

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME LOCAL 70

and

KENOSHA COUNTY

Case 241

No. 64802

MA-13021

(Ball Suspension Grievance)

Appearances:

Mr. Thomas G. Berger, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 044635 Racine, Wisconsin, appearing on behalf of Local 70.

Ms. Lorette Pionke, Senior Assistant Corporation Counsel, County of Kenosha, Kenosha County Courthouse, 912 56th Street, Kenosha, Wisconsin, appearing on behalf of Kenosha County.

ARBITRATION AWARD

AFSCME Local #70, hereinafter "Union," and Kenosha County, hereinafter "County," requested that the Wisconsin Employment Relations Commission provide a panel of arbitrators to the parties in order to select an arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was selected to arbitrate the dispute. The hearing was held before the undersigned on March 28, 2006, in Kenosha, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs, the last of which was received on May 22, 2006, and declined to file reply-briefs, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute and framed the substantive issues as:

1. Was Wayne Ball disciplined by the County of Kenosha for just cause and did the County of Kenosha impose that discipline in a fair and impartial manner?
2. And if not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

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ARTICLE I - RECOGNITION

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Section 1.2. Management Rights. Except as otherwise provided in this agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work; to contract for work, services or materials; to schedule overtime work, to establish or abolish a job classification; to establish qualifications for the various job classifications; however, whenever a new position is created or an existing position changed, the County shall establish the job duties and wage level for such new or revised position in a fair and equitable manner subject to the grievance and arbitration procedure of this agreement. The County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner. The County will not contract out for work or services where such contracting out will result in the layoff of employees or the reduction of regular hours worked by bargaining unit employees.

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ARTICLE III - GRIEVANCE PROCEDURE

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Section 3.5. Work Rules and Discipline. Employees shall comply with all provisions of this Agreement and all reasonable work rules. Employees may be disciplined for violation thereof under the terms of this Agreement, but only for just cause and in a fair and impartial manner. When any employee is being disciplined or discharged, there shall be a Union representative present and a copy of the reprimand sent to the Union.

The foregoing procedure shall govern any claim by an employee that he has been disciplined or discharged without just cause. Should any action on the part of the County become the subject of arbitration, such described action may be affirmed, revoked, modified in any manner not inconsistent with the terms of this Agreement.

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BACKGROUND AND FACTS

The Grievant, Wayne Ball, was hired by the County on July 15, 1996 to the Public Works Department, Highway Division and worked in a Heavy Equipment Operator position, assigned to operate a D3 Dozer. Prior to the discipline in question, the Grievant was a model employee with an unblemished work record.

During August, 2004, a member of the Highway Division was involved in an accident while operating the Cruz Aire. A cyclist was seriously injured and an investigation concluded that the accident was the result of operator error. The employee was cited and a civil trial resulted in damages.

Subsequent to the accident, the County highway division employees and its Union submitted two documents to management wherein they questioned the safety of the Cruz Aire. The first document dated November 3, 2004, was a memorandum to Fred Patrie, Director, Department of Public Works, referencing the subject "Serious Safety Concerns" which the Grievant and 13 other employees signed. The memorandum read as follows:

The following Division of Highways Heavy Equipment Operators respectfully request not to be required to operate the 1085C Cruz-Airs due to the extremely unsafe blind spots inherent with this piece of equipment unless the machinery is trailered or a shadow vehicle is provided. This is in reference to the following work rules that are listed in the "Kenosha County Uniform Work Rules Applicable to All Departments, revised 1995":

- Work Rule #13: Employees must promptly report defective equipment or safety hazards to their supervisor or management.
- Work Rule #14: Employees must obey all safety rules, wear protective equipment provided, and shall not engage in any conduct which tends to create a safety hazard.

The second document was also submitted on November 3, 2004 in reference to "Serious Safety Concerns" and was from the AFSCME Local 70 Executive Board Membership. This memorandum was signed by 29 employees and read as follows:

The attached list of Division of Highway employees are deeply concerned about their own personal liability while performing daily operations such as paving, shouldering, grading and snow and ice control to name a few.

As you are aware, this work force has been very diligent in our mission to provide the motoring public with the safest possible roadways at all times! While carrying out these sometimes difficult tasks we are required to operate left of center on a roadway to clear the accumulated snow and ice or possibly while paving, the fleet is required to back large trucks down difficult roads many times against traffic and without available flagging personnel. Our routine backing through controlled and uncontrolled intersections to clear them of snow and ice is also of great concern. Noting our outstanding safety record reflected by the presentation from then County Safety Director, Bob Riedl in 2001 should attest to our competence in performing such difficult work in adverse conditions.

We are now more aware then (sic) ever before that although Administration appeared pleased with our past performance they have failed to show us the support we require to perform these sensitive procedures. Your inability to show the required support forces us to no longer continue to sacrifice our quality of life by possibly violating the following State Statutes and related work rules as they are printed:

- State Statute 346.05 Sub 1, Operating Left of Center and Deviation from Designated Lane 346.13
 - State Statute 346.87, Unsafe Backing
 - State Statute 346.18, Failure to Yield Right of Way at a Controlled or Uncontrolled Intersection
 - Work Rule #13, Employees must promptly report defective equipment or safety hazards to their supervisor or management.
 - Work Rule #14, Employees must obey all safety rules, wear protective equipment provided and shall not engage in any conduct which tends to create a safety hazard.
- Work Rule #19, Employees must comply with all Federal or State codes and regulations that govern their respective departments.

As a result of the accident and the two memorandums, the County met with the Union to discuss the safety of the Cruz Aire on November 4, 2005. At the conclusion of the meeting, the parties agreed that the Cruz Aire would remain in operation.

The Grievant operated the Cruz Aire on December 20, 2004 for two and one-half billable hours. The Grievant did not express any concerns regarding the machine after this shift.

On January 25, 2005, the Grievant was assigned by Highway Division Patrol Supervisor Ken Petges to operate the Cruz Aire. The Grievant did not question the assignment, complied with Petges' directive and operated the Cruz Aire for 4.5 billable hours. The County did not assign any employees to perform traffic control for the Cruz Aire. At the conclusion of the workday, the Grievant sought out Petges to speak with him regarding safety concerns with the Cruz Aire, but Petges had already left for the day. The Grievant informed Supervisors Fedoro and Fenske that he intended to speak to Petges the following morning.

When the Grievant reported for work on January 27, 2006, he was assigned to operate the Cruz Aire by Foreman Glenn Fenske. Fenske was filling in for Petges who was scheduled to work the second shift that day. Fenske utilized the prior day's work assignment sheet when he made assignments for January 27. Fenske had assigned two flaggers to work with the Grievant, but the Grievant was unaware of the flagger assignments. The Grievant was dissatisfied with his assignment to operate the Cruz Aire, became agitated and communicated his dissatisfaction to Fenske in a loud and confrontational manner.

Fenske prepared an Incident Report on that date that read as follows:

On the morning of 1-26-05 when I was assigning work to Wayne Ball, he said he didn't want to run the Cruz-Aire. When I asked him why, he said he doesn't mind doing it once in a while, but that it was unsafe. When I asked him if he protested yesterday when he ran it, he didn't give me an answer. He also said to me after I told him a second time to run it, "I didn't sign for that, how can you make me run it?" I explained to him that on the job posting it says "all other duties as order or assigned". I also said to him that you have been running it for years with virtually no dissention other than how slow it goes climbing hills. I asked him what else he didn't want to run. After a few verbal exchanges, no real answer was given. I also asked him what would happen if everyone refused their job and nothing got done here. Before he answered I continued with "People would get laid off". His reply loudly was that "All 65 people here would blame me if they get laid off". At one point he announced loudly "I didn't want to run it!" It was loud enough for 2 employees sitting next to him to tell him to calm down. Realizing that the situation was getting somewhat out of hand and not wanting an employee with state of mind to run the Cruz Aire I reassigned Wayne to the Case SHD Steer to perform the tasks for the day.

The Grievant also completed an Incident Report on January 26, 2005 at 7:30 a.m., which read as follows:

At certain times of operation I do not feel safe operating the Cruz-Air. But I do believe there are certain jobs that it works well for, Example, wind damage, picking up brush and trees, and some other. Therefore most jobs it is asked to do, I do not feel an adequate level of safety in my mind to deal with traffic and other situations. I would prefer not to be asked to operate the Cruz-AIR in most situations take into consideration the safety of the public and my safety (sic).

I feel that this should be taken as a written statement and not as an incident as such paper is titled.

The Grievant received a one-day suspension on January 27, 2005. The Disciplinary Action Form described the infraction as:

At 7 am on 1-26-05, Wayne refused to operate the Cruz-Aire #4004 as directed by Supervisor Fenske. Kenosha County Uniform Work Rule #4 under Work Habits “employees shall be considered insubordinate if they refuse assigned work or refuse to obey a legitimate order of supervision or management”.

On January 31, 2005 the Union filed a grievance contending that Section 1.2, 3.5 and “any and all sections that may apply” of the collective bargaining agreement had been violated when the County suspended the Grievant. The grievance was denied at all steps of the grievance procedure.

DISCUSSION

The issue in this case is whether the Grievant was disciplined for just cause. The County maintains that the discipline was justified while the Union challenges the discipline. The Union’s challenge encompasses three areas; first, the safety of the Cruz Aire; second, the County’s investigation; and third, the degree of discipline.

The Grievant was disciplined for refusing to operate the Cruz Aire as directed by management. The Grievant admits he was insubordinate, but maintains that his refusal was prompted by his recognition that operating the Cruz Aire without traffic control was unsafe which created a hazard for him personally and for the motoring public. Given the Grievant’s safety concerns, the Union maintains his refusal was justified.

Insubordination is the refusal by an employee to work or obey an order. BRAND, DISCIPLINE AND DISCHARGE IN ARBITRATION, (BNA, 1998) P. 156. It is well established that when employees are faced with management orders which they believe violate the labor agreement, the general rule is to “obey now – grieve later” ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 6TH ED. (2003) P. 1023. An exception to the doctrine exists “where obedience would involve an unusual or abnormal safety or health hazard”. Id. To qualify for the exception, the safety or health hazard must be the real reason for the refusal. Id at 1023-24.

