BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

RAY O VAC CORPORATION

and

UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW LOCAL UNION 1329

Case 179
No. 60774
A-5992

Appearances:

Murphy, Gillick, Wicht & Prachthauser, by **Attorney George F. Graf,** 300 North Corporate Center, 300 North Corporate Drive, Suite 260, Brookfield, Wisconsin 53045, appearing on behalf of UAW Local Union 1329.

Foley & Lardner, by **Attorney Michael H. Auen,** Suite 3800, 777 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-5367, appearing on behalf of Ray O Vac Corporation.

ARBITRATION AWARD

Ray O Vac Corporation, hereinafter Company, and International Union United Automobile, Aerospace and Agricultural Implement Workers of America UAW, Local Union 1329, hereinafter Union, are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding which provides for final and binding arbitration of certain disputes. A request to initiate arbitration was filed with the Commission on January 17, 2002. Commissioner Paul A. Hahn was appointed to act as arbitrator on February 18, 2002. The hearing took place on April 9, 2002 at the Ray O Vac Corporation plant in Madison, Wisconsin. The hearing was transcribed. The parties were given the opportunity to file post hearing briefs. Post hearing briefs were received by the Arbitrator on May 20, 2002. The parties declined to file reply briefs. The record was closed on May 20, 2002.

ISSUE

The parties stipulated to the following issue:

Whether the grievant was discharged by the Company for Just Cause? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE IV – MANAGEMENT RIGHTS

Consistently with the provisions of this Agreement, the management of the plant and direction of the working forces, including the right to hire, distribute overtime, suspend or discharge for just and proper cause, and the right to transfer or relieve employees from duty, because of lack of work, or other legitimate reasons, is vested exclusively in the Company.

For the practical and successful conduct of this business, it is imperative and agreed that every employee shall follow the instructions of his supervisor and that in cases where he disagrees with the supervisor's interpretation of the contract or feels that he is unfairly dealt with by any direction, he shall take the matter up as outlined in the applicable grievance procedure. It is agreed that failure of an employee to follow instructions of his supervisor constitutes cause for disciplinary action including discharge.

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ARTICLE XIV – GENERAL PROVISIONS

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Section 5. When a suspension, disciplinary layoff or discharge of an employee is contemplated, the employee, where circumstances permit, will be offered an interview to allow him to answer the charges involved in the situation for which such discipline is being considered before he is required to leave the plant. An employee who, for the purpose of being interviewed concerning discipline is called to the plant or removed from his work to the supervisor's desk or office or called to an office, may, if he so desires, request the presence

of his steward to represent him during such an interview. All warning notices (excluding notices of suspension and discharge) will be in effect for a period of one (1) year from the date the latest warning is issued.

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ARTICLE XX – GRIEVANCE PROCEDURE

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Section 2.

. . .

(a) Such arbitrator shall have no power or jurisdiction to change, add to or subtract from the terms of this agreement. Such arbitrator shall have no power to modify or nullify any of the provisions of this agreement for the purposes of a particular case. The arbitrator shall issue a decision within ninety (90) calendar days after submission of final briefs.

. . .

(i) Neither party will be permitted to assert in any arbitration proceeding any ground or to rely on any evidence not previously fully disclosed to the other party.

STATEMENT OF THE CASE

This arbitration involves Ray O Vac Corporation and UAW Local 1329. (Jt. 1) The Union alleges that the Company violated the collective bargaining agreement by discharging the Grievant without just cause for allegedly failing to be ready to start work at the start of his shift, for taking an unauthorized coffee break and for not following the instructions of a supervisor when instructed to report to work. (Jt. 2)

The Company operates a plant in Madison, Wisconsin which is involved in packaging the Company's product. The incidents that led to the discharge of the Grievant occurred on August 1, 2001. The Grievant was scheduled to begin work at 4:30 a.m. and was assigned to a packaging line designated as the AA ProPack line. This packaging line needs a full crew of

employees to properly function. The Grievant left his home in sufficient time to arrive at work and begin his shift on time, but while driving to work, he received a speeding ticket, resulting in him being late for work. At approximately 4:36 a.m., the Grievant used a plant telephone to call the production superintendent's office and spoke to supervisor Nowaczyk. The Grievant asked whether he was needed to work that day and was told that he was needed and that he should report to his line. Production superintendent Tesmer, who was responsible for Grievant's assigned production line, the AA ProPack line, found that the Grievant was not at his work station at 4:30 a.m. as scheduled. To get that line staffed and running Tesmer took an employee off the C/D Bulk line and put him on the AA ProPack line. The production superintendent was now short of the seven employees necessary to work the C/D Bulk line, an incentive production line. Production superintendent, Tesmer, talked with Nowaczyk, and learned that the Grievant was in the plant. Both supervisors then went to look for the Grievant.

Grievant was not near the time clocks but was found by the two supervisors in the cafeteria where he was getting a cup of coffee and talking with the employee in charge of the cafeteria. Production superintendent Tesmer, upon observing Grievant getting a cup of coffee, told Grievant that he was needed on his scheduled line and for him to get going. The Grievant responded that he did not like what he perceived to be harassment by the production superintendent. While there is dispute between the Grievant and the supervising representatives of the Company about how many times Grievant was directed to go to work and how many times the Grievant stated that he did not like to be harassed, the Grievant ultimately followed the supervisors downstairs to the production line.

At about 5:05 a.m., when the employees on Grievant's production line changed job positions, the Grievant went to the production superintendent's office and told Tesmer that he was sick and that he was going to leave at first break. At the first break, the Grievant left work. The record is in dispute between the Grievant and Company representatives as to when the Grievant informed the supervisors that he was sick; the Grievant testified that he told Nowaczyk when Grievant inquired whether the Company needed him to work; Company witnesses testified that Grievant never indicated he was sick until he stopped by the superintendent's office at 5:05 a.m. and said that he was going to leave at first break because he was sick. There is also a dispute between the parties, as represented by their respective witnesses, whether Grievant's absence on his line and the removal of an employee from the C/D Bulk line caused disruption to production. A Union steward testified that the C/D Bulk line ran without the employee transferred to the AA ProPack line because of the Grievant's absence at the start of the shift although not as effectively; Company witnesses testified that both lines did not run as effectively or at all until Grievant arrived at the AA ProPack line and the replacement employee transferred back to the C/D Bulk line at about 4:50 a.m. At that point, both lines were running with a full compliment of employees.

The Company regarded Grievant's punching the time clock and then going to have coffee as an unauthorized break. The Grievant should have gone directly from the time clock to his work station. The Company further justified its discharge on the basis that when instructed by Nowaczyk and production superintendent Tesmer in the cafeteria to leave the cafeteria and get to his scheduled work station, the Grievant failed to follow that direction and was passive-aggressive toward his supervisors by accusing them of harassing him. The Company also took into account in its discharge decision three previous disciplines to the Grievant: May 2, 2001 where the Grievant received a written warning for using work time to make personal phone calls, (Ex. 5) a verbal warning for unsafe conduct with a fork lift on May 7, 2001 (Ex. 6) and a two and one-half day suspension without pay for using abusive language toward his supervisors on February 21, 2001. (Ex. 7)

The parties processed the discharge of the Grievant through the contractual grievance procedure but were unable to reach a resolution. The matter was appealed to arbitration. No issue was raised as to the arbitrability of the grievance. Hearing in the matter was held by the Arbitrator on April 9, 2002.

POSITIONS OF THE PARTIES

Union position

The Union's position is that while Grievant's actions were not totally appropriate on August 1, 2001, those actions did not warrant the discharge of a 15-year employee who had a good employment record until his last year of his employment. The Union argues that on the morning of August 1, 2001, the Grievant was sick but decided to come to work and would have been on his scheduled line at 4:30 a.m. except that he received a traffic ticket on his way to work. The Union, based on the Grievant's testimony, takes the position that Grievant told his supervisor when he got to the plant that he was not feeling well and that the supervisor told him that it was the Grievant's decision whether he worked or not. Despite his not feeling well, the Grievant punched in and went to his locker which is next to the cafeteria and, since his route to his work station went through the cafeteria, he stopped to get a cup of coffee and briefly told the cafeteria employee about his traffic problem.

The Union argues that when supervisors Tesmer and Nowaczyk found Grievant in the cafeteria they only had to tell him once to get to his work station and that the Grievant immediately followed the two supervisors to his work station. Grievant admitted that he told the supervisors that he felt they were harassing him; however, the Union points out that there is no evidence in the record of any orders being given nor of any refusal of any order. The Union argues that these interactions between the supervisors and Grievant from the cafeteria to

his work station cannot under the evidence be considered insubordination. In fact, the Union submits it was Tesmer who acted irrationally and caused the harassment statement from the Grievant by Tesmer confronting the Grievant in the cafeteria even though Tesmer had been told by Nowaczyk that the Grievant was in the plant and was on the way to his work station.

The Union refutes the Company's position that the Grievant's absence caused production problems. The Union relies on the testimony of Union officer Meyer that no one was removed from the C/D Bulk line but in fact an employee was brought down from the labor pool which is set up to cover absences. The Union argues that there was no lost production and that the lines operated efficiently. Further the Union submits these lines can and do operate temporarily without a full compliment of employees.

The Union takes the position that Grievant did not take an unauthorized break. Grievant did not stop to take a break after he punched in on August 1st but merely stopped to get a cup of coffee on the normal route he would take from his locker, to pick up his shoes and safety glasses, to go back downstairs to his scheduled line.

The Union argues that some penalty may have been appropriate but certainly not discharge. The Union submits that the Company has handled incidents similar to August 1st involving other employees by giving those employees a written warning or at most a modest suspension. Lastly, the Union points out that the Grievant is a 15-year employee and the evidence from the incidents on August 1 does not establish a reason for discharge. The Union submits this is particularly true as the Grievant was sick and still came to work and Grievant's actions were caused by the Company's reactions which border on harassment. Ultimately, the Union posits, the Grievant should never have consented to come to work and should not be fired because he tried to accommodate the Company's needs.

In conclusion, the Union submits that for the reasons discussed herein, the Arbitrator should sustain the grievance, setting aside the discharge of the Grievant and fashioning an appropriate remedy based on the facts presented.

Company Position

The Company takes the position that the discharge for events that occurred on August 1 be considered in light of the fact that in the previous six months before August 1, 2001 the Grievant, as noted above, had been disciplined three times for abusive language toward a supervisor, which resulted in a two and one-half day suspension without pay, a written warning for using work time to make personal phone calls and a verbal warning for unsafe conduct with a forklift. The Company notes that all the discipline was in writing and that each

of the disciplinary documents informed the Grievant that future inappropriate behavior could result in more severe disciplinary action, specifically including discharge. The Company argues that the Grievant acknowledged at hearing that he understood that discharge could result for any additional inappropriate conduct. The Company also notes that none of the aforementioned discipline was grieved.

The Company submits that when Grievant arrived at work at 4:36 a.m. on August 1, 2001, he spoke with supervisor Nowaczyk and discussed whether he was needed to work. Nowaczyk told him that he was needed to work. The Company argues that the testimony from Nowaczyk is conclusive that the Grievant at that time never told Nowaczyk that he was sick. Shortly thereafter Tesmer, the production superintendent who was responsible for the AA ProPack line, found that Grievant was not at his work station at 4:30 a.m. and in order to get that line staffed and running he took an employee off the C/D Bulk line and put him on the AA ProPack line. Because Tesmer was now short on the C/D Bulk line he went to see Nowaczyk for help. Nowaczyk told Tesmer that the Grievant was in the plant and both went looking for him. The Company submits that Tesmer had to ask the Grievant in the cafeteria no less than three times to come to work and that the Grievant delayed and procrastinated by going to the condiment table for sugar and/or cream and then slowly proceeded to follow the supervisors downstairs to the production lines. The Grievant did not hurry and in fact took his time and on several occasions accused the supervisors of harassing him and at no time did he say that he was sick.

The Company submits that when the Grievant went to speak with Tesmer at the production office at 5:05 a.m. it was the first time that Grievant announced to anyone in management that he was sick and stated then to Tesmer that he was leaving at least in part because he did not need the harassment that he felt he was receiving from Company representatives.

The Company submits that the C/D Bulk line, because of the transfer of an employee to the AA ProPack line, did not run for the first 20 minutes on August 1, 2001, and that without the employee transferred to the AA ProPack line, the C/D Bulk line, which normally needs a crew of seven employees, did not operate efficiently. Because the CD Bulk line is incentive production, employees can make their incentive only when the line runs efficiently.

The Company then summarized its argument by stating that Grievant did receive progressive discipline and that Grievant knew and understood that future misconduct such as occurred on August 1, 2001 could result in discharge. The Company submits that the Grievant did three things wrong on August 1, 2001, first by taking an unauthorized break in that he punched in and then was getting coffee and socializing with an employee in the cafeteria before coming to his work station. Second, the Company submits the Grievant was non-cooperative with supervisors Tesmer and Nowaczyk and became passive-aggressive with the two

supervisors by continually claiming that he was getting harassed and Grievant delayed going to his line to make the point that he was being harassed. Third, the Company argues that the Grievant was not actually sick but continued this passive-aggressive behavior to carry out the Grievant's view that he was being harassed and that this allowed him to avoid his work assignment.

The Company notes that the collective bargaining agreement is very clear that "the failure of an employee to follow instructions of his supervisor constitutes cause for disciplinary action including discharge." The Company argues that the Grievant is not a candidate for leniency, that he had a serious recent disciplinary record, and that his conduct was deliberate and intentional as opposed to negligent and that he plainly did not get the message from the previous progressive discipline. The Company submits to the Arbitrator that employees have an obligation to comply with reasonable instructions such as "we need you on the line" and that the Company has an obligation to maintain discipline and order in the work environment. Intentional, uncooperative behavior, the Company submits, even if done in a passive-aggressive manner, is improper and serious and warrants discharge.

Further, the Company argues that the Union's position that the Grievant received disparate treatment fails because the Union only attempted to prove disparate treatment by submitting the disciplinary record of just one other employee, by the name of White. White was disciplined in 1994 with a five-day suspension for avoiding work. A second suspension of ten days resulted from a mitigation of a termination decision but that the reason for the mitigation was never entered into the record. The Company argues that one example of perhaps different discipline for a similar occurrence, which the Company argues was not as serious as the Grievant's, does not result in proof of disparate treatment.

The Company submits to the arbitrator that the general view of arbitration case law is that arbitrators do not sit to impose personal standards of discipline or a standard that is unpredictable, despite Union arguments to the contrary. Most arbitrators, the Company argues, believe that if management has acted in good faith on accurate facts and there is no existing proof that the discipline is different than that imposed in other cases, management's decision should not be disturbed. With this line of argument, the Company submits, the penalty issue is not whether what the Grievant did on August 1, 2001, warrants termination, it is his past record that make this discharge proper and for cause even if there is debate about the seriousness of his conduct on August 1, 2001.

In conclusion the Company submits that the Grievant's termination in the circumstances set forth in the record was for cause and the grievance should be denied.

DISCUSSION

This arbitration involves the discharge of the Grievant from his employment with the Company on August 3, 2001 for incidents that occurred on August 1, 2001. (Jt. 2) The Union alleges that the Company violated the parties' collective bargaining agreement because the Company did not have just cause for the discharge. (Jt. 1 & 2) The record establishes three reasons for the discharge: the taking of an unauthorized break; failure to follow a directive of a supervisor to get to work; insubordination by the continued accusation by the Grievant to a supervisor that the supervisor was "harassing" the Grievant. The Company also took into consideration in making its discharge decision three previous disciplines of the Grievant in the six months previous to August 1, 2001. (Jt. 2, 5, 6, & 7) The facts are not in dispute except as described above.

I find that the record establishes that the Grievant took an unauthorized break after he punched the time clock on his arrival at work on August 1, 2001. It really does not matter if the Grievant was late, or was sick, which is disputed, the rule of the plant is that once an employee punches the time clock, the employee is expected to go straight to his assigned work station. This the Grievant clearly did not do; he instead went to his locker and then went to get a cup of coffee and took time to tell the employee in charge of the cafeteria about a traffic ticket he received on the way to work that morning. (Er. 3, Tr. 69 & 70) Grievant knew that he was to be at his work station on the AA ProPack line at 4:30 a.m. He was admittedly late when he punched in at 4:36 a.m. which if anything should have encouraged or required him to hasten to his work station as he knew or should have known that his absence might cause problems with starting the production line to which he was assigned. Once he was in the plant and was told by supervisor Nowaczyk that he was needed, whether he told Nowaczyk that he was sick or not as Nowaczyk testified, Grievant took his time getting to work. (Jt. 2) If an employee is a team player, as alleged by the Union for working even when sick, the employee should not have to have two supervisors come look for him to get him to work after the employee is on the clock.

The Union argues that this short period of time was not a big deal as there was no lost production. However I accept the Company's factually supported position that it had to transfer an employee from the C/D Bulk line to Grievant's line in order to get production started. (Er. 3 & Tr. 13 & 14) Union witness Meyer testified that the Bulk line on which he was assigned can run with one less employee and disputes that an employee was transferred. (Tr. 121) But Meyer also testified that the line for twenty minutes operated with only six employees and did go down more than once until the seventh employee was on the line at 4:50 a.m. (Tr. 115 & 116) I credit supervisor Tesmer's testimony that he did transfer an employee off Meyer's C/D Bulk line because of Tesmer's contemporaneous notes of the August 1 incident. (Er. 3) I credit that the Company did lose production on August 1st, particularly on the C/D Bulk line, an incentive based production line. Grievant's unauthorized break mattered.

I find that the Grievant failed to properly respond to Tesmer when directed by Tesmer to get to work. I credit Tesmer and Nowaczyk over Grievant that when Tesmer said "Doug, we need you on your line, let's go", Grievant failed to respond in a timely manner. This may not have been a direct order and it may not have been a direct refusal on Grievant's part but insubordination can occur from an improper response by an employee to a directive or request from a representative of management. Had Grievant responded immediately it might be a different story, but he did not. (Tr. 16 & 51) Unfortunately for Grievant, his attitude exemplified by the incidents in the three previous disciplines and his accusation of harassment does not help him when trying to convince me that his testimony that he followed Tesmer downstairs to the line immediately is accurate. The Grievant admits he knew he should have been working rather than getting coffee and talking with the cafeteria attendant. (Tr. 77) Grievant admits he accused Tesmer at least once of harassing him and he admits he 'blows up' easily. (Tr. 78, 82 & 84) These actions by Grievant do not support a finding contrary to Tesmer and Nowaczyk that he responded immediately to the directive to go down to his assigned job.

The accusation by Grievant that Tesmer was harassing him is really tied to the previous discussion. I have treated it separately because the Union argues that Tesmer, by his actions, caused the reaction from Grievant and therefore it was really Tesmer's fault. It is a good argument to advance on behalf of the Grievant, but I reject it. I simply do not believe it is harassment for one or two supervisors to look for Grievant when he is in the plant but is not at his work station and two production lines are being affected. I recognize that supervisors are under pressure from their bosses to get production running on time. If one looks closely at the language all witnesses agreed Tesmer used to get Grievant to his job, it was hardly language that would indicate that Tesmer was mad or should have elicited a response by Grievant that he was being harassed. Grievant could have and should have responded to Tesmer's statement that he was needed and let's go by saying I am on my way and been so. Yet, Grievant takes his time and accuses Tesmer of harassing him on several occasions which I credit over Grievant's testimony that he only said it once. (Tr. 16, Er. 3,Tr. 70) Although Nowaczyk only heard Grievant make the harassment statement once, as the Union argues, the record indicates that Nowaczyk may not have heard the statement even once as he testified that he went into the bathroom after Tesmer's first directive to Grievant that Grievant was needed on the line. (Tr. 51)

I find that the use of the harassment language by Grievant to be insubordination when looked at in the light of his abusive language toward two supervisors, one of whom was Nowaczyk, in February of 2001 for which he received a two and one-half day suspension. (Tr. 53 & 54 and Er. 7) These types of statements toward management representatives are and can become a not so subtle form of intimidation toward supervision that

can lead to a reluctance by supervisors to carryout the directives toward Grievant that are necessary to run the plant. The statements can also have an adverse effect on the discipline that is necessary in any employment situation to ensure an environment that is conducive to order and efficiency.

I find that the Company has proven that Grievant violated the Company's code of conduct contained in the employee handbook for which the Grievant acknowledged receipt and an awareness of its terms. (Er. 8 & 9, Tr. 47 & 48) Grievant took an unauthorized break and was insubordinate on August 1, 2001.

The issue then becomes did Grievant's actions warrant discharge. I find that coupled with the three disciplines against Grievant in February and May of 2001, which Grievant did not challenge by filing a grievance, the Company did not arbitrarily or unreasonably discharge the Grievant. The Union makes a disparate treatment argument. The Union argues that employee Leo White who was disciplined twice in 1994 and once in 1997 with five and ten day suspensions is proof that the discharge of Grievant was excessive discipline of Grievant after fifteen years of employment. (Er. 11 & 12 & U. 13) White's first two disciplines were for refusal to do a job assigned to him and the last discipline was for belligerence toward co-workers. While there are similarities, the facts of the incidents of White and Grievant are different and White's most recent discipline occurred over four years ago. I also do not believe disparate treatment is shown by one example unless the situations are similar and of recent vintage. As confirmed on the record, the White discipline is the only situation the Union brought forth to prove the disparate treatment argument. (Er. 14 & 15 & Tr. 133)

I am not unmindful of the significance of upholding a discharge of a fifteen year employee. But I cannot say that the Company did not have just cause or was arbitrary in its discharge decision. Grievant's actions and resulting discipline in the six months before his discharge are not indicative of a fifteen year employee who values his job with this Company and I find the Company met the just cause standard.

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

AWARD

The Company did not violate the collective bargaining agreement when it discharged the Grievant. The grievance is denied.

Dated at Madison, Wisconsin, this 7th day of June, 2002.

Paul A. Hahn /s/

Paul A. Hahn, Arbitrator

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