

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
LABORER'S INTERNATIONAL UNION OF NORTH AMERICA
and
MUSSON BROTHERS, INC.

Case 1
No. 71817
A-6534

ARBITRATION AWARD

Appearances:

Timothy C. Kamin, Krukowski & Costello, 1243 North 10th Street, Suite 250, Milwaukee, Wisconsin, 53205, appeared on behalf of Musson Brothers, Inc.

Matthew R. Robbins, Previant Law Firm, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin, 53212, appeared on behalf of Laborer's International Union of North America.

This is a grievance arbitration dispute which arises out of the termination of Anthony Krukowski by Musson Brothers, Inc. Krukowski's employment is covered by the terms of a labor agreement entered into between Laborers Local #113 and the Wisconsin Transportation Employees' Council of which Musson Brothers Inc. is a member.

Krukowski was discharged on May 25, 2012 and per the agreement between the Union and Musson, the Company could not "discharge or suspend any employees without just cause". Jt. Ex. 1, Article VIII ¶ 1. The appropriate grievance was filed and following the parties' processing of the grievance, the matter was submitted to the Wisconsin Employment Relations Commission for the assignment of an arbitrator and for the conduct of a hearing which took place on January 29, 2013 in Brookfield, Wisconsin before the undersigned. The parties presented witnesses and introduced exhibits and, post-hearing, submitted written argument.

The single stipulated issue submitted for decision is:

Did the employer Musson Brothers have just cause to terminate the employee and, if not, what is the appropriate remedy?

The matter is ripe for resolution and I hereby issue the following:

AWARD

Musson Brothers, Inc. is engaged in the construction business and maintains a permanent facility in Brookfield, Wisconsin. The Company also has a facility in Rhinelander, Wisconsin which is not involved in this dispute. Musson is involved in excavation, asphalt paving, trucking, ready mixed concrete and related enterprises. Krukowski was employed as a laborer and had worked for Musson for two years prior to May of 2012. He had no history of discipline and was twenty-seven years old at the time of the dispute.

The evidence centers on events taking place over two days, May 21 and 22 of 2012. Some background however is useful to understanding events on those two days. In 2011 the Wisconsin Legislature passed a change in the law governing collective bargaining in the public sector. To say the least the change in the law was controversial. Opposition to the new law took the form of large demonstrations in Madison, Wisconsin and much of the enmity was focused on Governor Scott Walker. A sufficient number of signatures were gathered to force a recall election of the Governor. The subsequent campaign was volatile and feelings amongst many ran very high. As in much of the state, strong feelings and opinions existed at least among some of the employees at Musson. Krukowski counted himself among those favoring the recall of the Governor and it was the display of a bumper sticker on his vehicle, expressing his view that the Governor should be recalled, that played a role in this dispute.

Confrontation with R. Torn

A number of the employees working out of the Brookfield facility would typically park their personal vehicles at the headquarters (called the "Brookfield shop") and work at job sites away from the headquarters, returning at the end of the day to pick up their vehicle, and leave for home. Some, including members of management, would work at the shop. Ron Torn, who the Company identified as a Shop Foreman/Dispatcher was stationed at the shop and among other things dispatched trucks to various job sites. According to Krukowski, Torn was a vocal supporter of Walker and took a dim view of Krukowski's support of the recall. The Company characterized their interactions on the issue as "good natured teasing," but Krukowski took a different view. Part of his unhappiness over the contrary viewpoint of some of his co-workers focused on efforts to remove or deface his "Recall Walker" bumper sticker which he displayed on the back window of his pickup truck. One of the efforts involved placing a piece of duct tape with the handwritten words "Walker has my vote" over the bumper sticker.

According to Krukowski this political disagreement advanced far beyond “good natured teasing” when on May 21 Ron Torn told Krukowski that he could not park his vehicle on the Company property. There is no dispute that the “no parking” directive was tied to Krukowski’s “Recall Walker” bumper sticker. Krukowski indicated that Torn told him that “the guy upstairs doesn’t like it – he can’t speak but I can – you guys make too much money already.” The Company denied that anyone from top management had made that statement to Torn but Torn himself did not testify. While the Company steadfastly maintains that Torn was not, as a matter of law, a supervisor, Krukowski understandably may have believed Torn had more authority than an ordinary co-worker.

In any event Krukowski contacted his business representative Michael Wilburn. The following day Wilburn showed up at the facility and met with Mr. Sikma, the manager of the facility. He also spoke with Ron Torn about the previous day’s confrontation with Krukowski.

That afternoon members of management were alerted to a loud and angry confrontation between Torn and Krukowski that was taking place in the shop facility. Torn was apparently angry with Krukowski for raising the bumper sticker issue with the Union. Torn questioned why Krukowski “called the Union on him” and stated that “two guys came in looking for me”. Torn told Krukowski to “get the fuck out of here this is a non-Union shop”. In a written summary of the incident the Company described Torn as “clearly agitated”. Jt. Ex. 3. Safety Director Darren Muljo and Pipelining Division supervisor Pat Wunsch interceded, separating the two. Muljo took Krukowski outside and advised him that he should have contacted Muljo if he had a problem with Torn. He further indicated that Krukowski should have used the Company’s harassment policy procedure or at least notified Muljo of the problem. Krukowski was then sent home and advised not to return to work.

Following this incident the Company learned of an incident involving Krukowski and co-worker Lucas Bignell that had occurred the previous day.

Confrontation with Bignell

During the day on May 21st Krukowski was working on a crew supervised by Les Bignell. Les Bignell’s son Lucas was working on another crew also being supervised by Les Bignell. Krukowski was required to pick up a piece of equipment from the crew site where Lucas was working. Lucas was inside a trailer with three other employees. According to Lucas he became upset over the fact that Krukowski was providing a lengthy explanation as to why he was taking the equipment. Lucas stated angrily “I don’t care faggot just go away.” Krukowski’s version is similar but he indicated that Lucas called him a “faggot” twice in the conversation including referring to him as a “fucking faggot.” Both agree that Krukowski then proposed that they meet after work and settle their dispute by fighting each other. Bignell agreed to the fight arrangement. This exchange took place mid-morning.

At the end of the work day, around three o'clock Krukowski was standing near his vehicle outside the gated entrance. Lucas Bignell was inside the work area assisting his father with some end of day tasks. Co-worker Bill Holland saw Krukowski and inquired as to why he was hanging around. Krukowski indicated he was planning on fighting Lucas Bignell. Holland attempted to calm Krukowski down. Holland left and called Les Bignell on his cell phone to advise him that Krukowski was waiting to fight Lucas. In the meantime Krukowski entered the facility and sought out Lucas Bignell. When he located Lucas he was with his father, foreman Les Bignell. Krukowski asked Lucas "if they were going to do this thing" i.e. fight it out. Lucas responded that he was not going to fight Krukowski because he did not want to lose his job. Krukowski suggested fighting at a nearby Home Depot parking lot and Lucas again declined. The father and son Bignells then left the premises as did Krukowski.

According to Lucas as he left the parking lot Krukowski followed him in his vehicle. Krukowski denied following and indicated that if he did it was coincidental with his departure from work. Les Bignell did not report the incident to management.

Discharge

Safety Director Maljo first learned of the May 21 "fight" issues following the "Torn" confrontation on the 22nd. He obtained a statement from Lucas Bignell on May 23 and on May 25 the decision was made to discharge Krukowski for violating Standard Work Rule #7 which provides:

Violence, threats, harassment, intimidation, and other disruptive behavior including verbal or written statements, gestures, or expressions that convey a direct or indirect threat of physical or emotional harm.

The Company also believed that Krukowski was guilty of "stalking a fellow employee with ill regard". Krukowski was told of the termination by telephone when he called inquiring about his employment status.

In my judgment this is not a close case and I conclude that there was an absence of just cause for the termination of the grievant Anthony Krukowski.

The undisputed evidence is that co-worker Lucas Bignell, who was in the same age range as Krukowski, had a history of making abusive comments to Krukowski including name calling, and urging him to work faster. The particular epithet directed at Krukowski on the morning of May 21 was uttered in the presence of three other fellow workers and demonstrated Bignell's utter disdain for Krukowski. The comment was humiliating and dismissive in content and tone. Krukowski had three choices; he could have ignored the comment and departed, he could perhaps have filed a harassment complaint under the Company's harassment policy or he

could challenge Bignell's comment. He chose the latter course of action and his challenge took the form of a proposed fight after work to apparently resolve the issue of his masculinity.

It is important to remember the nature of the employment and the context. This is a male dominated masculine heavy construction operation. Certainly it is a rough and tumble atmosphere where strong language is not uncommon. In fact if one went to the typical heavy construction worksite and proceeded to go from worker to worker calling them "fucking faggots", it would not be long before a challenge to fisticuffs or worse was encountered. My point simply is that the observation of Lucas and the response by Krukowski would more likely occur at a construction site than at the Brookfield Public Library. Given the context did the act of proposing a fight clearly violate Work Rule 7? Krukowski proposed a fight to resolve his differences with Lucas. Lucas accepted the proposition at least tentatively. One can certainly argue that this proposition was not a threat, although in some circumstances a fight proposal might be a threat. If one of the potential combatants is so physically imposing when compared to the other a fight "proposal" may in reality be a threatened beating. That is not the case here nor did Lucas feel sufficiently threatened to even raise the issue with management. Although Krukowski was slightly larger in stature than Lucas neither was physically imposing.