This record does not support a conclusion that the Grievant’s behavior on January 26 falls within the safety exception to the “obey now, grieve later” doctrine. Rather, a combination of circumstances led the Grievant to conclude that he did not want to operate the Cruz Aire, none of which justified his insubordination.

The Grievant’s proffered reason for concluding that the Cruz Aire was unsafe to operate on January 26 was because he assumed traffic control were not assigned to assist him. The Grievant reached this conclusion because traffic control was not assigned on January 25. While it was reasonable for the Grievant to have reached this conclusion, it does not comport with the conversation he had with Fenske. The Grievant and Fenske engaged in a heated exchange as a result of the assignment, but at no time during that exchange did the issue of traffic control or flaggers arise. It is beyond understanding why, if the Grievant’s concern was traffic control, he never asked Fenske if flaggers were assigned or more likely, why he didn’t inform Fenske that he wouldn’t drive the Cruz Aire unless the County assigned flaggers.

The Grievant completed an Incident Report after he refused to operate the Cruz Aire. The Incident Report does not state that it was unsafe to operate the Cruz Aire. Rather, the Report communicated the Grievant’s opinions regarding when the Cruz Aire should be used and his discomfort and preference to not operate the machine. The Grievant reiterated this position in his January 28 meeting with management regarding his discipline. Supervisor Fenske testified that when he met with the Grievant and his Union representative on or about January 28, the Grievant stated that he (the Grievant) did not mind running the Cruz Aire machine, but that he just didn’t want to run it (Cruz Aire) everyday. A review of the evidence indicates that the Grievant was willing to operate the Cruz Aire so long as it wasn’t all the time and only when it was doing the specific jobs that he believed were appropriate uses for the machine. The Grievant’s willingness to operate the machine, albeit when he deemed it necessary and appropriate, indicates that this was not a situation where he believed the Cruz Aire to be so unsafe that it should not be driven.

There is no question that the August 2004 accident traumatized the Grievant and the bargaining unit and permeated the events that followed. The equipment operators, including the Grievant, and the Union shared their safety concerns with the County in November 3 memorandums. These concerns were pointed and faulted the blind spot on the Cruz Aire. The

parties met on November 4 regarding safety issues. Subsequent to those meetings, the decision was made that the Cruz Aire was a useful machine to the County and would be used. It is unclear from this record whether the parties agreed that traffic control would be provided at all times the Cruz Aire was in operation, but clearly the Union had communicated their expectation that traffic control would accompany the Cruz Aire.

The Grievant expressed at hearing his dissatisfaction with the County's handling of the August 2004 accident. This dissatisfaction was similarly shared by the Union membership and it was communicated to the County in the November memorandums. The Union and the Grievant believed that the County had forsaken the driver in the August accident and the Grievant was concerned he would find himself in a similar situation. The Grievant was an experienced operator. He understood the severity of a similar mishap. This was a factor in the Grievant's decision-making and his outburst on January 26.

Clearly the Grievant was concerned for his safety and that of the motoring public when he made the decision on January 26 to refuse to operate the Cruz Aire. But his concern was not directly related to a specific weather condition or the condition of the machine on January 26. Rather, his concern was ongoing – from August 2004 – without differentiation between November 4 or January 26. The evidence does not establish that the Grievant was presented with an abnormal or hazardous safety situation on January 26 which justified his insubordination.

As to the Union's assertion that the County failed to conduct an investigation, the County obtained Incident Reports from the Grievant and Fenske. Those reports are similar and afford a factual recitation of what occurred. While there is disagreement over the safety of the Cruz Aire, a disciplinary investigation is not the venue to address this concern. The disciplinary investigation is intended to determine whether the alleged misconduct or work rule violation occurred. The County conducted an investigation.

Finally, the Union challenges the discipline on the basis that the Grievant was unaware that his behavior would subject him to discipline. The Grievant testified that he did not know that he would be disciplined if he raised his voice to a supervisor and subsequently refused to do the job that the supervisor had directed him to do. I do not find the Grievant's testimony credible. I find the Grievant to be a sincere and straightforward man. This was an extreme situation with heightened levels of emotion. While it may be that these facts explain his behavior, they do not justify his refusal or inappropriate outburst.

I concur that insubordination is a serious infraction and therefore deserves a severe response. I also recognize the unique circumstances that surround the Cruz Aire which explain the Grievant's qualms. The Grievant refused management's directive in violation of County Work Rule #14. The Grievant admitted he was loud and obnoxious when he voiced his refusal and attributes his behavior to his frustration with the County and his belief that his safety concerns were being ignored. The record establishes that a one-day suspension is consistent

with the discipline imposed by the Highway Division previously for insubordination infractions. It is not the role of the arbitrator to substitute his or her judgment for that of the employer, and as such, the grievance is dismissed.

AWARD

1. Yes, Wayne Ball was disciplined by the County of Kenosha for just cause and the discipline was imposed in a fair and impartial manner.
2. The Grievant is dismissed.

Dated in Rhinelander, Wisconsin, this 17th day of August, 2006.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator