

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GREAT LAKES CALCIUM CORPORATION

and

GENERAL TEAMSTERS UNION, LOCAL 662

Case 4

No. 69368

A-6390

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller and Brueggeman S.C., Attorneys at Law, by **Nathan D. Eisenberg**, 1555 River Centre Drive, Milwaukee, Wisconsin, appeared on behalf of the Union.

Liebman, Conway, Olenjniczak, & Jerry, S.C., Attorneys, at Law, by **Ross W. Townsend**, 231 South Adams Street, Green Bay, Wisconsin, appeared on behalf of the Employer.

ARBITRATION AWARD

General Teamsters Union, Local 662, herein referred to as the "Union," and Great Lakes Calcium, 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 Green Bay, Wisconsin, on March 13, 2010. Each party filed a post-hearing brief, the last of which was received May 24, 2010. ¹

ISSUES ²

The parties stipulated to the following statement of the issues as follows:

1. Did the Employer discharge the Grievant for just cause?
2. If not, what is the appropriate remedy.

¹ The Union did not file a reply brief.

² The parties stipulated that I could retain jurisdiction over the specification of the remedy if either party requested that I do so in writing, copy to opposing party, within sixty (60) days of the date of the award.

RELEVANT AGREEMENT PROVISIONS

“ . . .

ARTICLE 13 – DISCIPLINE, SUSPENSION AND DISCHARGE

The Employer shall not discipline, discharge, or suspend any employee without “just cause.” Some acts are so egregious that the Employer may immediately suspend or discharge an employee. Most incidents do not rise to that level, in those “lesser” incidences the Employer will give at least (1) written warning notice to the Employee, with a copy to the Union.

The discipline process will be administered in accordance with the Employer’s discipline policy. Development and implementation of the discipline process lies exclusively with the Employer. The Employer will inform the Union Business Agent prior to implementing changes.

Grievances protesting discharge or suspension shall be filed within (5) days of receipt of written notice and shall be processed in accordance with the grievance and arbitration procedure set forth in Article 12, starting at Step 3.

. . . . “

FACTS

The Employer is a manufacturer of calcium from crushed rock. The Union represents production employees of the Employer.

Grievant Peter Ziber was first employed by the Employer on September 7, 2005, as a mill operator. About two and a half years later he became a Payloader Operator. At the time of this dispute and prior discipline, he was assigned to the second shift. There are two employees assigned to the second shift. They are required to report to work at 10:45 p.m. and the shift itself starts at 11:00 p.m. and ends at 7:00 a.m. The other person assigned to the shift was a Mill Operator. The mill operator worked inside the mill throughout his shift. The two operate without direct supervision. The Employer has placed a cell phone in the payloader to call the day shift supervisor at home. The day shift supervisor is Production Supervisor Michael Flaig. He normally left at the end of the day shift but regularly responded to calls from the night shift unless he was sleeping. He responded immediately upon waking if a call came in while he was asleep. Ziber had made calls a substantial number of times before and was familiar with the procedure.

Ziber was also the sole Steward for the Union at the plant. He had represented and consulted with employees in numerous disciplinary situations.

The Employer's property is located with a Lake Michigan dock for lake-going freighter ships to deliver shipments of raw lime stone. The Employer does not have enough storage space for the stone and, therefore, it rents property across the street. The rented property is about 400 yards from the Employer's property. The Employer's property has a mill to crush the rock into the fine calcium which is its product. The Employer's property itself is dissected by a rail siding for set-out of rail cars for delivery of raw materials and shipment of some finished product. Another rail set out siding goes past the entrance to the property for the delivery of shipments of coal for a neighboring Wisconsin Public Service electric plant. Deliveries on that siding can delay employees' arrival by blocking the entrance for a significant period of time.

There is a small utility building on the rented property which had electrical service from a nearby overhead utility wire that spanned the driveway to the rented property and was connected through a pipe extending downward through the roof through into an electrical distribution box. At the time of this dispute, the building had been unoccupied for some time. The building was owned by Brown County and left locked at all times. The Employer did not have access to that building. This property is dimly lit. The Employer's property is well lit.

Ziber operated a payloader, a large two axle (with auxiliary third axle) dump truck, a Skidster, and a pickup truck with a water tank and distribution system. Ziber's ordinary work consisted of several functions. One (the one leading to the incident in question) of Ziber's jobs was to use the payloader to load the Employer's dump truck with stone from the pile at the dock and take it by dump truck to the rented property for storage. Another required that he load raw material stone into the hopper of the mill for crushing. In addition to that, if time permitted, he would drive the pickup truck and spray water to keep the dust arising from the crushing process down. He would file a written report at the end of his shift concerning the vehicles to alert the next shift of their condition. Ziber had no significant prior experience with dump trucks having used a small one on a farm on a few occasions. He never operated any of these vehicles off the Employer's premises. The training he received for operating the dump truck involved familiarization with its operation by a fellow employee.

The Employer had experienced a problem with the bolts that held the bed on the dump truck. At one point a bolt "walked out" during a shift and the other sheared causing the dump truck's entire box to fall off. After that occurred, the Employer conducted a safety talk about the dump truck for which Ziber was present. The Employer, in part, emphasized that the truck must always be operated with the minimum stress on the box (keeping it as low as possible). It is undisputed that Ziber knew that he was not to drive the dump truck any significant distance with the box up.

The facts of the discharge incident were not seriously in dispute. Between 12:30 a.m. and 1:00 a.m. on October 26, 2009, Ziber brought a load of raw material by dump truck to the pile in the rented storage yard. He raised the box and dumped the load. While operating the box, he heard a strange noise. He raised the box a second time and got out of the truck with a flashlight to see if he could locate the source of the noise. He could not. He then got into the

truck and drove with the box up, making the right hand turn required to exit from the rented lot. Ziber testified that he did so mistakenly and that is not disputed. What is disputed is whether he should have noticed the situation by the handling of the truck. In any event, as he exited the lot, he violently tore the power wire between the utility pole and the unoccupied utility building with the upraised dump box. The resulting impact caused a “popping” sound and arc of electricity which Ziber noticed. The resulting impact tore out a section of wire which rested on the truck. Both ends of that section were entirely disconnected. A different section hung from the pole and did not touch the ground. The impact caused significant damage to the building. The force of the impact caused the electric box inside the building to be pulled away from the wall. The impact caused the wire inside the building to damage the track to the garage door. It, of course, left the building without power. At the same time some of the wire from the utility pole hung from the pole but did not touch the ground. Other wire was left spanning other utility wires still attached to the pole. Unknown to Ziber, the impact caused damage the grounding of the electrical service of a neighboring business which was not open until the morning.

The Employer’s work rules make it a violation if an employee fails to “report” an injury or accident. Ziber testified that he surmised that since the wire section on his truck was broken off there was no risk to him exiting the truck. He did so and coiled that section of wire and laid it on the ground in what would be plain view were it daylight. He did not call his supervisor or anyone. He decided to wait until Flaig reported for work at 7:00 a.m. to notify him.

At 6:55 a.m., Ziber called Flaig on Flaig’s cell phone. When Flaig received the call as he was reporting for work, he took the following steps immediately. Flaig called Wisconsin Public Service’s downed utility wire reporting hot-line telephone number and reported the problem. He also called the Employer’s own electrician, Craig, from Van Ert Electrical. Both responded immediately to the scene. He then took photographs and contacted Brown County to get a key to the building. He called his supervisor, Operations Manager, Stephen Moss, at about 7:30 a.m. who was on his way to work. Moss was delayed by a coal train delivery from the full site, but he was able to survey the site from where he was. He inspected the situation. He waited for the train, and went over.

The damage and response cost the Employer about \$2,500. There was some damage to another nearby business causing it to lose “grounding” for its electric service. That business paid for a repair to its electrical service. The damage presented a risk of injury

The Employer has a four-step progressive disciplinary policy, the fourth step of which is termination. Prior to the disputed incident, Ziber had been disciplined for being a no-call, no show on February 13, 2009, for sleeping on the job on February 17, 2009, and issued a last chance letter for being two hours late on October 7, 2009. This discipline occurred on October 25 and 26, 2009

The Union filed a grievance on Ziber's behalf and the same was properly processed to arbitration.

POSITIONS OF THE PARTIES

Employer

The Employer had just cause to discharge Ziber. Ziber admitted that he committed the act in question. Specifically, he concedes that at about 1:00 a.m. on the morning of October 26, 2009, he was driving the Employer's dump truck with the dump box in the full upright position and that as he drove along the box tore down the overhead power line on the neighboring property. Ziber also acknowledged that the actions were negligent. The Employer's decision to terminate him was justified under all of the circumstances.

The Employer discharged him because his actions in causing the damage were negligent and his choice to fail to report the accident until the end of his shift was a violation of Employer policy. His actions violated the Employer policy:

1. Damaging product, tools or equipment either intentionally or through gross carelessness
2. Knowingly committing an unsafe act
3. Failure to report an injury or accident
4. Violation of safety rules

Driving with the box up was easily discoverable and clearly warranted another step in the disciplinary process. Ziber also concedes that he waited more than six hours to report the incident to management. Ziber argues that he waited six hours because: "There was nothing anyone could do." Ziber had previously called management about problems which could not be remedied until the morning. In any event, there clearly was something Flaig could have done in the middle of the night, notify Wisconsin Public Service. Ziber was wrong about the hazards and a passerby or neighbor could have been injured.

The decision to terminate him was in strict compliance with the Employer's progressive discipline policy. Ziber had reached the final step in that four-step process.

Grievant's argument that he did not receive a notice of the verbal warning in February, 2009, is without merit. First, Moss testified that the Employer did give him notice at the time of the incident. Second, even if he did not receive notice, it would not affect the decision in this case. There is no requirement to deliver a copy of the notice to the Union. Third, Ziber is broadening the scope of his grievance by waiting until this matter to make this allegation. Fourth, the Union never raised this issue before hearing.

The Employer otherwise met the standards of due process. Ziber had repeated opportunities to explain his actions and plead his case. Thus, the Employer gave more than adequate due process. The Employer has not treated him more harshly than other employees. The Employer asks that the grievance be denied.

Union

The Employer lacked just cause to discharge Ziber, a Union Steward. This is industrial “capital punishment.” The arbitrator should apply a heightened burden of persuasion. The Employer cannot discharge Ziber for reasons not given at the time of discharge. The reasons given were that he repeatedly violated safety rules and that he waited until the end of the shift to report the incident. The Employer argued that he was also terminated for “damaging product, tools, or equipment either intentionally or through gross negligence” and for “knowingly committing an unsafe act” for the first time at arbitration. Neither reason was made known to the Union until the hearing. These reasons should not be considered properly before the arbitrator because the addition of new reasons violates principles of due process. The Employer treated Ziber more harshly than fellow employees. In none of these instances did the Employer instigate any type of discipline against the individuals. The Employer’s argument that it gave them verbal warnings violates Article 13 which requires that lesser discipline be reduced to writing and a copy given to the Union. The fact that the Employer took no formal disciplinary action in any of these incidents implies that Ziber was singled out for disparate treatment. No employee has ever received formal discipline for a work related accident. Ziber was the only person to receive formal discipline on the first instance of tardiness. The Employer lacked just cause to discipline Ziber for knocking over the power line and not immediately reporting the line incident where no written safety rules exist and where there is no written policy on informing supervisors about accidents. There was no training or policy directly relating to driving with the dump truck bed up. The Employer relies upon “common sense.” This notion is less certain. Ziber testified that he had little training on the dump truck. The only time Ziber was instructed to contact management was when there was a “breakdown” which interfered with production. Under the Employer’s policies, Ziber was entitled to determine when to tell management of this issue.

The Employer alleged for the first time that Ziber was guilty of gross carelessness. In any event, Ziber’s conduct does not rise to the level of “gross carelessness.” The Employer must prove that there was some additional factor beyond “careless” that made his conduct “gross carelessness.” Irrespective of that, the Employer has never found an employee’s actions to be “gross negligence.” The Employer has also failed to show that Ziber had any significant training on the dump truck. Although Ziber reported the accident late, the Employer never alleged that he tried to cover up anything when he did report it. Accordingly, the Union asks that Ziber be reinstated and made whole for all lost wages and benefits.

Employer Reply

The Union's argument boils down to two main arguments. First, two of the Employer's four reasons must be disregarded by the arbitrator because the Employer did not specifically enumerate them at the time of discharge. Second, the Employer treated Ziber more harshly than other similarly-situated employees. The Employer only needs to give the employee sufficient notice so that the Union and the employee can determine whether there is just cause for the discharge. The Union has cited no authority that the Employer need specific each individual reason in the notice of discharge. In any event, the discharge notice did put Ziber on notice that he violated all four rules in dispute.

The Union bears the burden to establish that the Employer's decision to discharge was discriminatory whether it be for anti-union animus or otherwise. It has failed to do this. The Union claims that Landers was treated more favorably because he was not terminated for running over a paint can. As an act of leniency, the Employer chose not to discharge him for that very minor incident. Ziber also received similar leniency for a no-call, no-show violation. The Union also compares to seven other incidents. Each of these was far less severe than the incident involved was far less severe than the incident involved. The Employer asks that the grievance be denied.

