

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 73, AFSCME, AFL-CIO

and

CITY OF APPLETON

Case 447
No. 66417
MA-13522

Appearances:

Mary Scoon, Staff Representative, Wisconsin Council 40, appearing on behalf of the Union.

Ellen Totzke, Deputy City Attorney, City of Appleton, appearing on behalf of the City.

ARBITRATION AWARD

The Union and Employer named above are parties to a 2006-2008 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties jointly asked the Wisconsin Employment Relations Commission to appoint the undersigned to hear and resolve the grievance of Rich Fleury. A hearing was held on December 7, 2006, in Appleton, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on January 22, 2007.

ISSUE

The parties ask:

Did the Employer violate the collective bargaining agreement when it issued an oral warning to the Grievant? If so, what is the appropriate remedy?

BACKGROUND

The Grievant is Rich Fleury, who is a Relief Operator Maintenance Helper at the City's water treatment plant. He has been there for about 11 years. He is the most senior Relief Operator at the plant and was part of the design team for the new plant which opened in 2001. He was given an oral reprimand for an incident occurring on May 25, 2006, which is the subject of this grievance.

On May 25, 2006, the Grievant was working in the membrane room when he was notified by a secretary that Garrow Oil was making a delivery of diesel fuel. He went to assist the delivery driver. He had helped unloading fuel in the past. A delivery of fuel comes in two or three times a year, and the last delivery was in September of 2005. There have been different companies and different drivers in the past. The chemical delivery unloading procedure calls for relief operators to show the chemical delivery driver the tank and the associated piping to enable the driver to watch for leaks while unloading. It also calls for notifying a supervisor if there is a spill and filling out a spill form. It is the delivery driver's responsibility to verify the proper connection for transfer.

The Grievant unlocked the container so that the driver could put the hose into it. Neither the driver nor the Grievant realized right away that the fitting was not correct, and the driver turned on the pump and tried filling the fuel but it was squirting out. The driver then turned up the motor on the truck but the fuel was still leaking into the container. The Grievant thought that the problem was with the motor, not the fitting. The driver stopped and called his boss, who asked him to look for another way to unload the fuel. The Grievant and the driver went into the fuel room and looked at the tank to see if he could fill it from the top.

The Grievant assumed that the driver delivers fuel all the time and would be well versed in tanks and containers. They both crawled up to the top of the tank and found a pipe with a metal cap and wire. The pipe was connected to the bottom of the tank. The Grievant was not aware that this was a double wall tank. The Grievant thought the wire might be a sensor. They took the wire out and the driver started to try to fill the tank but it was seeping out. The driver asked the Grievant to go to his truck and get some floor dry, which they sprinkled on the floor. The Grievant called his supervisor, Mark Kessler, and the driver called his boss to notify him that there was a spill. Garrow Oil came over to clean up the spill.

Kessler is the Operations Supervisor at the plant. He and other supervisors were in a large conference room at the water plant for a training exercise when he first learned of the fuel spill. He asked the Grievant to fill out a fuel spill report, which stated that "Driver did not have a cam-lock for transfer of product correctly and safely." The Grievant also filled out an incident report, which stated in part:

Driver showed up with improper fitting. Driver called his boss on cell phone to discuss options. He asked for another way into the tank. I then showed Kevin the fuel room. We both climbed to the top of the tank, looking for another option to fill. We found a 2" cap off the side of the tank. I unscrewed and took out sensor. I didn't know if it was a fill or if we could use that. We never unloaded in room before. He (Kevin) thought it was a fill pipe and decided to use it. He climbed down and he wanted to fill it through that pipe. He placed the fill hose in pipe and started filling. He had me watch sight gauge to see if it was going up. About a minute or two later he had trouble unloading it. So he went out to truck to turn up idle to get more pressure. Once he realized he had a problem filling it was coming out the pipe, he shut the system off called his boss. That is when I called my supervisor. I also called Linda.

Kessler explained that the tank, which holds 7,000 gallons, is a double wall containment tank. There is a dry well jacket on the outside of the tank for a second containment. The fill connection for the tank is on the outside of the building. The tank is pressure filled through a cam lock connection. When the driver did not show up with the cam lock connection, the driver and the Grievant removed the sensor for the secondary containment and used the pipe for the dry well on the secondary containment to unload the fuel oil. After the first 50 or 60 gallons went in, the truck developed back pressure. By that time, the fitting was leaking. About 10 gallons spilled on the ground.

Kessler gave the Grievant an oral reprimand because of the potential for serious damage to the plant. Kessler thought that all employees should have been aware of the procedures for connecting to the tanks. After the incident, Kessler gave the Grievant a picture of the correct cam lock fitting for the fuel oil tank to post out by the fuel connection.

Michael Buettner is the Utilities Director, and he was aware that the Grievant had supervised the unloading of fuel oil and chemicals in the past. Buettner expected him to notify a supervisor immediately if there was an issue with a delivery truck. He thought that discipline was warranted for not notifying a supervisor and not following customary procedure for unloading chemicals. He also thought that the Grievant should have stopped the work immediately if he had any questions.

There have been chemical spills in the plant in the past. The Grievant was aware of one or two lime spills. A former Relief Operator, Roger Linder, was unloading lime and the driver over-pressured the air bag system that takes the dust out of the air. The room filled up with lime dust, which triggered the fire alarm system. The employees then created a procedure to prevent that from happening again. Linder was involved in another mishap with lime that was accidentally put into the wrong silo. Linder put it into the power activated carbon silo. The lime jammed up the carbon feeders and maintenance was called several times to unclog them. The employees then ordered differenced keyed locks for the different chemical containers. Linder was not disciplined for either incident.

Ed Valencic is also a Relief Operator and the Union Steward. He was not trained to unload fuel and had not done it before. Valencic was not aware of the proper connection for the fuel until it was posted outside after the spill. He noted that the fittings and methods differ from one chemical to the next. Some chemical deliveries required them to provide air to pressurize their vessels to get the chemicals out, others do not need pressure. The Relief Operators taught each other how to unload chemicals before the incident with the fuel oil spill. None of the employees were aware that the fuel tank had a double wall.

Both the Grievant and Valencic noted that they have always accommodated vendors and suppliers. They have tried to find ways to help them unload supplies, such as getting a hose clamp or crawling on a tank to find another way to unload the delivery. They have unloaded other chemicals on the top of the tanks in the past. Valencic said he knew that they were not supposed to find alternate ways to put chemicals in a tank but they have done so.

Before 2005, there was a Utilities Director at the new plant but no direct supervisor. The employees at the new plant worked as a self-directed team, with each of them getting a portion of the supervisor's salary. The Utilities Director was in charge of both the water plant and the wastewater plant. The team was dissolved in the early part of 2005.

DISCUSSION

The collective bargaining agreement calls for just cause for discipline and also states that the disciplinary procedure is a device to inform employees of work habits which are not consistent with the aims of the Employer's public function and to correct those deficiencies. This does not mean that every accident or mishap that occurs at work requires a disciplinary action. There was nothing in the Grievant's work habit that was inconsistent with the Employer's aims and public function. The Grievant was trying to get a job done and used questionable judgment in handling the matter when things went awry. The language regarding "inform" and "correct" means that the City is to inform an employee of wrongdoing and correct it by a disciplinary measure. It does not mean that the City is to inform an employee of a preferred procedure by means of a disciplinary action where it has not informed an employee of the correct procedure beforehand.

There are several reasons why the City's action does not measure up to just cause for discipline. First of all, the fact that the City posted a picture of the correct fitting on the outside of the building next to the container for a delivery after the spill weighs against the City. It shows that the City did not properly inform employees of the correct fitting before the accident. The City's own procedures call for the Relief Operator to show the driver the tank and piping, and it is the driver's responsibility to verify the proper connection for a transfer. Employees have not all been trained in unloading procedures for all chemicals and they have actually taught each other when the need arose.

It is not even completely clear what the Grievant did that warranted discipline. Kessler said that the Grievant should have not let the driver fill the tank from inside. Buettner said that the mistake was that the Grievant should have called Kessler immediately.

However, employees have accommodated delivery drivers and used alternate procedures to help get those deliveries completed in the past. Both Valencic and the Grievant agreed on this point. The delivery driver was getting pressure from his boss to find an alternate way to make the delivery, and the Grievant only tried to help out as employees had done in the past. The fact that they had previously worked as a self-directed team without direct supervision tends to show that they were not accustomed to seeking the advice or input of a supervisor before solving a problem, particularly where they had a history to trying to accommodate the delivery drivers. Finally, there have been other accidents in chemical deliveries without discipline being imposed.

Even though this oral reprimand is a minor disciplinary action, it still must pass the test of just cause. I find that there is no just cause based on the reasons noted above.

AWARD

The grievance is sustained.

The City did not have just cause to give Rich Fleury an oral reprimand for the incident on May 25, 2006, and it is ordered to remove this reprimand from his records.

Dated at Elkhorn, Wisconsin this 8th day of March, 2007.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator