BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS UNION, AFL-CIO, DISTRICT LODGE 10, LODGE 2560

and

BALL METAL BEVERAGE CONTAINER CORP.

Case 1
No. 65113
A-6182

Appearances:

Yingtao Ho, Attorney at Law, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

Robert McClelland, Associate General Counsel, Law Department, 10 Longs Peak Drive, Broomfield, Colorado 80021, appearing on behalf of the Employer.

ARBITRATION AWARD

International Association of Machinists And Aerospace Workers Union, AFL-CIO, District Lodge 10, Lodge 2560, herein "Union," and Ball Metal Beverage Container Corp., herein "Employer," selected the undersigned from a panel of arbitrators provided by the Federal Mediation and Conciliation Service to act as neutral arbitrator in the matters specified below. Subsequent to that designation, the undersigned became employed as a member of the staff of the Wisconsin Employment Relations Commission, herein "WERC." The parties thereupon agreed to have the undersigned appointed by the WERC from its staff to act as neutral arbitrator in the dispute specified below. The WERC appointed the undersigned to so act. The undersigned held a hearing in Glendale, Wisconsin, on September 7, 2005. Each party filed post-hearing briefs, the last of which was received October 6, 2005.

ISSUES

The parties were unable to agree to a statement of the issues. They agreed that I should state them. I state them as follows:

1. Is the grievance substantively arbitrable?

2. If so, did the Employer suspend Grievant Joe Hoefs for cause within the meaning of Article 3, Section 1 of the parties' collective bargaining agreement?

3. If not, what is the appropriate remedy?

RELEVANT AGREEMENT PROVISIONS

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ARTICLE 3
MANAGEMENT

Section 1. Except as otherwise expressly provided in this Agreement, the rights of management of the plant and the direction of the working forces and of the general affairs of the Company shall be vested entirely and exclusively in the Company. These rights shall include, but not be limited to:

A. The right to . . . suspend or discharge for cause. . .

. . .

ARTICLE 4

GRIEVANCE PROCEDURE

. . .

Section 2. . . . . If not resolved, the grievance shall be reduced to writing on a regular grievance form, signed by the employee or employees aggrieved, and shall be appealed to the second step within three (3) crew working days . . . .

. . .

ARTICLE 21

COOPERATIVE PARTNERSHIP AGREEMENT

. . .

Section 3. Partnership Structure.

. . .

D. Local Roles and Responsibilities

. . .

7. Support work environments built on fairness and commitment to improving the quality of employees' work life:

. . .

RELEVANT WORK RULES

. . .

Any employee who fails to maintain at all times proper standards of conduct or who violates any of the following rules or Ball policies shall be subject to disciplinary action up to and including discharge of employment.

. . .

16. Carelessness resulting in damage to company equipment, material, products or property.

. . .

18. Any violation of a safety rule or practice, including the unauthorized starting of equipment and/or unsafe use of any equipment, machinery or mobilized devices (forklifts).

. . .

22. Failure of an employee to perform his/her assigned job in a safe, capable and efficient manner when the employee is capable of doing so.

FACTS

The Employer is a multi-state producer of containers. The Milwaukee plant was originally built by Miller Brewing to provide its needs for beverage containers. It was sold several times. Ball Corporation became its most recent owner in August 1998, and has

assumed its predecessor's collective bargaining agreement. The Milwaukee plant produces two-piece beverage containers which are primarily provided to Miller Brewing on a "just-in-time" basis. It also sells some of those containers to other customers and also makes a line of plastic containers for other food items.

Grievant, Joe Hoefs, is a forklift driver. This case involves an accident he had on October 18, 2004. He is in the bargaining unit. Forklifts present serious safety issues. OSHA requires that forklift operators be trained and licensed by the Employer in accordance with its regulations. Each operator is required to receive four hours classroom training and to be evaluated while operating a fork lift before receiving a license. Each employee is required to be retrained and re-licensed every three years. Mr. Hoefs had about three years' experience at the time of this accident. He had gone through re-training shortly before this accident.

The facts of the accident are not in dispute. Mr. Hoefs was driving the forklift to which he is ordinarily assigned on October 18. The low fuel siren sounded. He started to drive his fork lift toward the fuel area. He passed his supervisor, Mr. Dean Stockfish who was then talking to another person. Mr. Hoefs and all forklift drivers ordinarily carry heavy gloves. Some of them use the gloves to avoid getting dirty from the steering wheel of the forklift. Others use them while fueling the forklift. All of the drivers use them while fueling. One of Mr. Hoefs' gloves fell to the floor boards near the operating pedals while he was driving. He did not immediately grab for the glove as it fell. He then reached for the glove and took his attention away from controlling the forklift. He rammed an I-beam with his forklift. The forklift has two forks with two tines each. One of the tines pierced the I-beam and the other was slightly bent, all on one of the two forks. Mr. Stockfish went over to investigate and asked Mr. Hoefs what happened. Mr. Hoefs stated that he was reaching for his glove when he unexpectedly hit the I-beam.

The tines had to be bent back into shape by the forklift truck repair agency at a cost of less than $310. The Company engineer was called to assess the structural damage to the I-beam. He sought an outside assessment of the damage. The assessment was done long after the accident, on January 28, 2005. It cost $355. They concluded that the I-beam could be repaired with a weld which was performed by the in-house welding crew at nominal cost.

The Employer is committed to workplace safety, as is the Union. There have been a number of accidents involving forklifts in the past. The Employer has ordinarily imposed a written or verbal warning on permanent employees for errors in judgment leading to accidents. It has suspended at least one employee who had an accident while driving a scrubber. It has discharged some probationary employees for forklift accidents under circumstances it appeared that they would not become successful employees. It has not done so in other circumstances where it concluded the error was related to inexperience on the job and that the employee was likely to become a successful employee.

It chose to impose a one-day suspension in this case. It has not done so to a non-probationary employee in the past. It should be noted that the warehouse is relatively new. Some of the earlier accidents were partially attributed to factors relating to the new structure and the employees' inexperience in dealing with it.

The Union filed the instant grievance at the third step in accordance with Article 4. The parties met at the third step and discussed the grievance. The discussion was based primarily on the Union's allegation that the discipline imposed in this case was more severe than that ordinarily imposed for similar conduct and, therefore, was the result of unequal treatment. Further, the Union alleged that when discipline is imposed at this higher level, it has difficulty in assisting in rehabilitating the employee. It does not appear that there was any discussion about the specific provision of the agreement which was applicable. The Employer did not object to having the grievance commenced at the third step and did not allege that the grievance was not substantively arbitrable. The Union properly processed the grievance to arbitration and the Employer first raised the issue of substantive arbitrability at the outset of the hearing.

POSITIONS OF THE PARTIES

The Employer takes the position the grievance is not arbitrable. It notes the grievance specified only that Article 21 was violated and the added page alleges only that Article 21, Section 3, #7 was violated. Article 21, Section 10 expressly precludes the arbitration of disputes over any aspect of Article 21. The Employer alternatively notes that the evidence supports the conclusion that it did not violate the agreement in the level of discipline it imposed on Mr. Hoefs. It notes the Union has conceded that Mr. Hoefs was negligent in operating the forklift. The Employer argues that the evidence supports the conclusion that the level of discipline imposed was appropriate. It points to the testimony of all of its relevant witnesses, Mr. Stockfish, Ms. Vaughan, and Ms. O'Connor, that they all looked at the totality of all of the circumstances surrounding this incident, including the experience of the driver, the cause of the accident, the actual and potential damage to property or persons and the effect on the safety of the plant. The Employer distinguishes the situation involved in this case from all other situations in that Mr. Hoefs deliberately allowed his attention to go away from driving and that he was an experienced driver. The Employer also believes that reducing the penalty in this case would set a dangerous precedent. Accordingly, the Employer takes the position that the arbitrator should not substitute his judgment for that of management.

The Union takes the position that the Employer violated the "cause provision of Article 3 of the parties' agreement by suspending Mr. Hoefs. It does not dispute that Mr. Hoefs was negligent, but does dispute the penalty imposed. While the grievance incorrectly cites Article 21 for the violation, the statement of the case attached to the grievance clearly shows that the Union was arguing that the suspension was without cause. It notes that the parties fully discussed the grievance on the cause theory at the third step and the Employer never argued that the grievance was not substantively arbitrable.

The Union next argues that the suspension was not for "cause" because the evidence shows that Mr. Hoefs was merely negligent, not reckless. It also disagrees with the Employer and argues that the accident involved was minor. The damage to the forklift was only $127 and the damage to the I-beam was only $50. While there was $335 spent on evaluating the I-beam, Mr. Hoefs cannot be charged with the full cost, because there was previous damage to the I-beam. Finally, the penalty issued by the Employer is disproportionate with those penalties issued in other cases. Three other drivers received written warnings and two other drivers received one day suspensions only for their second offense. The decision maker, O'Connor, cited five different reasons for applying an enhanced penalty. They are:

1. severity of the accident
2. willfulness of the conduct
3. other similar violations
4. the amount of damage
5. experience of the driver

In its view, the experience and good record of the driver are mitigating rather than exacerbating factors. There is no evidence this accident had more damage than others. In any event the damage occurred, in part, because the I-beam was previously weakened. Hoefs was operating at one-quarter of his normal operating speed. In its view, the Employer has failed to show he was more negligent than others. The Union asks that the grievance be sustained, the discipline reduced to a written warning, and Grievant be made whole for one day's pay.

DISCUSSION

Statement of the Issue

The parties agreed that I might state the issues. The difference between the parties is that the Employer has raised the substantive arbitrability claim of lack of jurisdiction over a violation of Article 21. Accordingly, it has sought an issue on that subject. The Union believes that the grievance is substantively arbitrable, but has not denied that the issue of substantive arbitrability is properly before me.

The specific issue as to arbitrability relates to the scope of the grievance. The grievance which was filed cited only Article 21 in the upper right-hand and only "Article 21, Section 3, #7" in the attached explanation as the relevant provision, but a fair reading of it demonstrates it also alleges that Mr. Hoefs received a harsher penalty than other employees who had committed a similar offense. Unequal treatment is a common argument made in disputes involving "cause" for discipline under provisions similar to Article 3's "cause" provision.[1] The Employer's implicit position is that the scope of the grievance is limited only to Article 21, while the Union's position is that the scope relates to both Article 21 and Article 3's "cause" provision.

[1] Elkouri and Elkouri, *How Arbitration Works*, (BNA, 6th Ed.), Ch. 15, Section F, pp. 995 *et seq.*

Substantive Arbitrability

The grievance procedure of Article 4, Section 2, requires that grievances taken to the second step be reduced to writing "on a regular" grievance form, but does not otherwise state what the written grievance must contain. It does not include a provision that the grievance must correctly state the agreement provision which the Union alleges was violated. The form used by the parties requires that the grievant state the "nature of the grievance." It also provides in the upper right-hand corner, a blank for a statement of the Article involved. The purpose for writing a grievance in this form is not to require a technically correct, detailed grievance, but to give the Employer a fair notice of the nature of the dispute. Accordingly, a grievance should be liberally construed if it gives the Employer adequate notice of the nature of the dispute, even if there was an error in the specific provision cited. The grievance as written addresses both Article 21 by name and the "cause" provision of Article 3 by the substance of the claim made. The scope of the grievance properly includes arguments under both provisions. Arguments addressed to Article 21 are not arbitrable by the terms of Article 21. The Employer's third step response demonstrates that the parties both addressed their analysis of the grievance to the equal treatment argument. The equal treatment argument essentially is a dispute under the "cause" provision of Article 3. Thus, the grievance gave enough notice of the nature of the dispute that the parties were both able to address the dispute at hand. No one challenged the scope of the grievance on behalf of the Employer at the third step. I conclude that the grievance, properly construed, is addressed, in part, to Article 3, and the Employer was not misled by the error. As such, it is substantively arbitrable.

Cause for Penalty

“Just cause” is an established doctrine long recognized by the courts and arbitrators to have certain elements. One of those elements is that the penalty must fit the nature of the discipline. Thus, the Employer must not only prove in order to show "cause" within the meaning of Article 3 that it has good reason to discipline an employee, but must also show that the penalty it applied fits the misconduct. The parties correctly agree that the Employer had good reason to impose some level of discipline on Mr. Hoefs. Mr. Hoefs allowed himself to be distracted and caused the accident in question by doing so.

The Union primarily disputes the fairness of the penalty. Arbitrators ordinarily give great weight to the expertise and judgment of an employer in choosing the level of discipline to be applied. Arbitrators subscribe to the principle of progressive discipline but look to the practices of the parties as to how that principle should be applied. Employees are entitled to fair treatment, which ordinarily means that they have a right to expect that the amount of discipline for similar infractions will be the same. Since no two circumstances are precisely the same, the doctrine is applied to recognize that there may be minor variations, but the doctrine requires that the employer's choice of penalty be based on sound management reasoning.

The Employer considered the following factors in its decision:

1. the cause of the accident including the culpability of the employee
2. the seriousness of the damage and risks the accident entailed
3. the employee's history of previous accidents and prior work record
4. the Employer's own policies
5. the experience of the employee

These are proper considerations.[2]

The Employer is correct that arbitrators have sustained higher levels of discipline when the negligence of an employee has caused unusually serious and expensive damage. There are a number of circumstances over the years where forklift operators have hit I-beams. Few have resulted in serious damage to the beam. The I-beam involved in this accident had been previously seriously damaged and repaired. I am not satisfied that the level of damage is so extreme as to warrant more severe discipline. I am also not satisfied that the level of damage was the real reason for the higher level of discipline.

The main reason for the Employer's decision was Mr. Hoefs' more serious breach of safety than had occurred in prior accidents. Contrary to the position of the Union, a more experienced employee should have known better.[3] This accident IS more serious precisely because Mr. Hoefs chose to look away and give up reliable control over his forklift. The Employer's main point is that Grievant deliberately chose to reach for the dropped glove without stopping the forklift. There is no doubt under the facts of this case that Mr. Hoef's choice to do so was a "voluntary" choice rather than a reaction such as, for example, grabbing for the glove as it fell. Both sides appear to agree that the glove itself posed a safety risk for interfering with the controls if left where it was. However, the appropriate response would have been to stop the forklift and pick up the glove. I am not at all persuaded by Grievant's claim that he is less culpable because he was driving the forklift at reduced speed. The danger of choosing to look away from the controls is too great for any voluntary choice to allow one's self to become distracted. This is particularly true when, as he admitted, there was a probability the forklift would operate erratically during low fuel circumstances. Were these the sole factors contributing to this accident, the Employer's judgment might be sustained.

However, the Employer did not make a fully considered judgment about the cause of this accident. The Employer appears to have entirely ignored some of the circumstances which appear to have contributed to this accident. Grievant and his supervisor both testified that the low fuel siren was sounding when he passed his supervisor. Grievant quite believably testified that when the siren sounds, the forklift operates at about a quarter of its speed. Grievant also credibly testified that when the low fuel siren sounds, he has only a short period of time to get

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[2] See Brand, ed., *Discipline and Discharge in Arbitration*, (BNA, 4th. Ed.), p. 259

[3] The Union is incorrect in its argument that experience should not be considered a factor in considering the degree of culpability of the employee. The concept of long service and clean work record is a factor mitigating a penalty, but not culpability.

to the fueling station. If he does not arrive in time, he will be forced to carry a heavy fuel tank to the stalled forklift. His productivity will also be reduced during any ensuing delay. The tenor of his testimony was that he was under substantial pressure from management to not have any delay by not making it to the refueling station. The better view of this fact situation is that the Employer's policies as to the refueling process contributed to this accident. In any event, it is clear from the testimony offered by the Employer that it did not ask Mr. Hoefs why he reached for the glove or make an effort to assess whether a change in its policies might reduce the risk of future accidents in low fuel situations. I note that the testimony offered by the Employer is that it does routinely closely examine its policies in accidents situations to avoid future accidents. Thus, the choice not to do so in this accident is highly inconsistent with its accident investigation approach. I conclude that Mr. Hoefs has been treated differently than other employees who have had accidents. I also conclude that the Employer has failed to show that Mr. Hoefs was more culpable than other employees who have had accidents. Accordingly, the Employer had reasonable grounds to impose some level of discipline but the Employer lacked "cause" within the meaning of Article 3 for the penalty imposed. The appropriate remedy is to reduce the discipline imposed in this case to a written warning.

AWARD

Since the Employer lacked "cause" within the meaning of Article 3 to imposed the suspension involved, the grievance is sustained and the Employer is ordered to reduce the discipline involved in this case to a written warning. The Employer shall make the employee whole for all lost wages and benefits. I reserve jurisdiction over the calculation of back pay and entitlements if either party requests, in writing, that I do so with a copy to opposing party, within sixty (60) days of the date of the award.

Dated at Madison, Wisconsin, this 3rd day of November, 2005.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator

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