DISCUSSION

The discharge incident facts are not seriously in dispute. Ziber testified at the time this incident occurred until the end of his shift, he routinely was the only on the neighboring premises when the incident happened.³ Shortly after midnight, he started using the dump truck to haul rock over to the crusher. He was aware that some weeks earlier the dump box came off the truck when one of the two bolts holding it on had worked itself loose and the other gave way. On the way to his second load, he heard creaking coming from the bed area. He filled the box and delivered the load to the crusher. On his way back for a third load, he heard the same noise. He stopped the truck, raised the bed and used his flashlight to see if one of the securing bolts was missing or what else might be the problem. He forgot to lower the bed and got back into the truck and drove to the rock. He stated that he did not intentionally leave it up. He passed underneath a wire that ran from the utility pole to the utility building owned by Brown County, but not in use. As he passed under the wire with the bed raised, he saw sparks and heard crackling. He then took the flashlight and saw that the wire was off the pole and disconnected at the other end from the building. He coiled that section of wire and placed it on the ground, out of the way. He did see that there was potentially live wire hanging from the utility pole.⁴ He concluded that since no one was around, he could wait until the morning to tell his supervisor. He did tell his supervisor when he came in.⁵

³ The mill loader was on duty on the Employer's premises, but presumably inside the mill. His testimony on this point starts at page 155 of the transcript.

⁴ At page 159, he denied seeing the wire still hanging off the pole. At page 160, he acknowledged that he saw it, but that it did not reach anywhere near the ground.

⁵ He said that Flaig told him that it was not "that big a deal." See, page 161.

On cross, he acknowledged that he knew not to drive this truck with the bed raised and that it was “boneheaded” to have done so. He stated that he had called his supervisor when there had been problems in the past. He understood that he was to call his supervisor at night only if the situation interfered with production or an employee did not show up for work.

I address the negligent operation of the truck. I find that he knew he should not operate the truck with the bed raised and that doing so presented a risk to the truck itself. His testimony about lack of training on the truck is irrelevant. Further, without quibbling about “gross negligence,” this incident could only have occurred from a lackadaisical or highly inattentive attitude. It appears likely that this situation presented a serious risk of injury to Ziber himself. It was clearly negligent.

I now address the issue of the failure to call. I conclude this violation is very serious. It is understandable that an employee who has this type of accident and who is otherwise likely to get severe discipline would be in “denial” of the severity of circumstances. However, the reality of what had occurred is that Ziber recognized that there was damage to the unoccupied building and he saw, or should have seen, that there was a live electric wire hanging from the utility pole. The amount of damage shows that the impact with the wire had been fairly violent. Ziber is not an electrician and there is no way he could have known the extent other wires were loosened or there was other collateral damage. Ziber did not know that the damage was so severe that the building housing a business next door had lost the grounding factor in its electric service. It was clear to him that this was a situation where it was obvious that there was a low risk that someone would come in contact with the dangling wire. While the risk was low, the result would be severe injury or, worse, fatal.

Irrespective of the Employer’s policies, every employee owes his or her employer a duty of loyalty which requires them to take action to prevent injury to others or to report serious problems. Ziber’s testimony that he understood he should only report matters which interrupted production is inconsistent with the Employer’s rules and lacks common sense. Ziber’s choice to wait until his supervisor was nearly at work to call ran a serious risk to others coming to work in the neighborhood, particularly, to those arriving at the business next door. Ziber owed it to his employer to report the incident and to minimize the risk of injury to others or further property damage. At the very least, his failure to do so was an act of negligence.

The record shows that Ziber had been disciplined about eight months earlier for “falling asleep in a running front end loader. This incident is connected because it tends to indicate a lackadaisical or inattentive attitude. Accordingly, that prior discipline is an aggravating circumstance showing a serious want of care.

The Union has argued that Ziber was treated more harshly than other employees who have been negligent. None of the incidents cited by the Union reach the level of negligence or risk involved in this situation. For example, in October, 2008, an employee parked the golf cart employees use to get around the property too close to the railroad track. The golf cart was

subsequently destroyed by moving train cars. There is no evidence that there was any risk of injury to anyone. As recounted before, an employee lifted the bed of the dump truck and the bed fell off. It is possible that this was foreseeable and avoidable with inspection. It is unclear what the risk was to others, but it was serious. It was an entirely unexpected occurrence. That employee was, at most, warned for not having inspected the bolts holding the bed on the truck. Similarly, the Union has failed to show any evidence of anti-union animus. I also conclude that the Employer has substantially complied with its disciplinary policy and that the sleeping incident is sufficiently related that discharge is the only appropriate response. Accordingly, the Employer had just cause to discharge Ziber. I dismiss the grievance.

AWARD

The Employer had just cause to discharge Ziber. The grievance is denied.

Dated at Madison, Wisconsin, this 29th day of July, 2010.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator