BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SPANCRETE GROUP, INC.

and

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 113

Case 20
No. 67839
A-6321

Appearances:

Gregory Gill, Gill & Gill, S.C., Attorneys at Law, 128 North Durkee Street, Appleton, Wisconsin 54911, appearing on behalf of Spancrete Group, Inc.

Ying Tao Ho, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Laborers' International Union of North America, Local 113.

ARBITRATION AWARD

Laborers' International Union of North America, Local 113, herein referred to as the "Union," and The Spancrete Group, Inc., herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Waukesha, Wisconsin, on September 23, 2008. Each party filed a post-hearing brief, the last of which was received November 11, 2008. A dispute arose after the filing of briefs over the climactic conditions on the day in question. The Arbitrator reopened the hearing for evidence with respect thereto, upon the motion of the Employer. The reopened hearing was conducted by telephone, January 9, 2009, after which the parties agreed to make written submissions and argument, the last of whch was received February 3, 2009.

ISSUES

The parties were unable to agree to a statement of the issues but did agree that I could phrase the issues. I state them as follows:

1. Did the Employer violate the collective bargaining agreement, its stated policies, or applicable law by suspending Grievant Shawn Wolfe for conduct on February 27, 2008?

2. If so, what is the appropriate remedy?

RELEVANT AGREEMENT PROVISONS

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ARTICLE X
SENIORITY

Section 1. The seniority rights of each man shall prevail, provided that capability to perform work is considered normal, including the opportunity for plant workers to, on a temporary basis, perform work in the field. All workers with seniority rights shall be recognized over any part time employee or inexperienced worker. When an employer is required to reduce his work force because of diminished business and lay-offs are necessary, employees with the least seniority shall be laid off first in order, and rehired in reverse order. For purposes of lay-off there shall be a separate seniority list for each of the employer's three plants. Duly appointed Union stewards and Company appointed foremen shall receive super-seniority subject to Article III, Section 6(a). In the event of a workforce reduction, stewards and foremen will be the last employees to be laid off and the first employees to be recalled.

Section 2. In the event there are lay-offs at one plant employees on lay-off shall be offered work at the Employer's other plants covered by this Agreement in order of seniority date, provided the senior employee has the minimum qualifications to perform the available work. However, an employee at one plant may not displace an employee whose regular position is at another plant. An employee will not be required to accept an assignment at another plant for less than forty (40) hours of work nor with the Employer contest unemployment compensation benefits of that employee in such an instance. Employees temporarily assigned to another plant will be given a minimum of two working days notice. Employees shall be recalled to the plant at which they are regularly employed in order of seniority, including those employees who may be temporarily working at another plant.

Section 3. The ordinary rules of seniority shall prevail in the engagement, promotion, and lay-offs of all classes of employees. If an employee is discharged and arbitration follows, and if the final decision by arbitration is that said employee returns to service, he shall be reinstated with all his seniority rights. Any employee drafted into the service of the United States shall be

reinstated into his regular place of seniority upon his discharge from service, provided he is capable of performing the available work. The seniority date of each employee shall be fixed by the Employer at the close of the said employee's first month of service. No employee shall have a seniority rating with more than one (1) Employer at one time.

Section 4. If an employee has been furloughed and is recalled to work and fails to report to work within forty-eight (48) hours after the employee and the Union have been notified by registered or certified mail, said employee shall lose his seniority rights.

Section 5. There shall be a probationary period of ninety (90) days to allow the Employer to determine the fitness and adaptability of a new employee to do the work required, and whether it desires to retain such employee, during which time the new employee shall accumulate no seniority and may be discharged without recourse to the grievance procedure. During this probationary period, the employee has thirty (30) days to join the union. He will pay union dues to the union and pension will be paid to the pension fund on his behalf by the Employer.

Section 6. Seniority shall be lost by (a) voluntary quit (b) discharge for cause; (c) withdrawal or transfer from the Bargaining Unit (d) absence from work for two (2) consecutive days without notifying the Employer or without reasonable cause, in which case the employee will be considered for the purpose of seniority to have quit voluntarily; (e) lay-off for more than one year; and (f) unavailability for work for two (2) years because of medical reasons.

Section 7. Employers shall not be required to assign employees to operate equipment or perform work for which they are not qualified.

Section 8. Employees who have been released for work by their doctor must advise the Company of this fact within 24 hours and must be available within 48 hours to report as needed once released.

ARTICLE XI

MISCELLANEOUS PROVISIONS

Section 1. Foremen. The foremen shall be selected by and be a representative of the Employer.

Section 2. Discharge. Any employee discharged for adhering to the terms of this Labor Agreement shall be reinstated and paid by the Employer for any earnings lost for being discharged.

Section 3. Employer's Work Restrictions. No Employer, superintendent, or master mechanic shall at any time operate any equipment on any job so as to displace a regular employee.

Section 4. Where boiler or pump attendance is necessary, two (2) hours pay at the prevailing rate will be paid when the employee is required to check or service same.

Section 5. A heated lunch are shall be provided for employees.

Section 6. Equal Employment Opportunity. The Employer and the Union agree that neither party will unlawfully discriminate against any employee because of race, religion, color, sex, national origin, age, handicap or marital status.

Section 7. Drug and Alcohol Policy. The current drug and alcohol policy, in effect at the time of this contract is effective, automatically becomes a part of this Agreement. In addition, the parties have agreed to Random Drug Testing Guidelines.

Section 8. When a regular employee receives a written warning or suspension, the employee and the Union office shall receive a copy. No such warning or suspension shall be used or remain in effect more than eighteen (18) months after it is issued.

Section 9. Employees refusing to work in subzero weather shall not be subject to discharge, however, junior employees may be substituted in their place without being subject to the restrictions of the seniority clauses contained in this Agreement. The temperature readings to be in accordance with Crites Field in Waukesha.

Section 10. Except in cases of emergencies and weather conditions beyond the Employers control, the company will provide at least one week notice prior to a change in the starting time.

Section 11. Supervisors, but not quality control employees, may perform production and maintenance work for the purpose of instruction, training or in the event of emergencies or on a temporary basis where the skills required are not possessed by bargaining unit employees or none are immediately available. The term "temporary basis" shall mean until a bargaining unit employee is available, that is for the remainder of the day, if there is a bargaining unit employee on lay-off. If there is no bargaining unit employee on lay-off, until an employee can be hired.

Section 12. Any permanent positions in the plant or field shall be posted, allowing all bargaining unit members the opportunity to apply for these positions. Filling these positions will remain the sole discretion of the Employer.

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RELEVANT RULE PROVISIONS

The Spancrete Group, Inc, and Subsidiaries

Standards of Conduct

July 2007

The Company, like any other organization, must establish reasonable standards of conduct so that employees understand what is expected of them and are aware of the penalties that will result if they fail to comply with those standards of conduct. The following list of offenses will act as a guideline of unacceptable conduct, but is by no means exhaustive. The Company reserves the right to add to, modify or change these rules and regulations, as situations require. The nature and severity of the offense as well as the circumstance involved in each case may affect the discipline imposed. If an employee's record is completely void of any disciplinary offense for a consecutive twelve (12) month period, the employee's record will be considered to be clear of any disciplinary offenses. Notwithstanding that certain offenses are grounds for immediate discharge employees will be terminated if they receive three written disciplinary notices for offenses against any rules (not just the same rule) within a twelve (12) month period.

The following list is divided into groups depending on the seriousness of the offense and the disciplinary action to be taken.

CATEGORY I INFRACTIONS

	INFRACTION	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
1.	Theft of Company property or personal property of other employees, customers, vendors or visitors without permission.	Discharge		
2.	Fighting or provoking a fight on Company property, job sites or other business functions. Combatants will be suspended and incident will be investigated before final decision is made.	Discharge		
3.	Unauthorized release of confidential information or official records.	Discharge		
4.	Intentional falsification of your time card.	Discharge		

5.	Punching time card other than your own.	Discharge		
6.	Dishonesty, which includes but is not limited to, willful falsification or misrepresentation on your application, resume or other work records, lying about sick or personal leave, falsifying reason for a leave of absence or other data requested by the Company, alteration of company records or other Company documents, misrepresenting facts regarding injuries, misrepresenting claims that relate to Company benefit plans.	Discharge		
7.	Unauthorized use or possession of dangerous or illegal firearms, weapons, explosives or illegal contraband of any type on company property or while on company business.	Discharge		
8.	Immoral conduct or indecency on company property.	Discharge		
9.	Conduct detrimental to the welfare of the Company or its employees.	Discharge		
10.	Leaving work before the end of the workday without permission of supervisor or manager.	Discharge		
11.	Insubordination or willful refusal to follow instructions or perform work assigned by your supervisor, manager or other designated representative of the Company.	Discharge		
12.	Willful tampering with safety equipment or safety devices that could cause injury to self or other employees.	Discharge		

CATEGORY II INFRACTIONS

	INFRACTION	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
13.	Abuse, misuse, destruction or damage to Company equipment or property.	3 day suspension	Discharge	
14.	Sleeping on the job.	3 day suspension	Discharge	
15.	Limiting output, own or others.	3 day suspension	Discharge	
16.	Negligence or any careless action, which endangers the safety of, or results in injury to self, another employee or a visitor.	3 day suspension	Discharge	
17.	Any act of harassment toward employees, customers or vendors.	3 day suspension	Discharge	
18.	Failure to immediately report an accident involving an employee, or damage to Company equipment and/or property to a supervisor or manager by the end of the shift.	3 day suspension	Discharge	
19.	Removing or altering notices on any bulletin board on Company property without permission of managaement. (sic)	3 day suspension	Discharge	
20.	Failure to follow instructions or perform work assigned by a supervisor or manager.	3 day suspension	Discharge	

CATEGORY III INFRACTIONS

	INFRACTION	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
21.	Unsatisfactory job performance	Written Warning	3 Day suspension	Discharge
22.	Unsatisfactory or carless (sic) work; mistakes due to carelessness or failure to get necessary instructions; refusal or inability to improve job performance in accordance with written or verbal direction after a reasonable period of time.	Written Warning	3 Day suspension	Discharge
23.	Smoking in unauthorized areas	Written Warning	3 Day suspension	Discharge
24.	Failure to punch own time card.	Written Warning	3 Day suspension	Discharge

25.	Failure to comply with Company policies regarding telephones, computer hardware and software, e-mail and Internet use.	Written Warning	3 Day suspension	Discharge
26.	Failure to observe safety rules or safety practices; failure to wear required safety equipment.	Written Warning	3 Day suspension	Discharge
27.	Playing pranks or horseplay.	Written Warning	3 Day suspension	Discharge
28.	Loitering or loafing during the working hours, including reading newspapers or magazines in the work area.	Written Warning	3 Day suspension	Discharge
29.	Unauthorized soliciting or collecting for any purpose on Company time without specific permission of management.	Written Warning	3 Day suspension	Discharge
30.	Unauthorized distribution or circulation of any literature on Company premises without specific approval of management.	Written Warning	3 Day suspension	Discharge
31.	Leaving the work area early for breaks or lunch; returning to the work area late after breaks or lunch.	Written Warning	3 Day suspension	Discharge

IV. Disciplinary action for the offenses listed below are found in the respective policies

INFRACTION	
Absences from work or tardiness at the start of the workday.	As provided in the Attendance Policy
Violation of the Drug and Alcohol Policy	As provided in the Drug and Alcohol Policy

RULES OF CONDUCT AND REGULATIONS FOR EMPLOYEES OF SPANCRETE INDUSTRIES, INC.

Revised 12/99

The purpose of these Rules of Conduct and Regulations is to promote the safety and welfare of all employees, to protect the mutual interests of the employer and employees, and to provide a code of conduct to be followed by all employees.

Violators of the rules will be subject to disciplinary measures ranging from warning to immediate discharge, depending on the seriousness of the offense in the judgment of Management.

GENERAL

1. All Company property, such as tools and equipment, which are charged to you must be accounted for if you leave the employ of the Company or at anytime upon request.

2. If you are released from the payroll you will not be permitted to enter any Company location without authorization.

3. You will be expected to obey all general Company safety rules for your particular job.

4. Physical examinations and drug tests, at the Company's expense, may be required:

- at the time of employment;
- upon return from layoff or leave of absence of three (3) months or longer duration;
- upon return from any illness or injury deemed of a serious nature by the Company; or
- random drug testing as outlined In the Labor Agreement

5. All warnings, suspensions and discharge will be in writing to the employee and to the Union.

6. Work rules shall be presented to the employee to read and understand. A signature sheet shall be signed and dated, and kept on file.

RULES OF CONDUCT

INFRACTION	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
2. Refusal or failure to: a) do job as directed; b) comply with Safety Rules; c) follow prescribed methods. TO CAUSE: A. excessive equipment wear or damage; b. waste USE UNSAFAE EQUIPMENT	Warning	3-Day Suspension	Discharge

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INFRACTION	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
12. Breaking safety rules such as:			
a) horseplay	Warning	3-Day Suspension	Discharge
b) removing safety equipment or tampering with Company property	Warning	5-Day Suspension	Discharge
c) using vehicles or other equipment without authority.	Warning	5-Day Suspension	Discharge

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INFRACTION	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
15. Misuse of assigned equipment, machinery or vehicles such as:			

a) failure to maintain required proper lubrication and coolant levels;	Warning	3-Day Suspension	Discharge
b) failure to follow posted or written instructions pertaining to equipment maintenance;	Warning	3-Day Suspension	Discharge
c) permitting unauthorized riders;	Warning	3-Day Suspension	Discharge
d) negligent operation of equipment or machinery.			
• MINOR	Warning	3-Day Suspension	Discharge
• MAJOR	5-Day Suspension or Discharge		

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INFRACTION	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
26. Conduct detrimental to welfare of Company/employees	Discipline for any offense will range from warning to discharge depending upon the severity of the incident.		

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FACTS

The Employer is a provider of structural pre-cast concrete products. Many of these are very large items which must are generally the size of a flatbed semi-trailer or larger. It has a warehouse and storage facility in Waukesha, Wisconsin. The Union represents laborers at that facility. Shawn Wolfe is an employee in the bargaining unit represented by the Union.

Mr. Wolfe has been with the Employer about five years. He spent the first three years as an inside laborer and was promoted to foreman outside about two years before the incident in dispute. He was the lead person for a truck loading crew of four fellow unit employees. In that regard, he received the loading list and supervised his crew in loading and doing other work in the yard. He reported to Foreman Kelly Millard.

There is a dispute in the record, but the undisputed evidence indicates that the Employer had a policy of requiring those loading materials on trucks in cold weather to put Calcium Chloride on the bed of the truck before loading the piece. The purpose of the Calcium Chloride was to avoid the risk that the item would slip off the truck on any ice on its bed as it moved. The risks of the failure to use Calcium Chloride are obvious. There is a risk to fellow employees or others people on the highways if they or their vehicles are struck by product coming off a truck. There is, of course, also a risk of damage to expensive product should it come off of a truck and the expense of reloading.

There is little dispute about the incident which occurred and led to the discipline in question. The main issue is whether weather and other conditions were such as to require the use of Calcium Chloride. On February 27, 2008, Mr. Wolfe was responsible to oversee the loading of a pre-cast concrete column approximately 2 feet by 2 feet by 15 feet which weighed between 10-12,000 pounds on a truck near the end of the work day. The crew did not use Calcium Chloride before it placed the column on the dunnage and then placed the loaded dunnage on the truck. The load was not strapped down.[1] Mr. Wolfe was present and knew that the crew was not using Calcium Chloride. The load was scheduled to be moved to storage across a public street to another part of the Employer's area. The trailer was then scheduled to be stored there until it was picked up by a tractor for transport over the public roads to the customer's work site. As the driver drove the truck and trailer away, the column slipped off the truck to the ground placing anyone in its path at risk. Fortunately, no one happened to be in the way. The column was destroyed at a wholesale value of about $3,000 and delay costs to the customer.

Production Manger Tim Parnau and General Manager John Kaiser inspected the truck and column. They recognized immediately that Calcium Chloride was not used under circumstances which they believed it should have been used. They interviewed Mr. Wolfe, Mr. Kau, Mr. Matt Wilson and Mr. Huffman. They determined to impose a three day suspension. The Union grieved the discipline and the same was properly processed to arbitration in this proceeding.

POSITIONS OF THE PARTIES

Employer

The proper statement of the issue is: Whether or not the discipline imposed upon Mr. Wolfe was reasonable under the circumstances. The Employer has the burden of proof. It has shown that the discipline was reasonable under the circumstances. Mr. Wolfe knowingly allowed this crew to load the column without using Calcium Chloride. Mr. Wolfe admitted in this investigation that "screwed up" and that he knew he had taken a short cut. This risked the safety of others and the safety of the product. This violated rule 16 of the Company's Standards of Conduct. The Employer conducted a thorough investigation. Mr. Wolfe and his crew were fully aware of the need to use straps and Calcium Chloride. They had been instructed about this as a crew at a morning safety meeting shortly before this incident. Mr. Wolfe had previously been warned in a similar situation when product shifted because he used plastic dunnage.

The Union's theory of the case is entirely without merit. The Union's main contention, that the temperature was unseasonably warm and well above freezing on the day in question, is without merit. Published reports show that the temperature that day was, in fact, 19 degrees Fahrenheit. In any event, Mr. Wolfe admitted not using Calcium Chloride in the investigation

[1] The Employer did not include the failure to strap the load down as a reason for the suspension.

and implicitly admitted that he knew he should have used it. The Union's contention that discipline is unfair because others on the crew were not disciplined is without merit. Mr. Wolfe had the ultimately responsibility to insure that Calcium Chloride was used because he was the lead person. The Union's contention that there was no actual danger to the public is irrelevant. First, it is incorrect on the facts. Second, a reasonable reading of the rule is that it is applicable if danger is "perceived." There was a real danger to the public once the column left the yard.

The discipline imposed was consistent with the Employer's practice. The Union's argument that subsequent to the implementation of the 2007 Standards of Conduct, the Employer continued to apply the old level of discipline is irrelevant. The Company recognized the need for a transition period and not every incident fits neatly within the rules. In any event, the Employer did apply the new rules immediately after they were adopted. The situations to which the Union applies involve circumstances related to the old rules or having components relating to the old rules. Accordingly, the Employer asks that the discipline be sustained.

Union

The Agreement is silent as to whether employee discipline may be grieved through the grievance procedure and the decisional standard to be applied thereto. Arbitrability under a just cause standard should be inferred. The Employer must prove its case by clear and convincing evidence.

The Employer failed to prove its case by clear and convincing evidence. Neither Mr. Parneau nor Mr. Kaiser stated that they decided to suspend Mr. Wolfe because he did not have the load strapped down. Instead, they focused on his failure to direct his crew to use Calcium Chloride. Mr. Wolf's decision to not use Calcium Chloride was reasonable because based upon his training and experience it was not necessary. His training revealed that there were two circumstances when it was required to use Calcium Chloride; when the temperature was below freezing or when there was snow and/or ice present. He credibly testified that the temperature on that February day was unseasonably warm, February 27, 2008, and no snow or ice was present. The Employer's position that he should have used Calcium Chloride because of the potential that moisture would leak from the dunnage and form ice. In any event, since the temperature was above freezing, the moisture would not form ice anyway.

Mr. Wolfe and Mr. Pacher testified that the temperature was well above freezing and unseasonably warm on the February 27, 2008. There testimony is credible. Mr. Huffman is not credible because he viewed the scene much later.

The Employer has failed to establish that the failure to use Calcium Chloride caused the accident. It is possible that the proximate cause was the failure to strap the load down.

The Employer also did not treat Mr. Wolfe equally with others more at fault. Mr. Niera was the only driver to testify. He stated that it was the responsibility of the driver and not the crew leader to make sure the load was secure. The helper and driver were the two people on top of the load and were in the best position to make sure that the load was secure, yet, neither was disciplined. There is no evidence that anyone ever explained to Mr. Wolfe what his responsibilities were as a Leadman. Principles of just cause require that the Employer conduct a full investigation and discipline all involved. This was not done and Mr. Wolfe was not treated the same as other employees.

Even if the Employer did prove that Wolfe was careless, his violation would fall under rule 22 or rule 26. Under the rules, the proper penalty is a written warning. On the other hand, careless acts call for a three day suspension only if the action endangered or injured the employee, another employee, or a visitor. This did not occur. There was no actual danger, only a remote chance of danger.

On July 1, 2007, the Employer introduced new "Standards of Conduct" which increased penalties. The evidence establishes that the Employer was still applying the old rules as of the date of this incident. The Union requests that the grievance be sustained, the discipline ordered rescinded and Mr. Wolfe be made whole for all lost pay and benefits.

Employer Supplemental Submission

The Employer submitted data to show that the fundamental assertion by Mr. Wolfe that it was too warm outside was clearly false. It relies upon the arguments previously made to support the discipline imposed.

Union Reply to Employer Submission

The climatological data submitted by the Employer does not prove that the air temperature was below freezing both because the data is inherently inconsistent and because the Employer has failed to present any evidence that the data was accurately and reliably gathered or presented Alternatively, if the air temperature was about 19 degrees on that day, then every person on the crew should have been disciplined because each would have known that he should have used Calcium Chloride.

DISCUSSION

1. Issue

The Employer stated the substantive issue as: "Was the discipline imposed herein reasonable?" The Union stated the substantive issue as: "Did the Employer violate the collective bargaining agreement by suspending the Grievant?" The Union's position in this matter is that there is a just cause standard for reviewing discipline implied from the terms of the agreement. The Employer agrees that discipline is subject to the terms of the grievance

procedure, but can only be reviewed on a limited basis because there are no other terms specifying a standard for discipline. I have used the Union's statement of the issue without the assumption made by the Union as to the standard for reviewing discipline. Both parties agree that discipline is subject to the grievance and arbitration procedure. It is not necessary to address the standard for a review of a discipline less than discharge because the Employer has, in fact, met the standard of just cause. No decision is expressed on the applicable standard of discipline for cases less than discharge, but I have noted above the provisions of the Agreement which would require at less some standard of review of discipline less than discharge.

2. Cause for Discharge

The incident involved in this case involves a vital safety issue for the Employer. The evidence indicates in this case that the heavy load slipped off the trailer as it crossed Manhattan Drive to the other side of the Employer's property. Fortunately, no one was injured. However, the Arbitrator recognizes the inherent right of the Employer to insure that vehicles are loaded properly in general and especially before they are operated on public streets.

The main issue is the credibility of Mr. Wolfe and the corroborating witnesses. Mr. Wolfe testified in this proceeding. He stated that he is a Leadman for his crew after having been demoted from the position of Foreman. As a Leadman, he was supervised by a Foreman-Outside, on this day, Robert Kau and, above him, Fred Huffman, Sr. His normal duties consisted of the following. He received load lists for his crew, found the pieces for loading by his crew, and assigned specific members of the crew to their tasks in loading the truck. He inspected the pieces to make sure that they were acceptable for shipping. He denied that anyone told him that he had responsibility to make sure his crew loaded things properly. He stated that he believed that the driver had that responsibility for correct loading. He specifically testified that it was the driver's responsibility to strap down the load before moving it across the public street. He stated that if the crew had the time, they would assist the driver to strap a load down. By implication he denied that he understood he had any responsibility to insure that his crew used Calcium Chloride. He admitted that he knew it was his responsibility personally to use Calcium Chloride at the very least when the outside temperature was at or below freezing and when there was ice present.

