

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**INTERNATIONAL ASSOCIATION OF MACHINISTS,
DISTRICT NO. 10**

and

DINGS COMPANY, A DIVISION OF VENTUREDYNE, LTD.

Case 7
No. 68751
A-6360

(Jon Banty Suspension Grievance)

Appearances:

Matthew Robbins, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

John Sapp, Michael, Best & Friedrich, Attorneys at Law, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin 53202-4108, appearing on behalf of the Company.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and Company, respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to chair a tripartite arbitration panel to decide the Jon Banty suspension grievance. The other members of the panel were Union-designated arbitrator Donald Griffin and Company-designated arbitrator Greg Cichon. A hearing, which was transcribed, was held on September 11, 2009 in Milwaukee, Wisconsin. Afterwards, the parties filed briefs which were received by October 26, 2009. Based on the entire record, the arbitration panel issues the following Award.

ISSUE

The parties stipulated to the following issue:

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

PERTINENT CONTRACT PROVISION

The parties' 2006-11 collective bargaining agreement contains the following pertinent provision:

ARTICLE II
Management Clause

2.01 The regular and customary functions of management, such as the determination of the product to be manufactured, the schedule of production, the methods of manufacture, the direction of the working forces, including the right to hire, suspend or discharge for cause, or transfer and the right to relieve employees from duty because of lack of work or for other legitimate reasons and the right to enforce existing shop rules are retained by the Company subject to the other provisions of this Contract. Such management rights shall not be used for purposes of discrimination against any member of the Union.

PERTINENT COMPANY PLANT RULES

GROUP A:

A violation of any of the following rules by an employee is considered inexcusable and will result in immediate discharge:

...

7. Willful hampering of production or failure to carry out definite instructions or assignments.

8. Insubordination and/or failure to carry out direct orders from supervision or management.

...

BACKGROUND

The Company is a manufacturer of industrial magnets and power transmission equipment. The Union is the exclusive bargaining representative for the Company's bargaining unit employees. The grievant, Jon Banty, is in the bargaining unit.

Banty is a machinist. When this case arose, he had worked for the Company for about a year and a half. The record indicates that during that time frame, he received the following discipline. In March, 2008, he was given a verbal warning for producing excessive scrap. In

September, 2008, he was given a written warning for poor productivity/efficiency, leaving his machine and posting an inappropriate sign. In October, 2008, he was given a verbal warning for sleeping on the job.

In November, 2008, he was suspended from work. His suspension lasted about 12 hours. This case involves that suspension.

FACTS

Each machine in the Company's facility has set-up sheets which are kept in a large binder by the machine. These set-up sheets have been created by the machinists who work on that machine. The machinists use the set-up sheets to help them operate the machine.

Banty was assigned to learn how to operate a CNC machine known as the Tree Machine. That machine's regular operator, Bob Housch, had been operating the machine for decades. As part of Banty's training process, Jerry Hamberger (Banty's supervisor) told Banty to make written notes about how to operate the Tree Machine. Banty did as directed and made written notes as he learned how to operate the machine from Housch.

Those notes played an important role in what happened here. Banty made his notes in a notebook on 8 ½" x 11" paper. There were about a dozen pages of notes. The notes contained hand-drawn diagrams and drawings which related to tool numbers and tool dimensions. The notes also contained specific instructions on how to start and properly operate the Tree Machine. Everything in the notes related to the Tree Machine and its operation. There was nothing in the notes that could qualify as personal information. Banty made these notes at work during his regular work hours. Banty considered these notes to be his personal property. Until the following occurred, no one from management told him otherwise.

...

On November 5, 2008 (Note: All dates hereinafter refer to 2008), Hamberger saw the notes which Banty had made about operating the Tree Machine. Hamberger thought that Banty's notes were very good and very detailed, so he (Hamberger) wanted to place the notes in the Tree Machine's set-up binder. Hamberger asked Banty to copy the notes. Banty refused to turn over his notes to Hamberger, saying: "I don't think so. . . I wrote these notes, I made them, they're for me." Hamberger then walked away from Banty.

