

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
UNITED STEELWORKERS OF AMERICA, LOCAL 2138

and

PDM BRIDGE COMPANY

Case 2
No. 61200
A-6016
(Tim Murphy Discharge)

Case 3
No. 61274
A-6018
(Josh Sanders Discharge)

Appearances:

Murphy, Gillick, Wicht & Prachthausen, by **Attorney George Graf**, 22370 West Bluemound Road, Suite 204, Waukesha, WI 53186, appearing on behalf of Steel Workers Local 2138.

Harvey, Pennington, Cabot, Griffith & Renneisen, LTD., by **Attorney Christopher Murphy**, Eleven Penn Center, 1835 Market Street, 29th Floor, Philadelphia, PA 19103-2989, appearing on behalf of PDM Bridge Company.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, United Steel Workers of America, Local 2138 (hereinafter referred to as the Union) and the PDM Bridge Company (hereinafter referred to as either the Company or the Employer) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff to serve as arbitrator of two cases, involving the terminations of employees Tim Murphy and Josh Sanders. A hearing on the Murphy termination was held on August 12, 2002, at the Company offices in Eau Claire, Wisconsin. The hearing on the Sanders termination was held on August 22, 2002, also at the Company offices. No transcript was made of the hearings. The parties submitted post-hearing briefs, the last of which was

received on December 2, 2002, whereupon the record was closed. Because the cases involved the same incident, they were consolidated for argument and decision. Now, having considered the evidence, the arguments of the parties, the relevant contract language and the record as a whole, the undersigned makes the following Arbitration Award.

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.

ISSUES

In the course of the hearing, the parties agreed to withdraw any procedural arguments connected to the cases. The parties stipulated that the substantive issues before the Arbitrator are:

1. Was the Grievant, Tim Murphy, discharged for just cause and, if not, what is the appropriate remedy? And,
2. Was the Grievant, Josh Sanders, discharged for just cause and, if not, what is the appropriate remedy?

CONTRACT LANGUAGE

ARTICLE XII DISCHARGE

Nothing in this Agreement shall prevent the Company's right to discharge its employees for cause. If any employee is discharged or given a lay-off as a matter of discipline, such employee shall be given the reason in writing within three (3) working days of such action, but if an employee governed by this Agreement believes he/she has been discharged for Union activity, or that he/she has been dealt with unjustly as a result thereof, he/she shall have full right of grievance under Article XI hereof, if so requested by written letter or grievance to the Union and Company within three (3) working days after receiving such notice. If the action was without just cause, the Company shall reinstate the employee with back pay.

Prior to such action becoming effective, a meeting between Company representatives, the Local Union Grievance Committee and the employee involved shall be held to review the intended discipline in an attempt to

determine if the disciplinary action is for just cause. However, the Company has the right to make the final decision with regards to the disciplinary action to be taken.

BACKGROUND

The Company fabricates the components of steel bridges at a plant in Eau Claire, Wisconsin. The Union is the exclusive bargaining representative of the Company's production and maintenance employees. Grievant Tim Murphy was employed by the Company from 1980 through his discharge in March of 2002. At the time of his discharge, he was a Leadman on the second shift. Grievant Josh Sanders was employed by the Company from 2000 until his discharge in March of 2002. At the time of his discharge, he was working with Murphy's second shift crew, running the Travel Lift transporting steel at the Company's Pangborn Shop.

Both men were discharged as the result of a report that Sanders made about an alleged physical attack by Murphy on the 2:00 p.m. to 10:00 p.m. shift on March 6, 2002. They were working in a three-man crew, moving large steel girders into position for blasting and painting. Murphy was the Leadman, Sanders was operating the Travel Lift, and Harvey Horel was the third man on the crew. Murphy believed Sanders was operating the lift improperly and using the wrong route to move steel from the yard. He yelled up to Sanders, to no effect. Murphy then made a sarcastic comment over the radio he carried to communicate with the cab on the Travel Lift, that since Sanders knew so much, he should just bring the girder in and blast it. At the 8:00 break, Sanders got out of the cab and went to express his displeasure with Murphy's sarcasm, since radio transmission can be heard by everyone with a radio at the plant. Murphy told Horel to go ahead and take his break, and he and Sanders remained in the yard.

The events immediately after Horel left are the basis for these discharges and Sanders and Murphy are the only witnesses. The two men disagree about what happened:

According to Sanders, on the lift just before the 8:00 break, the girder was in an awkward place and he and Murphy disagreed about how best to move it. Murphy suggested a maneuver that Sanders believed would have caused him to collide with another girder, so he mouthed the words "No, I can't" and backed the lift up. In the course of this, he knocked over some 4" by 4" pieces of wood used in the yard, but that it a common occurrence. Murphy then came on the radio and told him that if he knew what he was doing so well, he should just take the girder in and blast it. He was offended that Murphy would denigrate him over the radio, and when the lift was done and the Travel Lift was shut down for the break, he got out and asked Murphy "What's the bullshit on the radio?" Murphy started screaming that he was a punk kid, then told Harvey Horel to "take a fucking hike."

Horel left for his break, and Sanders lit a cigarette. Murphy started to walk back towards a storeroom and gestured for Sanders to follow him. He was still screaming about Sanders being a snot-nosed kid. Sanders did not follow him because he knew Murphy had a bad temper and he was afraid of him. When Murphy got about 30 feet away, he turned and came back, still yelling. Murphy came up and told him he'd give him \$500 to punch out and go home. Sanders asked why he should and Murphy told him that if he didn't, he wouldn't be going home. Murphy then abruptly cocked his head back and head-butted him in the nose and mouth. Murphy said he could "take that to the fucking bank." Both men then walked inside the paint shop to take their break.

Sanders testified that he did not know what to do. He spoke on the telephone with his girlfriend, then went back and finished out the shift without speaking with Murphy. At the end of the shift, he went to office of Finishing Department Supervisor Tim Tubbs. He told Tubbs about the assault and asked what he should do. Tubbs advised him to make a report to Vern Olson, the General Foreman of the Finishing Department. At 5:30 the next morning, he came back and reported to Olson, who had him write up a report.

According to Murphy, Sanders was a know-it-all, who was very difficult to supervise. On a lift before the 8:00 break on March 6th, he could see that Sanders would not be able to get the girder through on the route he was trying to take, and so told him to go in a different direction. Sanders replied "fuck you, I know my job" and continued on. He struck three large steel tubes and knocked down the timbers that were on top of them. Shortly afterwards, Murphy went on the radio and called to Sanders, telling him "I don't mean to patronize you, but this one's ready." When the break came, Sanders got down from the cab and came over to him. He threw his cigarette down, and demanded "What's this bullshit on the radio?" He started to reply, then saw Harvey Horel standing there waiting to go on break. He told Horel to take off.

When Horel left, Murphy started walking towards a storage room at the end of the building and gestured for Sanders to follow him. He was thinking of locking him in the storeroom for the break, as a way of sending him to his room for a timeout. He twice called to Sanders to follow, and after the second time Sanders said "Fuck you – right here," pointing to the ground at his feet. Murphy turned around and started walking quickly back to Sanders. As he approached him, he tripped on a girder, and fell forward into Sanders. He tried to grab Sanders' shoulder to steady himself, but was not able to. His safety glasses struck Sanders, driving them into Murphy's nose, and cutting the side of his nose. He fell to the ground on all fours, and got back to his feet. He continued to argue with Sanders about being totally disrespectful on the crew, and suggested he sign a posting for Leadman on the third shift if he wanted to total control over the job. They continued to argue as they walked into the paint shop for break, with Sanders at one point swinging his elbow as if to keep Murphy away from him. Murphy spent the break in his office, then worked the rest of the shift. The following

day, he was told to report to the office and was confronted about the alleged assault. He admitted saying Sanders was a snot-nosed punk, but denied head-butting him, offering him money to punch out, or threatening that he wouldn't make it home.

Both men were called in for meetings the following day with Company and Union officials, and related their stories. The story told by Sanders essentially tracked his testimony at the arbitration hearing, though he did not mention having knocked over any wooden beams during the lift. Murphy's version was that he was going to grab Sanders and was thinking of locking him in the storeroom for the break, but that he tripped and fell into him. After these meetings, the Company suspended both men, and issued discharge notices the following day. Sanders' termination letter cited the verbiage of item #7 of Section "B" of the Work Rules – "Actions which Shall Be Cause For Immediate Discharge": "Provoking a fight on Company premises" and also referred to a one week suspension imposed on him in January of 2002 for his unsafe operation of a Company pickup truck. Murphy's termination letter cited the verbiage of Rule #8: "Placing a fellow employee in apprehension of harm" and noted that the conduct alleged was similar to past incidents.

Both discharges were grieved to arbitration. At the hearings, in addition to the facts recited above, the following testimony was taken:

Supervisor Tim Tubbs, Foreman Vern Olson and Plant Manager Phil Hoilien all testified that they met with Sanders at various points between the alleged incident and the meeting with the Union on the following day, and that he seemed genuinely fearful and cowed by Murphy, and that his face showed redness and swelling. Hoilien testified that there had been a meeting with Murphy in mid-January, 2000, about his approach to other employees. According to Hoilien, the meeting was called by then-Union International Representative Dave Martin, and Martin told Murphy that he could not threaten or intimidate other employees or make them feel threatened, and that if he did so in the future, Martin would support efforts to terminate him. Hoilien did not know exactly what incident Martin had in mind in calling this meeting. Tubbs and Olson also recalled an incident in which Murphy spoke about having served some time in the county jail for head-butting his son.

Union Committeemen Terry Eisold and Mark Hurlburt both testified that they observed Sanders during the meeting on March 7th, and did not note any sign of injury to his face. Employee Eric Loomis testified that he observed Sanders in the break room between the second and third shifts on the night of March 6th. According to Loomis, Sanders was pacing back and forth, and seemed quite upset, but his face did not show any swelling, cuts or redness.

All of the witnesses from Company and Union agreed that Sanders was a smart-ass, who was very cocky and difficult to work with. They also generally agreed that Murphy was a good worker.

Additional facts, as necessary, will be set forth below.

ARGUMENTS OF THE PARTIES

The Position of the Company

The Company takes the position that each of the Grievants was discharged for just cause. Murphy was discharged for head-butting Sanders, and Sanders was discharged for provoking Murphy. One or both of the Grievants exacerbated the offense by lying to the Company during the investigation and by lying to the Arbitrator under oath at the hearing.

The Company's review of the evidence suggests that Sanders told the truth about the altercation and that Murphy lied. Sanders was consistent in all of the essential details, while Murphy's version varied over time, making himself appear look less culpable as he re-told the story to various people. For example, by the time of the arbitration hearing, Murphy mentioned for the first time that Sanders swung an elbow at him when he approached him, a detail not present in any prior version of the story. Plainly, he was trying to make Sanders appear to be the only bad actor in this event. Murphy's ultimate story makes little sense. While he admits being very angry, he contends he merely tripped as he approached Sanders. While he claims to have fallen into Sanders hard enough to cut his own nose with the collision, he admits that Sanders did not fall. Most significantly, he claims to have intended to verbally correct Sanders for his work performance, yet he sent Horel away beforehand. Horel's presence during a verbal dressing down of Sanders would have made no difference. By sending Horel away, Murphy clearly indicated a more serious intent.

By contrast, Sanders was consistent in the details of his story. His claim that he feared for his safety and that of his girlfriend is consistent with the urgency he showed in trying to communicate with various management representatives. This fear is not what one would expect if Murphy merely fell into him by accident. Overall, Sanders is the more credible witness, and the arbitrator should credit his testimony over that of Murphy.

Just Cause for the Termination of Murphy

Crediting Sanders should lead the Arbitrator to the conclusion that Murphy was terminated for just cause. Intentionally head-butting a co-worker is obviously serious misconduct. Company rules clearly allow immediate discharge for "Provoking a fight on Company premises" and for "Placing fellow employees in apprehension of harm." These rules are reasonable, valid and widely known. Murphy's conduct violates both rules, as well as the accepted norms of any workplace. His behavior is even more outrageous when viewed in light of a prior counseling from the Union's then-District Representative that he must stop his threatening and intimidating conduct towards other employees or be discharged.

The evidence shows that Murphy is an unreformed bully, who has previously threatened co-workers and managers, and been jailed for head-butting his own son. While he is a long service employee, the Company has been more than patient in dealing with him, having reinstated him after a prior discharge for attendance problems and having shown restraint in the face of prior threats. This incident is the proverbial last straw. The Arbitrator should follow the general principles enunciated in his prior awards involving violence and threats of violence, and should conclude that the Company is not required to give this employee yet another chance.

Just Cause for the Termination of Sanders

Sanders, too, was terminated for just cause. Even the Union concedes that he was a short-term, miserable employee who was cocky, careless and difficult to work with. In his short career with the Company, he had repeatedly been counseled about his attitude and his performance and had been suspended for reckless operation of Company equipment. On the night of March 6th, Murphy was plainly wrong to head-butt him. However, Sanders' own conduct helped to create and escalate the confrontation with Murphy. He began by disregarding Murphy's instructions on how to safely and properly move steel. He then challenged Murphy's criticism of his work. When the verbal exchange started during the break, he was a willing participant. Rather than walk away, he engaged with Murphy in what quickly became a heated confrontation, ultimately a physical confrontation. Throughout, he displayed the same defects in judgment and attitude that marked his entire career with the Company. The Company should not be required to retain the services of a short-term employee who refuses to respond to supervision, counseling or discipline, and is nothing more than an accident waiting to happen. Given his prior work record and his role in provoking Murphy's attack, the Arbitrator must conclude that Sanders is every bit as culpable as Murphy. He clearly violated the rule against "Provoking a fight" and the Arbitrator should sustain the Company's decision to terminate him.

The Position of the Union

The Union acknowledges the dilemma posed by an incident in which the only witnesses are the two discharged employees, and about which there is substantial disagreement. However, under any version of events, there are undisputed points. The alleged altercation took place on break time. It involved no loss of work time and no damage to Company property. There was no physical injury of any significance. Given all of this, there is no justification for either discharge.

The Termination of Murphy

Murphy was by all accounts a good worker, with 22 years of service to the Company. On the night in question, he was working as a Leadman, and he performed as a conscientious Leadman would. He had a genuine and justifiable concern at Sanders' unsafe operation of the Travel Lift, which he felt endangered Company property and other employees. He attempted to counsel Sanders over the radio, to no effect. He then approached Sanders on the break, to further explain what was wrong with his attitude and his performance. Those are actions one would expect of a Leadman. The fact that he stumbled into Sanders is a matter of mischance rather than misconduct and should not rationally trigger a discharge.

The Union argues that the Company had little basis for disbelieving Murphy's version of events. There was no physical evidence to disprove his story, only the unsupported claims of Josh Sanders. The Company had previously branded Sanders a liar, when it discounted his explanation of a truck accident and it had no good reason to believe him now. The essence of the Company's reason for crediting Sanders over Murphy is that Murphy is a big, loud man with an intimidating physical presence, who is rumored to have threatened people in the past. Murphy is who he is, but that does not prove that he did what he is accused of. Just cause to terminate a long-term employee requires more than unsupported accusations and third party rumors. Murphy was terminated for placing a fellow employee "in apprehension of harm." Perhaps Sanders felt apprehensive, but just cause demands that Murphy be judged on the evidence of what he did, rather than how Sanders subjectively felt. The evidence of Murphy's actions is at best inconclusive, and 22 years of service demand that he be given the benefit of the doubt. Accordingly, the Arbitrator should conclude that there was no evidence providing just cause for his termination.

The Termination of Sanders

The Union argues that Sanders is in a real sense a victim of the Company in this matter. He testified that he never would have reported the incident if he had known the Company would make it into a reason to terminate him. Clearly, the Company used his report as an excuse to be rid of any employee it did not want. If, as it claims, the Company is crediting his story, there can be no basis for firing him. He testified, credibly, that he did not provoke Murphy and would not have, as Murphy was much larger than he and was obviously upset. All he was seeking was an explanation for Murphy's criticism of him and he did not need to further antagonize Murphy to accomplish that.

The Company cannot pick and choose which statements to credit and which to discredit between these two men's stories. They believe Murphy is truthful, but only to the extent it supports a finding that Sanders provoked him. They believe Sanders is truthful, but only to the extent that it supports a finding that Murphy head-butted him. They disbelieve both men

where the testimony does not support discipline towards one or the other. Perhaps there is some measure of shared blame here, but that mitigates both men's fault. The Arbitrator may reasonably conclude that both men deserve some discipline, but given the lack of clear evidence against either man, he cannot conclude that both deserve termination.

DISCUSSION

Credibility

The terminations in this case spring from a confrontation between two men on the night shift of March 6th. Sanders claims that Murphy threatened him, and then head-butted him. Murphy claims he did not, that in the course of an argument, he merely tripped and fell into Sanders, injuring himself. This is a credibility case and, as argued by the Union, there is little basis for picking and choosing portions of each man's story to construct a third version of events. They were the only witnesses. Their stories are diametrically opposed as to the basic facts of the alleged attack. Either Sanders is telling the truth and Murphy is lying, or Murphy is telling the truth and Sanders is lying.

In assessing Sanders' story, I note that he is a short-term employee, with a uniformly bad reputation within the Company. On at least one prior occasion, the Company concluded he was a liar, when in January of 2002, he claimed to have been traveling 3-1/2 miles per hour in a Company pickup truck when he had an accident. The Company discounted his claim, in part because the truck left 60 feet of skid marks. Taking all of that to be true, the issue before me is not which Grievant is the better employee. It is which one is telling the truth in this specific case. On the whole, I am persuaded that Sanders is telling the truth and that Murphy is lying.

As noted, the two men are the only witnesses to the incident. There is nothing about either's version that is impossible, although the sequence of events described by Sanders holds together better than does the sequence described by Murphy. Specifically, Sanders described a dispute that built from a verbal confrontation to a threat of violence to an act of violence. Murphy's version starts with a verbal confrontation, proceeds to an effort to lure Sanders into a store room so he could lock him inside, then abruptly ends when, while approaching Sanders to grab him, he stumbled and fell into him. At that point, according to Murphy, the two men walked inside for their break, continuing to argue as they walked. It is not clear why Murphy changed his plans after his fall and while the sharp de-escalation of the confrontation at that point is not out of the question, it does not seem completely plausible.

In addition to the sequence of events, I am influenced by the fact that portions of Sanders' story, notably the claim that Murphy offered him \$500 to punch out for the remainder of the shift, have the proverbial ring of truth. That is an admittedly imprecise standard, but the

statement is the kind of detail that only a very accomplished liar would think to incorporate. It adds nothing in particular to the basic claim of an assault, but it is consistent with an exasperated Leadworker trying to show his contempt for an annoying subordinate.

More than the two men's versions of events, I find support for Sanders' claims in the observations of Tubbs, Loomis, Olson and Hoilien to the effect that Sanders seemed terribly upset after the shift on March 6th. Given his temperament and regular run-ins with co-workers and supervisors, the argument described by Murphy would not be expected to cause that strong a reaction. According to Murphy, Sanders was anything but cowed as they walked back into the building for their break. Yet those who spoke with him found him fearful and very distressed, an attitude completely out of character for someone who was consistently described as cocky to the point of arrogance. Sanders' conduct in the wake of the incident is consistent with his story and inconsistent with Murphy's denials.

I also find credible the claims of the supervisors that they noted a redness and swelling around Sanders' face in the wake of the incident. While the Union committeemen all said they observed no injury or discoloration, they observed Sanders in the afternoon of the following day, and it may well be that the swelling had subsided. In crediting the supervisors, I have considered their lack of any evident motive to lie for Sanders. He was a short-term employee who was generally seen as a problem, while Murphy was a long-term employee who was conceded to be a skilled and good worker. There was no reason for the supervisors to target Murphy. Given a choice between the two, management would have better cause to keep Murphy on the payroll and be rid of Sanders.

Just Cause for the Discharge of Murphy

Weighing the record as a whole, I am persuaded that Murphy did, in fact, deliberately strike Sanders with a head-butt. Murphy is a long service employee, but he a long service employee who is guilty of a very serious offense. He is also an employee who had been personally warned just two years earlier against making threats, in a meeting called for that specific purpose, and told that conduct of that type would lead to discharge. The rules themselves are absolutely clear that immediate discharge is the penalty for this conduct and there is no evidence of a physical assault in which the guilty party was treated more leniently than was Murphy. The issue on penalty is whether the penalty selected is grossly out of proportion to the offense, or is inconsistent with the penalties imposed on other, similarly situated employees. On this record, I cannot make either finding. The Company could plausibly have given Murphy a lesser sanction, but it is not obligated to do so. For that reason, I conclude that there was just cause for the discharge of Tim Murphy.

Just Cause for the Discharge of Sanders

Sanders was discharged for provoking a fight on Company premises. In arguing for its decision, the Company asserts that he was the aggressor in approaching Murphy and prompting the assault. As noted above, however, the Company cannot pick and choose the elements of

each man's story, crediting Murphy for the sole purpose of painting Sanders as the aggressor, while crediting Sanders solely on the assault charge. In deciding to discharge Murphy, the Company chose to credit Sanders, and I have concluded that that was the correct choice. According to Sanders, he did approach Murphy and ask what the bullshit on the radio was all about, but after that Murphy was the moving party in escalating the confrontation from words to a physical assault. Murphy's sarcasm on the radio was obviously intended to insult Sanders, and it did. The fact that Sanders responded by demanding an explanation is not surprising and Murphy could not reasonably have seen it as some sort of provocation. It was precisely the response he should have expected.

Sanders may be every bit the terrible employee the Company describes him as being, but he was not discharged for being a terrible employee. He was discharged for provoking a fight. His conduct on the night of March 6th may have been annoying to his Leadman, but a reasonable person would not expect it to prompt an attack by the Leadman. That it did was Murphy's fault, not Sanders', and I cannot find on this record that there was just cause to terminate Josh Sanders for his role in Murphy's attack. The appropriate remedy is, according to the contract and to the normal principles applicable to arbitration, reinstatement and backpay for the period of the discharge, as well as removal of the discipline from his record.

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

AWARD

1. The Grievant, Tim Murphy, was discharged for just cause. His grievance is denied.
2. The Grievant, Josh Sanders, was not discharged for just cause.
3. The appropriate remedy is to immediately reinstate Josh Sanders to his position, remove the references to the discharge from his personnel file, and to make him whole for his losses.
4. The Arbitrator will retain jurisdiction for a period of thirty days from the date of this Award for the sole purpose of clarifying the remedy, if requested.

Dated at Racine, Wisconsin, this 27th day of March, 2003.

Daniel Nielsen /s/

Daniel Nielsen, Arbitrator

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