As to the day in question, he testified to the effect that he remembered it clearly. He worked with James Kucan, Matt Wilson, and Mike Schmitt. He located the pieces in question and made sure they were in marketable condition and that the crane raised them properly. He handed the dunnage on the trailer to Mr. Wilson and Mr. Schmitt. He acknowledged that in winter it was the crew's responsibility to inspect for snow and ice. He had a chance to look at the trailer, the dunnage and the load. He saw that there was no visible ice. He stated that he put Mr. Schmitt on top of the trailer because he had more experience than he did and, therefore, he could do a better job of inspecting for snow and ice. He corroborated Mr. Schmitt's testimony that the temperature that day was unseasonably warm, in the mid forties. He, therefore, had no reason to believe there was a need for Calcium Chloride.

He testified that because he was not on top of the truck, he did not know whether Calcium Chloride had been used. It was his opinion that it wasn't needed and, in any event, he trusted the judgment of the guys on the truck to make that call. He stated that if they saw ice and snow he expected that they would have immediately notified him. After they loaded the truck, the driver drove across Manhattan Drive and the crew proceeded to walk away. The accident then happened

He said his supervisors came down and asked why he had not put Calcium Chloride down and he did not have a response. He stated that he said they must have just forgotten and that they were in a hurry. He said there was no ice anywhere and he did not believe that is why the load fell off. He explained that the reason that he gave that answer was: "Fred is the type of person automatically you're the Leadman, you're at fault." [2] He denied that he ever admitted that I was at fault.

Both Mr. Kau and Mr. Huffman testified for the Employer. Mr. Huffman's testimony best summarizes what happened. Mr. Huffman said that it was cold that day and obvious that Calcium Chloride should have been used. He stated that he was called when the occurred and he went down and viewed the scene. He could see that the load was not strapped down and based upon his experience he knew that Calcium Chloride had not been used. He asked Mr. Wolfe why it had not been used and Mr. Wolfe stated they did not use Calcium Chloride and he said they were in a hurry to get home.

The preponderance of the post-hearing evidence specifically the historical weather observations from the Waukesha airport [3] are accurate for the time and reasonably applicable to this business. The preponderance of the available evidence indicates that the temperature was not above 20 degrees F. There was no precipitation that day. This flatly contradicts Mr. Wolfe's "clear" recollection of that day. His testimony is, instead, deliberate fabrication. It could not be the result of mere error. Further, Mr. Wolfe's own testimony demonstrates that he knew that his crew should use Calcium Chloride. Mr. Wolfe's testimony has many other contradictions as well. This is particularly true of the assumptions underlying how he worked with his crew. For example, his testimony that had the crew spotted snow and ice on the trailer, they would have notified him contradicts the tenor of his testimony that he has no responsibility to insure that his crew uses Calcium Chloride. While members of his crew who testified were evasive, the better view of that testimony is that they recognized that part of Mr. Wolfe's responsibility was to see that they did their jobs properly. Similarly, his testimony about his contemporaneous statements to his supervisors is self-serving and very unlikely.

The better evidence indicates that Mr. Wolfe knew it was his responsibility to insure that his crew used Calcium Chloride in the freezing temperatures. These responsibilities to insure his crew does the job right are normally associated with "Leadman" type positions. As noted, the testimony of his crew indicates that they knew he had responsibility to insure they

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[2] Tr. p. 242

[3] The arbitrator concludes that this source of information is very likely to be historical METAR weather observations routinely used in aviation from Waukesha airport. If so, these are very reliable observations.

did their jobs. Mr. Wolfe was trained as a Foreman and I conclude he must have had training in the responsibility of the Leadman to lead. He admitted he knew this at the time in question. Specifically, his testimony at tr. p. 242 indicates that Mr. Huffman had regularly held him to be responsible for what his crew did. Other parts of his testimony show that he regularly exercised the authority to direct his crew. In short, I conclude that Mr. Wolfe was aware that it was his responsibility to insure that his crew used Calcium Chloride.

This case involves more than a mistake in leading his crew. There is some ambiguity in the testimony of Mr. Kau and Mr. Huffman as to whether Mr. Wolfe when questioned at the time stated that he was in a hurry and he chose not to use Calcium Chloride or that he was in a hurry and forgot to use Calcium Chloride. The tenor of their testimony was that they concluded that Mr. Wolfe made a decision to not have his crew use Calcium Chloride and that he had done so in order to get home sooner. Mr. Huffman's written statement also contained a recitation of an expression of resentment by Mr. Wolfe that he had been demoted from his Foreman position. The testimony of Mr. Wolfe indicates that he admits being at the trailer at the time it was loaded. I don't believe that there was any way he could not have known that Calcium Chloride was not used. I also don't believe the crew would have failed to use Calcium Chloride if Mr. Wolfe had not expressly authorized them not to do so. In short, I conclude the better view of this evidence is that Mr. Wolfe specifically directed that the crew not use Calcium Chloride so that they could leave sooner. The Employer has demonstrated that Mr. Wolfe deliberately disregarded the vital interests of his Employer in excusing his crew from using Calcium Chloride.

3. Appropriate Level of Discipline

I turn now to the issue of appropriate remedy. Unfortunately, because of Mr. Wolfe's false testimony a lot of fine litigation efforts on his behalf were wasted. The first issue addressed by the Union was that the Employer deviated from its own newly adopted rules and/or the "old rules" which were more lenient were really being applied at that time. It is well established that a fundamental principle of discipline is that an employee is entitled to know what is expected of him or her and what the likely consequences of failure to meet those expectations are. Production Manager Tim Parnau testified at tr. p. 84-8 about the decision to impose discipline and the level at which it was imposed. He and his supervisor decided this offense involved a serious risk of injury, involved substantial damage to product, and a risk to customer relations. He also evaluated the fact that Mr. Wolfe deliberately took a short cut and, in essence, exhibited no real recognition of the seriousness of the incident. They, therefore, decided to impose greater discipline that might have been expressed in the rules. The new rules specify that penalties may be more severe than listed in circumstances which are more serious. The rules which arguably could be applied are: 9, 16, 21 and 22. These provide for discharge to mere written warning. The Employer applied rule 16 which specifies a three day suspension for the first offense. Contrary to the Union's position, the risk to employees, the public and the interests of the Employer are so great that this rule ought to apply. I note that this situation involves more than a mere error, but a degree of willful disregard of the Employer's vital interests.

It is important, however, to review some of the points which were made. The purpose of an investigation of an incident is not only to determine who is at fault but to examine all of the factors which contributed to it so that it is not repeated. I question whether this was done. It is not necessary to make a determination on that point. However, the evidence indicated that there were questions as to:

1. Whether the Calcium Chloride policy was well-defined and well explained.

2. Whether Mr. Wolfe's job is properly structured so that he can routinely make sure his crew does its job properly

As noted, these factors did not contribute to this situation because Mr. Wolfe chose to cut corners.

The Union also argued that the other members of the crew were not disciplined and therefore Mr. Wolfe was not treated equally. While the arbitrator agrees they should have been disciplined, the nature of Mr. Wolfe's responsibility was different. It was his responsibility to insure his crew used Calcium Chloride. Because his level of responsibility is higher than that of his crew, the failure to discipline them has no bearing on the choice of discipline for him.

However, there are broader reasons to sustain the discipline of Mr. Wolfe. There is a conflict in the concepts of treating employees the "same for similar incidents" and "treating employees individually." The better view of arbitral responsibility is to enforce a reasonable selection of penalty by an employer when the failure to do so would unnecessarily deprecate the seriousness of the offense committed by the employee. This employee's conduct demonstrates that he still does not "get it." This was a serious offense that risked serious injury to others. He shirked his responsibility and tried to avoid it throughout this proceeding. Any action other than sustaining the discipline would unduly deprecate the seriousness of this offense. Accordingly, I conclude that the Employer did not violate the agreement in this matter and the grievance is hereby denied.

AWARD

Since the Employer did not violate the agreement in disciplining Mr. Wolfe, the grievance filed herein is hereby dismissed.

Dated at Madison, Wisconsin, this 11th day of February, 2009.

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Arbitrator

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