

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ADVANCED BOILER & TANK COMPANY

and

BOILERMAKERS LOCAL UNION NO. 107

Case 14
No. 68331
A-6340

Appearances:

Joel S. Aziere, Attorney at Law, Davis & Kuelthau, S.C., 300 North Corporate Drive, Suite 150, Brookfield, Wisconsin, 53045, appearing on behalf of Advanced Boiler & Tank Company.

Matthew R. Robbins, Attorney at Law, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North RiverCenter Drive, Suite 202, Milwaukee, Wisconsin, 53212, appearing on behalf of Boilermakers Local Union No. 107.

ARBITRATION AWARD

Advanced Boiler & Tank Company (“Company”) and the Boilermakers Local Union No. 107 (“Union”) are parties to a collective bargaining agreement (“Agreement”) that provides for final and binding arbitration of disputes arising thereunder. The Union, with the concurrence of the Company, requested that the Wisconsin Employment Relations Commission designate a commissioner or staff member to serve as arbitrator of the instant dispute. The undersigned was so designated. A hearing was held on February 13, 2009, in Brookfield, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant.¹ A stenographic transcript of the proceeding was made. Thereafter, each party submitted post-hearing arguments, the last of which was received on April 8, 2009, whereupon the record was closed.

Now, having considered the record as a whole, the undersigned arbitrator makes and issues the following award.

¹ In the course of the same proceeding, evidence also was taken regarding Case 13 No. 68330 A-6339, another grievance arbitration matter involving the same parties, for which a separate award is being issued.

ISSUE

The parties stipulated to the following statement of issue to be decided:

Was there just cause for the suspension of the Grievant? If not, what is the remedy?

REVELANT PROVISIONS

The 2007-2010 Agreement between the Company and the Union contains the following provisions:

ARTICLE 12. Grievance and Arbitration Procedure

...

Section 2. Arbitration Procedure

In the event the grievance is not settled by the foregoing procedure, it shall be referred to an Arbitration Committee consisting of a representative of Employer, a representative of Union, and a third member to be chosen by those two (2) jointly. The decision of the majority of the Arbitration Committee shall be final and binding on the parties hereto. Such decision shall be within the scope and terms of this Agreement, but shall not change such scope and terms; shall be rendered within ten (10) days from the date of reference to the Arbitration Committee, and shall specify whether or not it is retroactive and the effective date thereof. If the two (2) members of Arbitration Committee fail to select a neutral member within two (2) days, the two (2) members already appointed shall, within two (2) days, call upon the Wisconsin Employment Relations Commission to make a the third selection. In the event either the Employer's or Union's representative fails to cooperate in calling upon the Wisconsin Employment Relations Commission, as herein prescribed, within the said two (2) day's, the other representative shall have the authority to make such request.²

...

² For the purpose of this proceeding, the parties stipulated to a waiver of the requirement set forth in this provision that unresolved grievance disputes are to be referred to a tripartite panel of arbitrators. They consented instead to the jurisdiction of the undersigned, causing the record to reflect that such waiver is limited to this proceeding and not intended to establish any precedent or past practice between them. The parties also stipulated to a waiver of the portion of this provision that would require this award to be issued within ten days.

Section 4. In the event the Arbitrator does not find just cause for the discipline or discharge, then the Arbitrator will determine the remedy.

BACKGROUND

At all relevant times, Grievant Jon Strandt was employed in the Company's fabrication division. Strandt's direct supervisor was Ken Weber, and Weber's supervisor was Jeff Preston, a Company manufacturing manager.

At approximately 2:30 in the afternoon on Thursday, June 12, 2008, employees in the Company's administrative office received news that a tornado warning had been issued for the Company's area. At that point, a tornado drill was initiated and all Company employees from the fabrication plant, as well as the office, were instructed to congregate in the Company's tornado shelter.

The Company's tornado shelter is located on the first floor of the Company's two story building. Approximately ten to twelve feet beyond the front door to the building, a hallway leads to a storage area and a women's restroom. The women's restroom serves as the Company's designated tornado shelter. Behind the area housing the entryway and the women's restroom is the fabrication plant, also located on the first floor of the building. There is a doorway from the fabrication plant leading directly into the front area of the building.

In response to the tornado drill, approximately thirty Company employees had congregated in the front area of the building. Because the women's restroom is too small to hold this many people, employees were located in the entryway as well. Jon Strandt had been working in the fabrication plant and was one of the last employees to hear about the tornado drill. When he entered from the plant into the front area of the building, he observed that people were packed in pretty tightly.

Strandt was smoking a cigarette. Although smoking is permitted in the fabrication plant where Strandt works, it is not permitted in the front of the building, which is considered part of the Company office. There are rules for the facility that establish that this front area is non-smoking, and there are no-smoking signs on the fabrication plant door that indicate that, as well.

Shortly after Strandt entered the area, an office secretary who had been standing in the women's restroom stated, "hey, somebody's smoking in there", referring to the entryway area. Strandt was making his way through the crowd and had stopped to say hello to Joe Kelly, an inspector. Manager Jeff Preston, who was also in the women's restroom, looked out into the entryway, and saw that Strandt was smoking. Strandt, at that point, had reached the halfway point between the women's restroom and the front door. Strandt already had turned to walk

toward the front door and had his back to Preston, when Preston shouted, “Jon, put out your cigarette”. Strandt did not respond to Preston, and continued in the direction of the front door. He was stopped again briefly by a coworker along the way. Shortly thereafter, Preston, who was still in the women’s restroom, heard another employee observe that Strandt was still smoking. Preston looked out at Strandt again and stated, “Jon Strandt, put that cigarette out now”. At that point, Preston exited the women’s restroom and headed toward the front door, where Strandt was standing, with the front door propped open against his foot. As Preston approached Strandt, he stated, “I told you to put that cigarette out”. At that moment, Strandt was facing away from Preston, taking one last drag from the cigarette and flicking it out the door.

When Strandt turned back into the building, Preston was standing within twelve or eighteen inches of him. At that moment, Strandt exhaled the smoke from his lungs toward Preston, into his face. According to Strandt’s testimony at hearing, he also stated to Preston, “you’re about as intimidating as the easter bunny”, and then, as Preston was walking away, Strandt told him to “fuck off”. At this point, Preston told Strandt that he was being suspended. As the area was crowded with employees, there were several people in the immediate vicinity of the front door to witness this exchange. Union Steward Barry Hallett testified that Preston was loud and “in [Strandt’s] face” while it was occurring.

Although Preston testified at hearing that he did not observe anyone else smoking, two other fabrication division employees were also smoking when they entered the front area of the building for the tornado drill. One had thrown his cigarette out before Preston made his first comment to Strandt. Another threw his cigarette out, through the front door, immediately after Strandt, as Preston and Strandt were having their discussion.

The Company policy manual sets forth major work rules and minor work rules. The policy indicates that a violation of minor work rules warrants the penalty of a written warning, and the violation of major work rules warrants a penalty of serious disciplinary action up to and including discharge. For the incident of June 12, 2008, Strandt was suspended for violation of major work rule number ten, which is defined as follows:

INSUBORDINATION. Refusal to follow supervisory instructions and/or job assignments.

Further, he is said to have violated major work rule fifteen, which is defined as follows:

MAKING FALSE, MALICIOUS, OR VICIOUS STATEMENTS concerning any employee, the Company, or its products. Any **ACTION** or **STATEMENT** which adversely impairs the Company’s image or standing with any of its employees, customers, vendors, or the general public.

There is some discrepancy in the record as to what disciplinary action was taken against the Grievant. The petition for grievance arbitration filed by the Union indicates that Strandt was given a three-day suspension. The disciplinary letter issued to him on the day the incident occurred, however, indicates that Strandt was suspended only for one day, on Friday, June 13. The Union suggested at hearing that that Strandt might also have been denied some overtime opportunities over the weekend of June 14 and 15, the days it apparently considers to have been the second and third days of Strandt's suspension.

DISCUSSION

The Company has supported its claim that Strandt's actions were insubordinate, in violation of major work rule ten. The record shows that shortly after Strandt entered the front area of the Company's building he was given clear direction by Preston to extinguish his cigarette. Though Strandt has asserted that he was already moving toward the front door when the directive was made, he took his time in complying with it. He stopped to chat with a co-worker along the way, and then, even after he finally reached the door, he propped it open against his foot and lingered inside the building, still smoking. Strandt only complied with the instruction to put his cigarette out after Preston told him to do so twice and then physically approached him.

The Union has made various arguments intended to cast doubt on the factual elements underlying the Company's case. Pointing out that Strandt already was facing in the direction of the door and therefore had his back turned to Preston when he first told Strandt to extinguish his cigarette, the Union suggests, for example, that the Company has failed to prove that Strandt even heard this initial directive. That assertion, however, is contrary to the evidence. Preston testified that he made his first comment to Strandt when Strandt was halfway between the women's restroom and the front door of the building, as Strandt was turning toward the door. Though Strandt apparently did not acknowledge Preston's directive at the time, he has never denied having heard it. Beyond that, Strandt's testimony at hearing confirms that he first heard Preston tell him to put out his cigarette when he was still in the middle of the entryway area and starting to head toward the front door, and then he heard a second directive when he was closer to the door:

Well, I was heading towards the door anyhow, and I was going this way. He had said something to me one time when I was closer to the ladies' room, and I was heading that way. I was stopped by somebody else had said something to me. I was heading towards the door, but somebody had stopped me briefly, and then Jeff repeated again much louder -- . . . Jon Strandt, put that cigarette out now --

Transcript at pp. 41-42.

The Union also asserts that certain testimony regarding exactly when Strandt disposed of his cigarette is unreliable, suggesting that Strandt should be considered to have complied with Preston's directive more promptly than Company witnesses have suggested. The witness testimony on this point, however, is irrelevant. As discussed, Strandt was in the middle of the entryway area when Preston first told him to extinguish his cigarette. The conclusion that Strandt did not promptly follow Preston's directive can be reasonably drawn from the fact that enough time had elapsed, between Preston's initial directive and Strandt's ultimate compliance, for another employee to complain again about the smoking and for Preston to leave the women's restroom and make his way through the crowded room and find Strandt standing by the door, having just taken a last drag and flicked his cigarette out.

Strandt certainly cannot be expected to have run to the door when Preston told him to put out his cigarette, but his apparent willingness to take his time to follow Preston's directive is even more problematic when understood in light of Strandt's own recognition, upon entering the room, that it was not an appropriate place to smoke. Strandt stated in his grievance form:

[E]mployees were instruction to go to a designated tornado shelter. I arrived there carrying a cigarette. It was a crowded hallway, and obviously not an appropriate place to be smoking.

And at hearing, Strandt also stated:

Well, I walked in through here, and I noticed it was crowded right away, and I did have a cigarette, and I, of course, right away recognized it was an issue, okay? I'll admit that right away.

Transcript at p. 40.

The Union suggests that the narrow analysis of whether Strandt complied with the order to put out his cigarette can be the only basis for a finding of insubordination. In doing so, it cites Preston's testimony at hearing, wherein he states that he felt Strandt was insubordinate when he refused to put out the cigarette when he was told the first time to do so. I find that Strandt's actions even after he put his cigarette out support a finding of just cause for Strandt's discipline. Preston's initial disciplinary letter to Strandt indicates that the suspension for insubordination was based, generally, on Strandt's alleged "vindictive behavior toward management". Further, in the parties' Agreement, insubordination is defined as the "refusal to follow supervisory instructions and/or job assignments". I believe that such a refusal can include a display of willful disrespect toward a member of management, because it has a tendency to undermine the ability of management to direct the workforce.

The message inherent in Strandt's behaviors even after he extinguished his cigarette – behaviors, it is important to note, that were carried out amidst the close audience of other

Company employees – was that Preston had no authority over him. The evidence is uncontroverted that Strandt blew cigarette smoke in Preston’s face. Regardless of Strandt’s claims that exhaling is not a “laser precision thing”, it is fair to conclude that the act of sending smoke toward Preston’s face was undertaken with some degree of intentionality. Certainly Strandt had no choice but to exhale the smoke in his lungs during his exchange with Preston, but anyone who has ever smoked anything knows that there is some directional control in that action. Similarly, Strandt’s comparison, at that moment, between Preston and the easter bunny was clearly intended to diminish Preston’s authority, as was Strandt’s statement that Preston should “fuck off”.

Much has been made by the parties regarding whether the use of the term “fuck” in this particular exchange, and in this particular industrial workplace, was an appropriate basis for discipline. I find that it was. While the term is reportedly used freely in conversations that occur in the Company’s fabrication plant, the evidence indicates that it is not used in the particular manner in which Strandt employed it. When Strandt told Preston to “fuck off” in the context of a serious conversation, regarding a supervisory directive, Strandt crossed a line that the record indicates his co-workers know not to cross. Further, the problem with Strandt’s comment is not as much with the particular term used as it is with the sentiment behind it. Even if Strandt had expressed the same sentiment without the use of a profanity, its underlying message of defiance most likely still would have been an appropriate basis for discipline.

For several reasons, I am not persuaded by the Union’s argument that the incident between Strandt and Preston should be attributed to some degree of provocation by Preston. First, the Union’s assertion that Preston pursued Strandt even after he had discarded his cigarette is simply not supported by the evidence. The fact that Strandt still had smoke in his lungs to blow at Preston is a reliable indication that Strandt was still smoking when Preston crossed the room and confronted him. Further, I am not persuaded that the physical elements of the interaction should be understood as an effort on Preston’s part to intimidate Strandt. The fact that Preston physically approached Strandt and perhaps even addressed him in a louder than normal voice, seems to have been a direct result of Strandt’s unwillingness to follow Preston’s first two directives from across the room. Further, the fact that Preston is six inches taller than Strandt or the fact that he was standing close to him, especially in a crowded room, does not make Preston’s interactions with Strandt per se intimidating. Moreover, in the end, what the Union describes in its case as intimidation seems really to have been embarrassment on Strandt’s part, at having been told what to do in front of his coworkers and friends:

Well, I guess, I was – I felt that it was confrontational and in a way – you know, we’re in this very tight area, like everybody else had said. There’s all office workers, people that I’ve worked for – with, I should say, for 20 years.

I've known these people, I've gone to Christmas parties with, and, you know, I've been to many of their houses, that kind of thing. And to me he was – it felt like he was trying to demonstrate authority in front of, you know, his superiors possibly, and I – I felt that it was uncalled for, and it was just a reaction. You know, I just felt like fuck you, like that was, you know, he was trying to intimidate me, and it was a simple reaction.

Transcript at pp. 44-45. Such discomfort does not make Strandt's insubordinate actions partially attributable to Preston. Further, the fact that Strandt has not shown any tendency in the past to behave in disrespectful manner might be relevant if the nature of Strandt's actions were at all ambiguous. Here, they were not.

Finally, I am not concerned with the evidence that two other employees in the area were smoking. Preston reliably testified that he did not see anyone else smoking during the incident, which undermines any claim that could be made that Strandt's discipline was somehow the result of disparate treatment.

Through the evidence regarding Strandt's insubordinate behavior, the Company has met its burden to show that it had just cause for whatever suspension was served by Strandt. Given this conclusion, it is not necessary to determine whether Strandt's statement to Preston, to "fuck off", also constituted a separate major rule infraction or whether it would have been more appropriately classified, as the Union argues, as a minor rule infraction.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 6th day of July, 2009.

Danielle L. Carne /s/

Danielle L. Carne, Arbitrator

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