BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL 565

and

CARNES COMPANY, INC.

Case 66
No. 60106
A-5954

Appearances:

Haus, Roman and Banks, LLP, by **Attorney William Haus,** 148 East Wilson Street, Madison, Wisconsin 53703-3423, appearing on behalf of the Union.

Michael, Best & Friedrich, by **Attorney Marshall R. Berkoff,** 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, appearing on behalf of Carnes Company.

ARBITRATION AWARD

Carnes Company, hereinafter Employer, and Sheet Metal Workers International Association Local 565, hereinafter Union, are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. A request to initiate grievance arbitration was filed with the Commission on July 5, 2001. Commissioner Paul A. Hahn was appointed to act as arbitrator on July 9, 2001. The arbitration hearing in this matter was scheduled on September 13, 2001. The hearing took place at the offices of the Wisconsin Employment Relations Commission, Madison, Wisconsin. A second day of hearing was held on September 20, 2001. The hearing was transcribed. The parties were given the opportunity and filed post-hearing briefs. Briefs were received by the Arbitrator on November 14, 2001 (Employer) and November 19, 2001 (Union). The parties were given the opportunity and declined to file reply briefs. The record was closed on November 19, 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

Union

The Union states the issue as follows:

Was the disciplinary action taken by the Employer against the Grievant for just cause? If not, what remedy is the appropriate remedy?

Employer

The Employer states the issue as follows:

Was the grievant discharged for cause on March 29, 2001? If not, what remedy, if any, is appropriate?

Arbitrator

The Arbitrator adopts the issue as stated by the Employer.

RELEVANT CONTRACT PROVISIONS

ARTICLE 3
MANAGEMENT RIGHTS – PLANT RULES

Section 1 – The management of the plant, direction of the working forces and operations at the plant, including hiring, suspending, discharge or otherwise disciplining of employees for good and sufficient cause, the scheduling of work and the control and regulation of the use of all equipment and other property of the Company are the exclusive functions of the Company provided, however, that in the exercise of such functions the Company shall not act contrary to, alter or attempt to amend any of the provisions of this Agreement, and shall not discriminate against any employee because of his/her membership in a lawful, recognized and permitted activity on behalf of the Union.

Section 2 – The listing of specific rights in this Agreement is not intended to be nor shall be considered restrictive of, or a waiver of, any of the rights of management not listed and not specifically surrendered herein whether or not such rights have been exercised by the Company in the past.

Section 3 – The Company shall have the right to establish, maintain, and enforce reasonable rules and regulations to assure orderly plant operations, it being understood that such rules and regulations shall not be inconsistent, or in conflict with, any provision of this Agreement. The Company shall maintain on its bulletin boards, and furnish the Union with, a written or printed copy of all such rules and regulations and all changes therein. Changes in existing plant rules and regulations, as well as new rules and regulations promulgated by the Company, shall not become effective until five (5) regular workdays after copies thereof have been furnished to the Union and posted on the bulletin boards. The Company agrees to discuss with the Union Committee the reasons for any new or changed rule prior to notice of same being given to the entire work force. The five (5) day provision shall not apply to such rules or regulations which for safety or health reasons need to become effective immediately. If the Union considers a proposed Company rule or regulation to be inconsistent, or in conflict with, any provision of this Agreement, such rule or regulation shall be subject to Article 12 (Grievance Procedure and Arbitration). The Company shall agree to a date certain for the arbitration within fifteen (15) days of the Union's request for arbitration.

. . .

ARTICLE 11
DISCHARGES AND DISCIPLINE

Section 1 – No employee shall be discharged or disciplined without good and sufficient cause. Any employee who has been discharged shall, if he/she so desires, be granted an interview with his/her shop committee person before he/she is required to leave the plant.

STATEMENT OF THE CASE

This grievance involves the Carnes Company and Sheet Metal Workers International Association Local 565. (Jt. 1) The Union alleges that the Employer violated the collective bargaining agreement by disciplining and discharging the Grievant from his employment on March 29, 2001 as a full-time maintenance mechanic for the Employer. (Jt. 2 and 6)

Grievant was a maintenance mechanic with the Employer and had been so employed for approximately 38 years. The Employer is in the business of manufacturing air distribution and air movement equipment and employs 180 employees in its Verona, Wisconsin facility where Grievant was employed. Grievant's duties included maintaining the Company's boiler on a

daily basis, performance of maintenance functions on all equipment inside and outside the plant and equipment repairs. Grievant was further required to use a lift truck in his work which was an essential function of Grievant's job duties. The Employer certifies employees as to their abilities to safely perform lift truck work and employees using lift trucks participate in training programs and are certified every three years. Grievant could be asked to perform his maintenance and repair duties by supervisors, by the use of work orders and by fellow employees such as the operator of production machinery. Grievant was not restricted to any area of the plant.

Maintenance mechanics are required to fill out a daily labor ticket. (Er. 8) This labor ticket is used by the Employer to determine the amount of maintenance that is performed on equipment; the mechanic's time is charged back as a cost of maintenance to particular departments. This information is also used by the Employer to determine whether to continue to repair equipment or to purchase new equipment. The matter before me started on March 1, 2001, when a supervisor complained to Julie Sundby, the Employer's Human Resource Manager, that his department was charged for labor on the February 28, 2001 daily labor ticket of the Grievant, which the supervisor claimed had not been performed or authorized. (Tr. 17) (E. 8) Investigation by Ms. Sundby and other supervisors, including Manufacturing and Facilities Engineering Manager Gary Kubat, determined that the February 28, 2001 labor ticket of the Grievant was inaccurate by five and one-half hours and contained entries for work that had not been performed on February 28, 2001. Ms. Sundby met with the grievant and his Union steward on March 2, 2001 and advised him of the discrepancies on his labor ticket which Grievant could not satisfactorily explain. Grievant indicated that some of the work shown on his labor ticket was "carried over" or "banked" from previous days or that he may have copied the wrong machine numbers on his labor ticket. (Tr. 25 & 26)

On March 5, 2001 the Employer's Safety Coordinator reported that she observed the Grievant violating a plant safety rule. Grievant was working on a project with his forklift truck nearby with the forks in the raised position holding a large metal object. The safety coordinator confronted the Grievant and told him to put the forks down; Grievant complied. (Tr. 36 & 37) On March 8, 2001 Ms. Sundby held another meeting with the Grievant and issued a disciplinary suspension of indefinite duration to the Grievant while the Employer continued its investigation. (Jt. 6) The indefinite suspension related to Employer work rule number 2 – falsification of records and safety rule number 17 – unsafe operation of a company forklift. (Jt. 6 & 7)

Grievant was ultimately discharged on March 29, 2001 for violation of the aforementioned rules following a meeting with Employer representatives on March 23, 2001. (Jt. 2) During the meetings with Employer representatives on March 2 and March 8, Grievant was represented by Union Steward Bill Niebuhr. In the discharge letter, the Employer cited previous disciplinary action against the Grievant: December 1998 disciplined for leaving the

forks on his forklift or lift truck in a raised position; February 1999 disciplined for starting a fire in the stock room because of unsafe operation of equipment; March 1998 disciplined for use of a utility knife in an unsafe manner resulting in personal injury; January 1999 disciplined for negligence causing the paint permeate tank to over flow. (Jt. 2)

The parties processed the grievance through the grievance procedure of the parties' collective bargaining agreement. The matter was appealed to arbitration. Hearing in the matter was held by the Arbitrator on September 13 and September 20, 2001 in Madison, Wisconsin. No issue was raised as to the arbitrability of the grievance.

POSITIONS OF THE PARTIES

Union

The Union initially argues that Grievant did not falsify Company records and submits that the word "falsification" or "falsify" requires an intent to deceive or conceal wrongdoing and such was not proven by the Employer. The Union submits that the Grievant is not well-educated, is inarticulate and because of the demands made on his time and the numerous ways that he could be called to perform maintenance and repair duties, that this resulted in his unintentional misstatement of work that he performed and recorded on his work record of February 28, 2001. The Union argues that the record is clear that the Employer never proved that Grievant was not working on behalf of the Employer for the five and one-half hours that were unaccounted for on the Grievant's February 28th labor ticket. The Union argues that examples of other employees who falsified various work records or falsified medical reports and were discharged are not pertinent as those employees all were shown to have intentionally falsified those records. In fact, the Union avers, no employee has ever been previously disciplined, including the Grievant, for falsification or inaccurate reporting of a daily work record or labor ticket. Further, the Union argues that the Grievant's lack of education and communication skills ill equipped him to counter the accusations of Employer representatives in the three March 2001 meetings that led to his discharge. The Union submits that Grievant credibly testified that his actions with the work record were unintentional and, while Grievant had a flawed understanding of the proper way to maintain his daily labor ticket, the record evidence does not show that he intentionally falsified his labor ticket. The Union argues that Grievant was never properly trained on how to fill out his daily labor ticket or the importance thereof.

The Union argues that prior discipline given to the Grievant, which the Employer introduced as its Exhibits 11 through 31, does not document in all cases a disciplinary action. The Union submits that many of the warnings were verbal, were not specific written complaints, never dealt with a disciplinary suspension and were mainly concerned with time

matters related to the Grievant's failure to properly punch the time clock, leaving work without permission or inappropriate absence from the job. The Union posits that Ms. Sundby, the Human Resource Manager, testified that she placed less weight on these earlier items of Grievant's discipline history that date back to the time of his hire. The Union notes that the Grievant has gone through significant time periods without any discipline and that the Employer's consideration and use of these minor violations that are decades old to justify the discharge of a 38-year employee would be contrary to rudimentary notions of just cause.

The Union next submits that although the Grievant received forklift training, the last of which was in November 19, 1998, there is no evidence in the record that clearly establishes that the Grievant was ever instructed that he could not use the forklift to perform a maintenance task with the forklifts raised while he was with the forklift, even though not necessarily on it or driving it.

The March 5, 2001 incident that was the safety violation that led to his discharge involved the Grievant lifting the top of a steel welding table on his forklift and raising it five feet while he worked on the bearings of the remainder of the table which are used to rotate the steel top. The Grievant was working in an extremely tight space but was close to the forklift. When approached by the Safety Coordinator who asked him to lower the forklift, the Grievant immediately complied.

The Safety Coordinator reported this to Human Resource Manager Sundby who determined this was an independent ground for disciplinary action based on her perception that this was tied with the December 9, 1998 forklift incident. For the 1998 incident, the Grievant received what the Union terms as a reminder that a forklift should never be left unattended with the forks raised which occurred when Grievant was working in a man-basket on the raised forklifts. At the end of his shift, the Grievant got out of the basket, used a step-ladder to get to the floor and went home, leaving the forks raised. (E-9) The Union argues that there are distinguishing facts between these two incidents; in the earlier incident the forks were raised and left unattended but in the incident on March 5, 2001, that led to Grievant's discharge, although the forks were raised, the Grievant was in the immediate area. Citing an OSHA Standards Interpretation and Compliance Letter, the Union argues that using the fork lift for support while performing work functions is not improper. (U. 35)

The Union submits that other employees received disciplinary action far short of discharge for improper use of a forklift.

Lastly, the Union argues that the indefinite disciplinary suspension of Grievant on March 8, 2001 (E. 6) proves that the Employer had already decided Grievant's guilt. That indefinite suspension was the only time in the Grievant's 38-year career that Grievant had been so disciplined. The Union states that the testimony of Ms. Sundby proves that she intended the

suspension to constitute disciplinary action for the falsification of the daily work record and the safety violation. The Union argues that it is fundamental that an employee cannot be disciplined more than once for the same conduct and that the subsequent discharge was a second discipline for the same offenses and therefore double jeopardy and improper.

In conclusion, the Union argues that even if there were sufficient basis for imposing discipline against the Grievant, the discipline imposed does not reflect the application of the principle of progressive discipline because the Grievant has never before been suspended and has only received oral or written warnings. The Union asks that the Grievant be reinstated with backpay and benefits and that if deserving of any discipline it should not exceed a three-day suspension.

Employer

The Employer argues two reasons for upholding disciplinary action against the Grievant and that its discharge decision was a product of just cause and arbitrable due process.

The Employer submits that the Grievant knew that falsification of Company records was a work rule violation and that Grievant provided no legitimate explanation or excuse for his claim of innocent error. Based on the record testimony, the Employer argues that Grievant was not truthful or believable in his responses to the Employer's investigating team. The Employer submits that every time that the Grievant was questioned about the daily labor ticket he changed his responses from sloppy record keeping to banking time to putting time in to cover periods of slack work.

The Employer argues that an underlying problem it had with Grievant to justify a less severe disciplinary action is that consistently through three investigatory meetings with the Grievant, including the final meeting at which his termination was decided, the Grievant failed to recognize his rule violations, accept responsibility and give the Employer a reason to consider reinstatement from the disciplinary investigatory suspension. In fact, the Employer submits, Grievant showed no remorse for his actions when he well knew the importance of the correct completion of his daily labor ticket and gave no indication that he would correct his ways even assuming that the incorrect entries on the February 28, 2001 labor ticket were a result of his sloppy record keeping.

The Employer submits that as to the March 5th safety violation while the Grievant was under investigation for falsification of records, the Grievant repeated a safety violation for which he had recently received a disciplinary warning. The Grievant on March 5 left his fork truck with the forks five feet in the air bearing a load of a welding table top. This the Employer submits is no different than the 1998 violation where Grievant went home leaving

the forks in the air which were later lowered by a safety coordinator. The Employer argues that there is no question that this constituted a violation of not only a longstanding Company safety rule but an OSHA regulation as well. (E. 39) The Employer avers that the record is clear that the Grievant regularly used a lift truck in his work and received periodic training, testing and certification for driving and that safety rules, including the one relevant to the safety violation pertinent to this proceeding, were covered in the Company's training and Grievant acknowledged that he had been trained in the safe use of a forklift.

The Employer argues that rather than convince the Company that he would be more careful in the future to adhere to safety rules, the testimony shows that Grievant treated the forklift situation in a lackadaisical manner and admitted that he would cut corners on safety if it would get the job done quicker. This type of statement, the Employer argues, did not give the Company assurance that this type of misconduct would not re-occur.

The Employer argues that the falsification of the daily work record was not an innocent mistake but in fact was falsification and cites arbitration case law to the effect that arbitrators will infer intent even if the rule of the employer does not require it and that flagrant and gross negligent misconduct of production records can prove intent. The Employer argues that it has been consistent in its disciplinary action against employees who have falsified Company records and points out that employees who have falsified a medical document have been discharged, employees who falsified a daily labor ticket by doing personal work on Company time have been discharged and that these employees' years of service ranged from 10 to 30 years, similar to the Grievant's 38 years of service. As to the safety violation, the Employer avers that other employees have been terminated for refusal to comply with safety rules as shown in the record.

The Employer next argues that Grievant's past disciplinary record for failing to conscientiously account for his time stands against the employee. The Employer posits that the Employer considered Grievant's record in connection with its determination whether there was any basis for clemency or mitigation of the discharge decision. Citing arbitration case law, the Employer submits that arbitrators have upheld discharges where neither the incident at the time of the discharge nor any other single incident was sufficient to warrant discharge, but the general pattern of the employee's unsatisfactory conduct and performance, as established by a serious of incidents over an extended period of time, was predominant evidence to justify discharge, in other words a "last straw" situation. The Employer argues that Grievant's past record regarding his failure to conscientiously account for his time stands against the Grievant where the Grievant was repeatedly warned about leaving his place of duty. Even though those incidents were not exactly parallel to the falsification of record incident, Grievant, the Employer submits, had warning enough of the seriousness of his misconduct and there was no reason to believe that one more chance would improve his conduct.

The Employer concludes its position statement by arguing that the Union's arguments on behalf of the Grievant are not meritorious. The Employer submits that the evidence in this case and credibility of its witnesses support a finding that the Grievant falsified his daily labor report on February 28, 2001 and violated a safety rule on March 5, 2001 with respect to leaving his lift truck with the forks elevated. Therefore, the Employer argues the discharge was for cause and the Employer's decision should not be reversed despite Grievant's long length of service. The Employer submits that the Arbitrator in this case should not substitute his discretion for those properly charged with the decision to issue discipline and that to do so would encourage employees of long service to think they could commit a certain number of offenses with impunity. The Employer states that the discharge was justified and should be sustained.

DISCUSSION

This arbitration involves a grievance filed by the Union for the discharge of Grievant on March 29, 2001. (Jt. 2 & 3) The Grievant was discharged for the alleged violation of two work rules: falsification of his daily labor ticket and a safety violation for leaving the forks on his lift truck in an upraised position. The Grievant had never been disciplined before for falsification of a company record but had received previous written warnings for safety violations which were noted in the discharge letter. (Jt. 2) One of those previous safety violations involved a similar incident of leaving the forks of his lift truck in an upraised position when Grievant went home from work. (E. 9) Grievant, over a 38 year career with the Employer, also had other written warnings dealing mainly with time clock and absence from work violations. Although these were considered by the Employer, I find that due to the age of these violations and the fact that they did not involve falsification of records, they were given little weight by the Employer.

To a great extent the facts in this case are not in dispute. It is the interpretation of these facts that is in dispute, as well as the resulting discipline and discharge of the Grievant. I find that the record substantiates that Grievant knew that falsification of his daily labor ticket would be a violation of a company work rule; he admitted as much to Human Resource Manager Sundby and never denied such knowledge at the arbitration hearing. (Tr. 30) The issue is did Grievant intend to falsify his labor ticket, as the Employer alleges and argues, or was the February 28, 2001 labor ticket, which was inaccurate by five and one-half hours, due to the daily demands on the Grievant and sloppy record keeping as argued by the Union.

Each maintenance mechanic completes a daily labor ticket noting by number the equipment he has worked on and the time is charged to the budgets of the various Company departments. (E. 41 & 42) The Employer uses the information to determine whether to continue to repair or replace a piece of equipment. (Tr. 161-163) Maintenance mechanics can be called upon by supervisors or any employee to work on a piece of equipment or by

responding to a work order. (U. 36) I credit Grievant's testimony that the demands on a mechanic can make for a hectic work day, but I find that Grievant knew the importance of an accurate work record and knew how to make sure his labor ticket was accurate but simply did not do so. Again, the question is did the Grievant intend to falsify his labor ticket on February 28th.

I agree with the Union that to falsify means an intentional act. I agree with the case cited by the Employer that "gross" and "flagrant" negligence can border on intentional. 1/ I do not accept the Union's argument that somehow Grievant's educational background or lack thereof excuses his labor ticket inadequacies. Grievant had been a mechanic for twenty years; he had to have known how to complete the labor ticket, particularly when after 1999 virtually every piece of equipment in the plant had a number assigned to it and all he had to do was enter the number on a simple one page form along with the time worked. (Tr. 163) However, I do not, after a careful analysis of the record, find that Grievant intentionally falsified his labor ticket. There was no direct evidence that Grievant was not working for the five and one-half hours that were missing and there was no evidence to refute Grievant's testimony that he was working. (Tr. 99) Grievant was certainly negligent, but I do not find his actions intentional. The Employer did not meet its burden to prove intentional falsification. While the Employer appropriately submitted cases of other employees who had falsified records, in those cases of false or altered medical reports and doing personal work on company time, the employees intended to defraud the company out of time or pay. (Tr. 71 & 72) The Employer had a right to discipline the Grievant, even if his actions were negligent and not intentional, the issue is how much discipline.

1/ MADISON FURNITURE INDUSTRIES, 88 LA 805, KING (1987) In this case, the discharged employee, with nine years seniority, was found by the arbitrator to have been "flagrantly and grossly" negligent by over reporting parts made under an incentive system which gave the employee more pay. The arbitrator ruled that the negligence was "tantamount" to an intentional misstatement of fact.

The safety rule infractions are what make this a close case. In the discharge letter, there are four recent written warnings for safety violations or concerns, two in 1998 and two in 1999. (Jt. 2) One of those safety violations, as mentioned above, is for the forklift incident in 1998 where Grievant went home, leaving the fork lifts in the up position. (E. 9) Two of these letters warn Grievant that future violations of safety rules could lead to discipline up to discharge and two advise Grievant that he violated safety rules. (E. 9, 28, 29, & 30) The Union never grieved the 1998 fork lift violation.

The 2001 forklift violation that led to Grievant's discharge occurred while the Employer was investigating the work record errors of Grievant's February 28th labor ticket. There is no dispute that Grievant was in a welder's work station repairing a welding table. Grievant took the top of the table off by the fork lift and raised it five feet on the lift forks to allow him in a tight space to work on the bearings of the bottom part of the table that allowed the top part to turn. When requested by the safety coordinator, who happened by, to lower the forks, Grievant did so. Grievant on direct testimony admitted that he could have done something different with the table top but was hurrying to get the job done; he could have transported the table top to the maintenance area. (Tr. 212-214, 264)

There is some dispute whether this March 5, 2001 fork lift incident was unsafe. The Union makes the point that unlike the 1998 incident, where Grievant went home leaving the forks up and the lift unattended, here the Grievant was in the area next to the lift truck. The Employer argues that regardless of whether Grievant was right next to the lift truck, he was not on it and therefore under Company safety rules the forks should have been all the way down. I believe that common sense would dictate that working in a tight space with a steel table top sitting on forks five feet in the air would not be safe. I find that the OSHA regulations offered by the parties are not contrary to my common sense belief.

The Union offered a compliance letter from a company regarding fork lift use approved by OSHA. But in that case, the forks were only two feet off the floor and the employees were actively loading a pallet on the forklift. (U. 35) The company allowed this practice to save on back strain. That is a different set of facts than those before me. The Employer offered an OSHA regulation that requires an employee within 25 feet of the lift truck to have the forks lowered. (E. 39) This regulation I find covers the case here. I also find that Grievant was adequately offered training opportunities, attended training sessions where the rule about lowering the forks was covered and admitted that he knew he should lower the forks in such a situation. (E. 10, U 34 & E. 40) (Tr. 81, 146, 155, 159, 224-226)

There is little question that with these two rules violations the Grievant warranted discipline; the issue is the degree. I find that the Employer conducted an appropriate "cause" investigation. I do not accept the Union's charge that Grievant was handicapped in his conversations with Human Resource Manager Sundby because in the first two investigatory meetings on March 2 and March 8, the Grievant was represented by his Union steward who did not testify to support this allegation. (Tr. 25 & 51) Further, I credit Sundby's testimony that every opportunity was given to the Grievant to explain himself in those two meetings and in the final meeting on March 23 when on Sundby's recommendation the decision was made to discharge the Grievant by the Employer's general manager. (Tr. 25, 51 & 64)

It is further evident, and this was rightly considered by the Employer, that Grievant did not help his cause by failing to give Employer representatives any assurance that he would not violate these rules again. I have considered Grievant's alleged statement to Sundby, which I

credit he made, that he would cut corners to get the job done. I also have considered that Grievant stated he falsified his time record because of an incident where he was criticized for not immediately answering a call to fix the boiler, that he had banked time or carried over time worked from one day to the next on his work record and that he would put down the time of another employee as his own when that non-mechanic employee was doing maintenance work. While these statements support an argument, which the Employer makes, that the Grievant could not be rehabilitated with lesser discipline than discharge, I find that though serious, they were statements made by the Grievant more out of frustration and anger that after 38 years his honesty and work effort were being questioned. It is clear from the record that there is no claim that Grievant's work performance had anything to do with the discharge decision.

The Employer's decision to discharge I find has a major weakness that causes me to overrule its decision to discharge the Grievant. The Grievant in this case had never before been charged with a violation of the labor ticket or work record rule. Standing alone and in the absence of proven intent, as I have found, I do not believe discharge is warranted. The safety violations present a closer question, but even when there were four previous safety violations by Grievant in 1998 and 1999, the Employer never gave the Grievant anymore discipline than a written warning. In other words, I find that the Employer did not engage in progressive discipline, a tenet of arbitration due process necessary in finding the "cause" required by the parties' collective bargaining agreement. When the warning letters for the previous safety offenses apparently accomplished nothing, there was some obligation on the Employer to ensure the Grievant was aware of the Employer's concerns, particularly dealing with a very senior employee who may have believed he did not have to follow the rules as closely as a less senior employee. This failure of progressive discipline I do not believe can be overlooked despite the cases cited to me by the Employer which, though offering guidance, do not tip the scales in the Employer's favor. 2/

2/ POTASH COMPANY OF AMERICA, 40 LA 582, ABERNETHY (1963) In this case, the discharged employee, with two and one-half years seniority, had a chronic problem of staying in his assigned work area and despite written warnings regarding this work rule violation. The arbitrator found that while one incident would not uphold a discharge, the Company's action must be considered in connection with a pattern of conduct. Despite the lack of discipline other than oral and written warnings. The employee's response to them gave the company little hope of that suspension would be fruitful. ELECTRONIC CORPORATION OF AMERICA, 3 LA 217 KAPLAN (1946) In this case, the discharged employee, with two years of seniority, received oral warnings for six incidents of poor job performance before a similar incident leading to the employee's discharge. The employee did not receive any written or suspension discipline. The arbitrator upheld the discharge because the employee's and union's testimony of excuses proved to the arbitrator an unwillingness by the employee to accept responsibility.

With this award and remedy, the Grievant will receive progressive discipline and should, with the Union's assistance, be made aware that further violations of the Employer's work and safety rules will seriously jeopardize his future employment with the Employer despite his length of service. The Union argues for three days suspension without pay as a reasonable discipline for the offenses committed; I find this highly inadequate. This is a close case and the record and particularly Grievant's testimony leads me to find that Grievant needs a significant suspension to impress upon him the seriousness of his actions. The Union argues in its grievance that it believes the Grievant can still be of value to the Employer; I trust this will be the case. I rule that given my decision on a reinstatement I do not need to consider the Union's double jeopardy argument. I also believe the remedy in this case will address the Employer's concern that lack of sufficient discipline will encourage senior employees to ignore the Employer's work and safety rules.

Based on the foregoing and the record as a whole, I issue the following

AWARD

The Employer violated the collective bargaining agreement when it discharged the Grievant. The grievance is sustained.

REMEDY

The Grievant's discharge will be modified to a ninety working day suspension without pay from the date of his disciplinary suspension on about March 8, 2001 and his seniority date will be readjusted to reflect said suspension. Grievant will be reinstated to his previous position with the Employer within fourteen calendar days of the date of this decision with back pay and benefits, less any interim earnings or unemployment benefits received for the period following the end of the suspension in this remedy until his date of reinstatement.

Dated at Madison, Wisconsin this 19th day of December, 2001.

Paul A. Hahn /s/

Paul A. Hahn, Arbitrator

rb
6315