Hamberger then went to see Jim Stark, who is the Company's Manufacturing Manager. Hamberger told Stark that Banty wouldn't "let us copy some notes." Hamberger elaborated on what he meant by telling Stark the following: that Banty had made some written notes about the operation of the Tree Machine, that he (Hamberger) considered the notes to be better than what was then in the set-up binder; that as a result, he (Hamberger) wanted to put Banty's notes into the Tree Machine's set-up binder; and that Banty refused to turn over the notes.

Stark then went onto the factory floor where Banty was working and told Banty that it was his (Stark's) understanding that he (Banty) did not want to leave his (Banty's) notes at the machine. Banty replied that Stark's understanding was correct and that he was not going to leave his notes there. Stark then asked "why?", to which Banty replied, "because they're my notes." Stark then asked Banty if he had made the notes on company time. Banty replied in the affirmative (meaning that he had made the notes on company time). Stark then asked Banty to show him his notes. Banty complied with Stark's request, but did so in the following fashion. From a distance of about six feet away, Banty held up a few sheets of paper at a time. Thus, Banty made Stark look at the notes from a distance of six feet away. After Stark had seen what Banty showed him of the notes, he told Banty that since the contents of the notes referred to company processes and company product, and had been made on company time, he (Stark) considered the notes to be company property and, as such, were not to leave the Tree Machine and were to stay near that machine like the set-up sheets. Banty's response back was that "he didn't feel like [he] needed to do that" (i.e. leave his notes at the machine). Banty did not comply with Stark's directive to leave his notes at the machine. Instead, at the next break time, Banty took his notes outside and put them in his car. Stark and Hamberger witnessed Banty do this.

The next day, November 6, Stark called his legal counsel to consult with him about Banty's work conduct.

On Friday, November 7, Stark asked Banty if he had taken the notes off the Company's premises. Banty replied in the affirmative (meaning he admitted that he had taken the notes off the Company's premises). Stark then told Banty to return the notes to the Company. Banty replied that he would do so (i.e. return the notes) on Monday (referring to Monday, November 10).

On Monday morning November 10, Banty went into Stark's office and gave him two sheets of paper that contained writings and drawings on them. Stark later showed the two sheets of paper to Hamberger. After reviewing them, they concluded that the two sheets of paper that Banty had given Stark that morning were not the notes that they had seen on November 5. Stark then met with Banty and asked him if the two sheets of paper were the same notes as what he and Hamberger had previously seen. Banty conceded that the two sheets of paper were not his original notes. Stark then told Banty that he (Banty) would have to return the original notes. Banty replied that he was unable to do that because the notes were at a friend's house, and that he couldn't get into the friend's house because the friend was "up north" at the time. At that point, Stark told Banty that he (Banty) was suspended until he returned the original set of notes to Stark.

The next day, Tuesday, November 11, Banty came into Stark's office about 2:30 p.m. and gave Stark a set of notes. The notes which Banty handed over this time were not the two pages that he had turned over to Stark previously; instead, it was the original set of notes which he and Hamberger had seen on November 5.

Banty returned to work on Wednesday, November 12. His suspension had lasted about 12 work hours.

Banty later grieved his suspension, and it was ultimately appealed to arbitration.

...

Banty testified at the hearing that the reason he did not comply with Stark's directive to turn over his notes when he was originally directed to do so was because he felt they were his personal notes. In his view, they were his because he created them. Additionally, he opined that "the Company had been functioning just fine without [his] notes."

POSITIONS OF THE PARTIES

Union

The Union's position is that there was not just cause for the grievant's suspension. It asks that the suspension be overturned. It elaborates as follows.

The Union acknowledges at the outset that the grievant initially refused to turn over his notes to management after he was directed to do so.

However, as the Union sees it, that act needs to be considered in the following context. First, the Union notes that the grievant was not the regular operator of the Tree Machine; someone else was. Building on that premise, the Union submits that the grievant was not knowledgeable about the machine and its operation. Second, the Union notes that the grievant was assigned to learn how to operate that machine. As part of the learning process, he was told to take notes about what he learned. Third, the Union notes that he did as directed and took notes in a personal notebook. The Union characterizes his notes as consisting of his observations about that machine.

The Union argues that the notes which the grievant made – and which he initially refused to turn over to the Company – were his personal property. Here's why. First, he made them, so they were his work product alone. Second, he made them for his own use. He did not intend for the notes to be shared with others. Third, while he made his notes during his work hours, the Union asserts that should not be a sufficient reason to make them (i.e. his notes) company property. According to the Union, not everything that an employee writes during their work time automatically becomes company property. Fourth, the Union believes it is significant that no one from management ever told him – that is, until after this matter arose – that the Company considered his notes to be company property and were going to be put in the set-up binder (where they could be used by other employees).

Building on the premise that the grievant's notes were his personal property, the Union contends that "no employee should have to give up his personal property to his employer."

The Union further avers that “no employee should have their personal property become property of an employer at its whim.”

The Union anticipates that the Company will argue that the grievant’s conduct in failing to turn over his notes to the Company violated the well-known workplace maxim of “obey now – grieve later.” The Union avers that numerous arbitrators have found that maxim inapplicable though under certain circumstances. According to the Union, this was a situation where the “obey now – grieve later” maxim did not apply because the directive which the grievant was given (i.e. to give up his personal notes to the Company) was an “illegitimate” directive. Notwithstanding the foregoing (i.e. the Union’s position that the Company’s directive to the grievant was “illegitimate”), the Union points out that the grievant eventually turned over his notes to the Company.

Finally, the Union argues in the alternative that even if the grievant was mistaken in his belief that his notes were his personal property, his failure to initially turn over his notes to the Company did not constitute disciplinary misconduct because “it is undisputed that he acted in good faith.”

In sum, it is the Union’s view that the Company did not prove that it had just cause to suspend the grievant. The Union therefore requests that the grievance be sustained, the suspension overturned, and a make-whole remedy issued.

Company

The Company’s position is that there was just cause for the grievant’s suspension. It asks that the suspension be upheld. It elaborates as follows.

The Company acknowledges at the outset that the grievant ultimately turned over his notes to management. The Company emphasizes that before he did that though (i.e. turned over his notes to management), he twice refused direct orders from Stark to do that. The first time was on November 5 when Stark told the grievant to leave his notes by his machine. The grievant did not do so. The second time was on November 10 when the grievant did not return the notes to work (as he was directed to do on November 7). From the Company’s perspective, that was insubordinate conduct which, in turn, constituted workplace misconduct.

Next, the Company contends that Stark’s directive to the grievant to turn over his notes was an appropriate workplace directive. Here’s why. First, the Company points out that the notes were made on Company time and on Company property. Second, it emphasizes that the notes related solely to the Tree Machine and thus, to the Company’s business. Building on that premise, the Company reasons that there was nothing personal about the grievant’s notes. Third, the Company maintains that the reason it wanted the grievant’s notes to be placed in the Tree Machine binder was because the grievant was an inexperienced operator and, as such, Company officials felt that his notes about the machine could be helpful to other inexperienced operators. Fourth, the Company points out that the reason Stark directed the grievant to turn

over the notes a second time was because the grievant had told Stark he (the grievant) was going to bring them in, but he failed to do so.

The Company argues in the alternative that even if the grievant had a colorable claim that he did not have to turn over his notes because they were his personal property (as opposed to being Company property), the Company believes it to be axiomatic that the grievant should have complied with Stark's order rather than resorting to self-help. It cites Elkouri and various arbitration decisions to support that proposition. Building on the foregoing, the Company avers that the grievant should have complied with Stark's order and immediately turned over the notes to management. He could have grieved it afterwards if he wanted. However, that didn't happen, and the grievant instead disobeyed two direct orders from Stark. According to the Company, "Banty was wrong to disregard the order to leave the notes, wrong to fail to return them, and wrong to ignore the grievance procedure. His excuse is nothing more than selfishness."

Finally, with regard to the penalty it imposed, it's the Company's view that a day and a half suspension was quite modest. Here's why. First, it notes that the shop rules provide that "failure to carry out definitive instructions or assignments" and "failure to carry out direct orders" are Class A offenses that are "inexcusable" and subject to "immediate discharge". Second, with regard to the length of the suspension, the Company asserts that it was the grievant himself who determined how long he was suspended. In making this claim, the Company points out that Stark told the grievant he was suspended until he brought back the notes from his friend's house. The Company opines that "it was in his power to shorten the period by simply complying with the directive." Third, the Company calls the arbitrator's attention to the grievant's "less than satisfactory" prior work record. Putting all the foregoing together, it's the Company's view that the penalty it imposed was warranted.

In sum, the Company believes it had just cause to suspend the grievant. The Company urges the arbitrator to deny the grievance and uphold the suspension.

DISCUSSION

At issue herein is whether the Company had just cause for the grievant's suspension. I answer that question in the affirmative, meaning that I find the Company had just cause to suspend the grievant. My rationale follows.

The threshold question is what standard or criteria is to be used to determine just cause. The phrase "just cause" is not defined in the collective bargaining agreement, nor is there contract language therein which identifies what the Company must show to justify the discipline imposed. Given that contractual silence, those decisions have been left to the arbitrator. Arbitrators differ on their manner of analyzing just cause. Some apply the seven-step DAUGHERTY standard. Others apply a standard which consists of a two-prong analysis: the first element is whether the employer proved the employee's misconduct, and the second, assuming this showing of wrongdoing is made, is whether the employer established that the

discipline which it imposed was commensurate with the offense given all the circumstances. Of these two approaches, I'm going to apply the latter here (i.e. the two-prong analysis). I only apply the DAUGHERTY standard if the parties agree to it, and that did not happen here.

As just noted, the first part of the just cause analysis being used here requires a determination of whether the employer proved the employee's misconduct. Attention is now turned to making that call.

I begin my discussion by noting that the grievant ultimately complied with Stark's directive and turned over his complete set of notes to Stark on November 11. However, he doesn't get brownie points for doing that because before he did that, he twice disobeyed Stark's order to turn over the notes. I'm referring to the following. First, he did not leave the notes by the machine as Stark directed him to do on November 5. Instead, he took his notes outside, put them in his car and ultimately took them off the Company's premises. Second, on Friday, November 7, Stark directed the grievant to bring the notes back to work, to which the grievant replied that he would do so on Monday (referring to Monday, November 10). On November 10, the grievant gave a couple of pages of notes to Stark, but what he gave Stark was not his complete set of notes. After discovering that, Stark told the grievant to return his original set of notes. It was at that point that the grievant said his notes were at a friend's house. These facts establish that the grievant twice failed to turn over his notes as Stark directed.

Since the grievant failed to comply with a work directive, I've decided to call attention to a commonly accepted rule of the workplace. It's this: when a supervisor gives an employee an order, or tells an employee to do something, the employee is supposed to comply with the order and do what they are told. That's how work gets done in the workplace. Employers have a legitimate and justifiable interest in maintaining order in the workplace and having employees follow directives from their supervisors. When employees fail to follow their supervisor's orders, that conduct is obviously detrimental to the workplace environment since it undercuts the authority of supervisors. No employer can be expected to tolerate it. If an employee has a problem with an order they are given, they can grieve it afterwards. In the meantime though, they are supposed to do what they are told. If an employee refuses to comply with the order, and does not do what they are told to do, then their conduct is not usually protected and there can be adverse employment consequences to the employee as a result. Said another way, employees who do not comply with orders given them by their supervisors do so at their own peril.

The grievant failed to comply with this basic rule of the workplace when he disobeyed Stark's order to turn over his notes.

The Union offers an explanation for the grievant's conduct which, as it sees it, should either excuse his conduct or make it qualify as an exception to the "work now - grieve later" principle. The Union's contention is that Stark's directive was "illegitimate" because the grievant's notes were his personal property. Building on that premise, it's the Union's view

that he didn't have to turn them over to management. In addressing this contention, it is initially noted that I can understand why the grievant thought his notes were his personal property: he made them for his own use and no one told him – that is until this matter arose – that they were not his property. Be that as it may, the Company thought otherwise. It felt that since the notes were made on company time and dealt exclusively with the Tree Machine and its operation, the notes were Company property. In this instance, the Company's view prevails. In so finding, I'm not going to get drawn into a broad discussion about an employer's right to take personal items from employees. In this case, it suffices to say that after the Company decided that it wanted the grievant's notes which concerned the Tree Machine and its operation, and clearly told him that, the grievant then became obligated – whether he liked it or not – to turn over his notes to the Company. Simply put, he should have done so. However, he did not. Instead, he played games with management over the notes. In making that statement, I'm referring to the following. First, on November 5, after he had been told to leave the notes by the machine, he instead took them off site (presumably, as an act of defiance). Second, on November 10, when he was supposed to bring in the notes, he brought in just two pages of the notes (rather than all of the notes). Third, after he was told to produce all the notes, he told Stark that he didn't have the notes anymore – they were at a friend's house. At that point, Stark had a justifiable basis to be irked at the grievant's behavior because it certainly seemed that the grievant was just pushing the proverbial envelope. Conversely, at the same time that the grievant was playing these games with management, neither Hamberger nor Stark did anything or said anything that was intended to provoke the grievant or try to create a confrontation with him over the notes. That being so, neither Hamberger nor Stark bears any responsibility for the grievant's behavior. Instead, it is the grievant who bears responsibility for his behavior and he alone.

Based on the above, I find that the grievant engaged in misconduct when he failed to turn over his notes as directed. He should have done so. To the extent that he thought he did not have to do so, he was just plain wrong.

Having concluded that the grievant engaged in unacceptable workplace behavior, the next question is whether that behavior warranted discipline. I find that it did. As previously noted, the Company has a legitimate and justifiable interest in ensuring that employees follow directions from their supervisors. The grievant failed to follow a legitimate directive he was given to turn over his notes. Aside from that, the Company has several plant rules that prohibit employees from failing to carry out direct orders. The grievant violated those rules. That also warranted discipline.

The final question is whether the penalty which the Company imposed for that misconduct (i.e. a suspension) was appropriate under the circumstances. I find that it was. Here's why. First, it is noted that nothing in the parties' collective bargaining agreement requires that a lesser form of discipline had to be issued in this particular case. Some labor agreements specify a particular sequence that must be followed by the employer when it imposes discipline (for example, a written warning must be imposed before a suspension). This collective bargaining agreement does not contain such language. Even if it did though,

the Company followed progressive discipline in this instance because the grievant had already received oral and written warnings. Second, the Union did not show that the grievant was subjected to disparate treatment in terms of the punishment imposed. In order to prove disparate treatment, it is necessary to show that other similar factual situations occurred where the Company imposed either lesser or no punishment. That was not shown. Given the foregoing, I find that the grievant's suspension was not excessive, disproportionate to the offense, or an abuse of management's discretion, but rather was reasonably related to his proven misconduct. The Company therefore had just cause to suspend him.

In light of the above, it is my

AWARD

That there was just cause for the suspension. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 6th day of January, 2010.

By Raleigh Jones /s/
Raleigh Jones, Chair, Arbitration Panel

UNION

COMPANY

I concur.

I concur.

Donald Griffin

Greg Cichon /s/
Greg Cichon

Date

12/23/09
Date

I dissent.

I dissent.

Donald Griffin /s/
Donald Griffin

Greg Cichon

January 4, 2010 /s/
Date

Date