the shop. Thus, the Company's time study was clearly flawed and the so-called "results" indicating that R.K.'s times were out of line with the rest of the shop are worthless and cannot be used to justify his discharge for poor productivity.

It is generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for variations in the assessment of punishment. Those same principles requiring employers to apply rules and discipline evenly among employees can be applied here. For where the Company undertakes a program like the time study that is intended to be used for discipline against participating employees, it too, must be applied equally and fairly. The time study was clearly enforced more strictly against R.K. than other welders. The Company's failure to uniformly apply and use the time studies among all employees negates its validity and destroys just cause for discharge.

R.K. was suffering from a documented shoulder injury for the duration of the 1999 time study which affected his ability to work. Even assuming, without conceding, that the Company's time study accurately portrays the welding times of Kees' employees, R.K.'s slower welding times did not justify his discharge in light of his ongoing shoulder injury. R.K. testified credibly regarding the date of his injury. At hearing the Company attempted to portray R.K. as incredible and untruthful regarding the date of his injury. According to R.K., he injured his shoulder during the third week in March when he was lifting a heavy jail grill with a co-worker. The Company contends, however, that R.K.'s injury occurred on May 21, 1999, and that his representations to the contrary are simply an attempt to back date his injury to cover for his poor performance. There is no merit to this position. Throughout the unemployment proceedings and arbitration hearing, R.K. has consistently testified that while he was experiencing pain in his shoulders prior to March, the accident which necessitated the work restrictions took place the third week in March, 1999. The accident report that R.K. completed is dated March 24, 1999. The notations suggesting that the date should actually read May were not placed there by R.K., nor were they added as a result of any discussions with R.K.. While a number of the Return to Work Records indicate an injury date of May 21, 1999, R.K. was not responsible for completing that portion of the forms, nor did he ever really pay attention to the date listed.

Even assuming the precipitating incident in which R.K. injured is shoulder attempting to lift a heavy jail grill with a co-worker occurred in May, the evidence shows that R.K. was experiencing pain in his shoulders prior to that incident. R.K.'s handwritten notes indicate that he had been "seeing Dr. P. for shoulder injury" and "had follow appt. for 4-20-99." In addition, in R.K.'s written grievance over his first written warning, he stated:

> I have been having a lot of shoulder pain in recent months. It got bad enough that I felt I should see the Dr. on March 2, 1999. I called and made an appt. to see Dr. the earliest I could get in was 3-26-99, I saw Dr. he said it was tendinitis and shoulder strain and put me on prescription med. to treat it.

Thus, the evidence proves that R.K. was experiencing pain in his shoulders and was under a doctor's care for shoulder problems dating back to at least March, 1999, early on in the Company's time study. As such, any times allegedly monitoring R.K.'s productivity from March 1999, through his termination in November 1999, were based on work he performed while injured. Such times clearly cannot be used to terminate R.K. for poor productivity.

The fact remains that the Company did not first discipline or even counsel R.K. regarding poor productivity until at least June 3, 1999, the date he presented his supervisor with his first work restrictions. While Norman testified that R.K. had been counseled previous to that time regarding his productivity, R.K. denied the same. Norman could not produce any documentation of the counselings which allegedly occurred prior to June 3, 1999, nor could he identify when they took place. Even assuming they took place, these informal discussions were not discipline and therefore cannot be used against R.K. for any purpose. Arbitrators consistently hold that allegations of wrongdoing for which the employee was never reprimanded or punished, and therefore not able to grieve, cannot later be relied upon for discharge.

Thus, given the documented onset of R.K.'s shoulder problems in March, 1999, and the timing of the Company's first discipline in June, 1999, there is no question that all of R.K.'s allegedly poor production times occurred while he was under a doctor's care for shoulder tendinitis, strain and a rotator cuff injury. The Company unfairly and unjustifiably held R.K. to a production standard which, because of his injury and continuing pain, he was not able to meet.

Vague and speculative testimony and prior incidents for which no discipline was issued cannot be used to support just cause for termination. The Company attempted to show through the testimony of other welders that R.K. was always slow, thereby discrediting the clear evidence that his shoulder injury affected his performance. None of the welders who testified, however, offered any evidence to support this claim other than vague testimony and blanket assertions that R.K. was a slow welder prior to 1999. Although the Company would have the Arbitrator believe that R.K. was always slow and that his shoulder injury did nothing to affect his performance, they presented no proof to that effect. Company Exhibits 2, 3 and 4 are not discipline and therefore may not be used to infer that R.K. has always been slow and therefore deserved termination on November 18, 1999. Norman admitted that prior to the advent of the time study in February 1999, the Company had no formal way of determining any welder's productivity or rate of welding speed.

Even if R.K.'s welding times were out of line with the Company's standard and other welders, his performance was affected by his shoulder injury. These facts constitute mitigating circumstances negating just cause for discharge. The Company continually gave R.K. work that was outside his restrictions. Beginning on June 2, 1999, until his termination on November 18, 1999, R.K. was under medical restrictions from his doctors with regard to the type of movements and arm positions he could sustain. Despite the Company's knowledge and possession of the doctors' restrictions, Kees continued to give R.K. work outside his restrictions. Although the Company claims that it never gave R.K. work outside his restrictions, R.K.'s notes written during the months leading up to his termination prove otherwise. Thus, contrary to the Company's assertions, the evidence proves that R.K. was asked to perform work that was outside his restrictions right up until the very end of his employment with Kees.

R.K. had legitimate doctor's restrictions which prevented much of his normal welding activity. Both at the unemployment and arbitration proceedings, Kees implied that R.K. repeatedly went to his doctors, seeking restrictions that would justify or explain his slow work; but failed to get what he needed. The Company is apparently suggesting that R.K. never actually had a shoulder injury, but rather, simply talked his doctors into creating work restrictions for him because he perceived his productivity at work to be an issue which could jeopardize his job. Such a suggestion is wholly without support. To the contrary, many of the work restriction forms indicate in the doctor's handwriting that R.K. would be re-evaluated in a particular number of weeks, to which the next work restriction sheet corresponds. Thus, Kees' suggestion that R.K. was attempting to justify his alleged poor productivity by asking his doctors to draft work restrictions for him is completely unfounded.

Further, contrary to the Company's claims, R.K.'s doctors clearly did feel that he had medical limitations on his ability to weld. At hearing, the Company presented the testimony of Dr. Dennis Brown, M.D. Dr. Brown performed an independent medical examination on R.K. on December 9, 1999, after his termination. Dr. Brown diagnosed R.K., just as his own doctors had, with bilateral shoulder pain from bilateral rotator cuff tendinitis. Dr. Brown testified, simply from examining R.K.'s return to work slips, that there was no reason why R.K. could not, quantitatively, perform as much work as anyone else. Dr. Brown, however, admitted that he had no independent recollection of seeing R.K. on December 9, 1999; nor had he ever been to Kees to observe what welders are required to do. Dr. Brown's testimony is no more than an interpretation of what another doctor, with whom he never spoke, wrote on a work restriction. As such, his testimony is wholly worthless to the issue of the quantity of work R.K. was able to perform.

Kees' assignment of work to R.K. which violated his work restrictions once again negates just cause for discharge. R.K. clearly could not be expected to perform up to Kees' alleged standard on job assignments which his doctors advised against. As such, any productivity problems are explained, not by an intentional act on R.K.'s part, but rather, by his incapacity to perform the work because of his shoulder strain. R.K.'s continual shoulder pain

is a mitigating circumstance which negates just cause for discharge. R.K. continually complained to the Company that he experienced constant shoulder pain and was not able to weld to the same extent as he had before his injury.

Kees erred when it failed to take R.K.'s injury into consideration and terminated him for poor productivity. Given R.K.'s shoulder injury and constant pain, his discharge for failure to work up to what the Company considered acceptable capacity is clearly unfair and unreasonable. It is the duty of an arbitrator to set a discharge aside if he concludes that the penalty is unduly severe or unreasonable under the circumstances of the particular case. R.K.'s termination for poor productivity is clearly too harsh under the circumstances.

The Company failed to prove that R.K. was intentionally wasting time or working inefficiently. R.K. did not spend an inordinate amount of time wandering around the shop. There were a multitude of legitimate reasons for R.K. to be away from his welding table; however, none of the welders who testified could say what the reason was for R.K.'s absence from his table when they allegedly saw him walking around, because none of them asked him.

R.K. did not intentionally waste time by using the restroom farther away from his work station. R.K. credibly testified that he chose to use the farther restroom when he needed to sit down because the restroom closer to the welding tables was filthy. R.K.'s testimony regarding the condition of the closer restroom is wholly supported by both Union and Company witnesses alike.

R.K. did not inappropriately confront a co-worker. In R.K.'s letter of termination, Kees accuses R.K. of approaching another employee following his November 17, 1999 meeting with Norman and Evrats and accusing him of "ratting" on him. According to R.K.'s credible testimony, when he returned to his work area after meeting with Norman and Evrats on November 17, his co-worker Tim Southworth approached him and asked what was said at the meeting. R.K. never accused Southworth of "ratting" him out about anything. This alleged confrontation between R.K. and Southworth provides no basis for termination.

R.K. did not engage in other poor welding techniques or work habits in an attempt to intentionally waste time. Throughout the hearing the Company accused R.K. of a vast variety of poor and inefficient work habits and behaviors with the implication that each was done to intentionally waste time and avoid work. There is no merit to any of these contentions. In addition to these alleged inefficient behaviors, the Company spent time attempting to malign the manner in which R.K. welded. According to R.K., before he injured his shoulder, he would always sit down while he welded. After his injury, however, he had to try to find other ways of welding and doing things which would not irritate his shoulders. Therefore, he began trying to stand while he welded; however, he testified that because he was not used to it, it slowed him down and affected his performance. The Company also suggested at hearing that

R.K. could have alleviated the problems that he experienced with his shoulders if he would have taken the blocks out from underneath his welding table. R.K. credibly testified, however, that he needed to keep his table on 6-7 inch high blocks because he wears bifocals and needed his welding job to be higher and closer to his face so that he could see it.

The Company failed to prove that R.K. falsified his time sheet. Therefore, his discharge as a result of progressive discipline cannot stand. R.K. received his second written warning for alleged falsification of his time sheet. According to the Company, R.K. misrepresented the time he spent talking with Evrats, Krupp and Norman, and misrepresented the time he set up his equipment. In order to prove R.K. falsified his time sheet, the Company must prove that R.K. intended to mislead Kees regarding his activities on the day in question, July 19, 1999. The Company failed to prove any intent by R.K. to deliberately mislead it regarding the time he spent doing anything on July 19, 1999. To the contrary, the "evidence" regarding his representations about time spent talking to different individuals is no more than pure speculation on all sides. None of this "evidence" adds up to intent to defraud the Company nor does it constitute deliberate misrepresentation by R.K. on July 19. As such, there was no just cause for R.K.'s second written warning for falsification and the discipline must be rescinded and wiped from R.K.'s record.

The Union concludes Kees, Inc. suspended and terminated the grievant, R.K., without just cause, and therefore, R.K. must be reinstated and made whole for wages and benefits lost as a result of the Company's unjust discharge and contract violation.

DISCUSSION

The undersigned is persuaded that the record evidence established that R.K. was not a very efficient or productive welder before, during and after the time study that was performed by the Company. His co-workers testified that in their opinion he wasted a lot of time by leaving his work station routinely every hour and heading to the restroom or other areas of the production facility. They also testified that the way he went about his work was very inefficient. When welding sleeves he would weld one, put it on the skid, weld another, put it on the skid, and so on, whereas other welders would not take the time to put each completed sleeve on the skid after it was welded, but rather would stack the finished sleeves on their welding table and then move them all at once when their table was filled. Thus, the evidence clearly established that R.K. had a history of inefficient work performance as a welder.

The Company, prior to the time study it undertook in early 1999, met with all the welders and indicated they wanted welders to pick up their pace. In 1997 and 1998, supervision had spoken with R.K. about his poor productivity. However, but for the discipline R.K. received for his poor productivity while working on a shearing operation with another employee (slow pace and excessive conversation with his co-worker), R.K. was never formally disciplined for his welding work productivity until after the Company had implemented its time

study of welders. But, beginning in June 1999, the Company commenced disciplining R.K. for his poor productivity as a welder. He received a written warning on June 29, 1999, for poor productivity. He was given a second written warning on July 19, 1999, for falsifying the amount of time he spent talking with supervision and the steward about the job assignment he had been given for that day, and the work restrictions he had been placed under by his doctor. Then he was given a three (3) day suspension on August 24, 1999, for poor productivity. He was terminated on November 17, 1999.

The crux of this case is whether the injury R.K. sustained and subsequent work restrictions his treating physician provided him excused his poor productivity. In other words, was he given work to perform that was outside his work restrictions, or could the Company reasonably expect him to meet the productivity standards established for the welding jobs he was directed to perform even with his existing work restrictions. R.K. alleged he was injured on the job on March 21, 1999, whereas the Company argued the alleged injury occurred on May 21, 1999. The undersigned has concluded the overwhelming record evidence established that R.K. was not injured on March 21, but rather on May 21. First, March 21, 1999 was a Sunday and R.K. was not working that day. Also, R.K. told the State Unemployment Compensation Examiner he was injured on May 21st. All of his "Return to Work Records" completed by his physicians show "5/21/99" as the "Date of Injury." Consequently, I do not find R.K.'s testimony that he was injured on March 21, 1999 credible, and have concluded his injury occurred on May 21, 1999.

Whether his injury occurred on March 21, or May 21, nonetheless, there is no record evidence to disprove his claim that he was in fact injured on the job. All of his "Return to Work Records" show that he was being treated for shoulder/rotator cuff tendinopathy, tendinitis, or shoulder strain. The earliest "Return to Work Record" in evidence is dated June 2, 1999. In that "Return to Work Record" Dr. Northrup stated R.K. could return to work without restrictions on July 2, 1999, and between June 2 and July 2 he could return to work with a 50 pound lifting, carrying, or pushing/pulling weight limitation. Dr. Northrup also stated R.K. should "avoid reaching and lifting at the same time." On June 8 R.K. was seen by Dr. Peschke and was diagnosed with bilateral shoulder strain, but the "Return to Work Record" completed by Dr. Peschke placed no restrictions on his return to work. R.K. was seen again by Peschke on July 15, 1999. Peschke wrote on the "Return to Work Record":

> Due to strain . . . which is slow to heal and can take up to 6 mo. after stabilization for total resolution. Currently may either be off work x 2 wk. or avoid any work above level of chest for 2 wk. due to re-exacerbation of 5/99 strain.

The subsequent "Return to Work Records" R.K. presented the Company on July 29, August 26, September 14, October 5 and November 2 and November 10, 1999, had restrictions very similar to those noted above.

There is no persuasive record evidence that the welding jobs assigned to R.K. required him to perform tasks that were outside the noted restrictions. R.K. demonstrated his welding technique which he believed placed him outside of or in violation of his restrictions when assigned a sleeve welding work order. I am not persuaded, in light of all of the other demonstrations of welding technique/form by Company welders, that R.K. had to weld in a manner that would have violated any of the "Return to Work Record" restrictions noted by his doctors. Also, I do not believe moving the raw materials to the welding table and into the welding jig, removing the finished sleeve from the jig and finally moving the finished product to the skid would have violated any of his doctors' work restrictions. Consequently, I am convinced that R.K.'s work assignments could have been performed by him without violating any of the work restrictions that appeared on his "Return to Work Records." Consequently, I find that his poor productivity cannot be excused on the basis of his injury and subsequent work restriction established by his doctors.

An argument made in R.K.'s defense was that the time study conducted by the Company was flawed. The Union argued that not all welders turned in their sheets as required, that R.K. was injured during the period the time study was ongoing, and that other welders were slow. However, even if all of these allegations were proven, the fact remains that there is no evidence to establish that the productivity standard R.K.'s performance was measured against was unreasonable. As noted earlier, his productivity/performance was inadequate and cannot be explained by his work restrictions. Thus, I am left to conclude that the productivity standards as applied to him were reasonable, and he did not meet them. Further, the progressive discipline did not result in his becoming more efficient and productive. Also, there is no record evidence establishing that there were other welders who after the time study were as inefficient and unproductive as R.K. and who the Company did not discipline for poor productivity. Thus, there is no basis upon which to conclude the Company acted inappropriately in singling out R.K. for discipline because of his poor productivity.

Therefore, the undersigned is persuaded that the totality of the evidence in this case established R.K. was an inefficient, low productivity welder, whose poor performance was not the result of his medical condition. The progressive discipline the Company imposed upon R.K. in an attempt to improve his productivity and eliminate his inefficient work habits was unsuccessful. Under these circumstances his termination was not inappropriate, and was for just cause.

Therefore, based upon the foregoing and the record as a whole, the undersigned issues the following

AWARD

The Company did have just cause to terminate the grievant, R.K. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 26th day of July, 2001.

Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator

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