Curiously the work rules forbid a wide range of behaviors and misdeeds yet nothing is said specifically about fighting which is commonly considered a work place offense warranting immediate termination. The function of a work rule is to alert employees to the parameters of what is or is not acceptable behavior in the workplace. Rule 7 in an effort to be all encompassing suffers from vagueness. Once past the ban on "violence, threats, harassment and intimidation" the rest of Rule 7 bars "other disruptive behavior including verbal or written statements, gestures or expressions that convey a direct or indirect threat of physical or emotional harm".¹ Would a proposal to fight a co-worker violate that language? Perhaps more importantly would it alert a worker that such a proposal would result in termination? While the Rule is imprecise, clearly Krukowski knew that actually fighting with a co-worker was conduct that would likely result in discharge. Nevertheless he pursued the issue to the point of waiting for Lucas at the gate and actually entering the facility. In the end however the "fight" turned out to be nothing but talk. To that end I conclude that proposing a fight and checking to see if the fight is still on is not equivalent to fighting on the job. This non-event does not constitute just cause for terminating Krukowski in these circumstances.

The Disagreement with R. Torn

Both sides have addressed the "Torn incident". The grievant takes the position that the event suggests an improper motive underlying the discharge and therefore overcomes any finding of just cause. The Company conversely asserts that the "Torn" incident was not a factor in the decision to terminate Krukowski.

¹One could argue that a ban on "violence" includes fighting.

I agree that the confrontation with Mr. Torn was not the deciding factor in the decision to discharge Krukowski. The incident however does undercut the employer's position relative to what Krukowski should have done. The Company argues that Krukowski should have submitted a harassment complaint rather than challenge Bignell to a fight. When Torn initiated a shouting match with Krukowski over the fact that Krukowski "reported" him to the Union, Krukowski was told by Mr. Muljo he should have contacted the Company rather than the Union about his concerns. While Torn did receive a verbal rebuke he apparently was not told to use the harassment complaint procedure to address his concerns. The Torn incident also mitigates Krukowski's conduct. Torn's decision to tell Krukowski that he could not park on Company premises occurred on the same afternoon that Krukowski decided to wait for Lucas after work. One could understand that Krukowski might well feel that he had nothing to lose in challenging Bignell to a fight and pursuing the battle. From his perception in the morning a foreman's son is directing abusive language towards him and in the afternoon a member of management is telling him he can't park on the premises because of his political beliefs. Torn may not have met the legal status of "supervisor" but Krukowski had no reason to believe that he was anything but a supervisor.

Disparity in Treatment

I also find support for the determination in the apparent disparities in treatment of both Lucas Bignell and Ron Torn as compared to Krukowski. Lucas Bignell who clearly provoked the reaction from Krukowski and who had a reputation as being abrasive, received a verbal rebuke for his actions. Ron Torn who also provoked Krukowski by telling him he could no longer park on Company property and then initiating a shouting match the next day received a verbal rebuke for his behavior. The Company asserts that Torn was not a supervisor yet it did nothing to correct his assumption of apparent authority.

If the employer is gravely concerned about the "unreasonable risk of physical harm" that might arise out of a threatened fight it would seem that those who engage in provocative behavior should be subject to something more than an oral reminder.

In the end contrary to the Employer's argument I conclude that proposing a fight to resolve differences did not create an unreasonable risk of harm, however, it certainly is not conduct which should be encouraged or condoned. I acknowledge that in a physically demanding work environment with time sensitive demands tempers can grow short and untoward remarks may be made. Had Krukowski done something more than show up after work prepared to fight clearly discharge would have been warranted. He did nothing more than inquire of Bignell as to whether the fight was still on and when Bignell declined the dispute was over. A short time before he had also been provoked by Torn which I consider

further mitigation for his behavior. Krukowski's behavior does warrant a disciplinary suspension. His appearance at the Company at the end of the day for the purpose of pursuing the fight plan is more serious than that engaged in by Torn or Lucas Bignell.

Accordingly based upon the record in its entirety the undersigned concludes that the Grievant's conduct does not warrant discharge. The undersigned concludes that the appropriate discipline should be a five working day disciplinary suspension. The discharge shall be rescinded and Grievant's seniority restored. Grievant will be reinstated with full back pay less any interim earnings and less any unemployment compensation benefits he received. The back pay will be reduced for any periods of time Grievant would not have been working had he remained in the Employer's employ. If Grievant received unemployment compensation during any such weeks that amount will not be offset from the back pay award.

I will retain jurisdiction of this matter for forty-five calendar days from the date of this Award with respect to the implementation of the remedy portion of the Award.

Dated at Madison, Wisconsin this 28th day of March, 2013.

James R. Scott /s/

James R. Scott, Arbitrator