BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, Local 78T

and

VOITH FABRICS

Case 10
No. 71712
A-6524

(Schultz Grievance)

In the Matter of the Arbitration of a Dispute Between

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, Local 78T

and

VOITH FABRICS

Case 11
No. 71713
A-6525

(Krohlow Grievance)

Appearances:

Mr. Richard T. Elrod, Attorney, Herrling Clark Law Firm Ltd., 800 North Lynndale Drive, Appleton, Wisconsin appearing on behalf of United Food and Commercial Workers International Union, AFL-CIO, Local 78T.

Mr. Thomas W. Mackenzie, Attorney, Lindner & Marsack, S.C., 411 East Wisconsin Avenue, Suite 1800, Milwaukee, Wisconsin appearing on behalf of Voith Fabrics.

ARBITRATION AWARD

United Food and Commercial Workers International Union, AFL-CIO, Local 78T, hereinafter "Union" and Voith Fabrics, hereinafter "Company," requested that the Wisconsin Employment Relations Commission provide a panel of arbitrators from which to select a sole arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot of the Commission's staff was selected. Hearing was held before the undersigned on December 11, 2012, in Neenah, Wisconsin. The hearing was transcribed. The parties offered post-hearing briefs the last of which was received by February 8, 2013 whereupon the record was closed.

Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute and framed the substantive issues as:

> Was the Grievant, Mike Schulz, terminated for just cause? If not, what is the appropriate remedy?
>
> Was the Grievant, Steve Krohlow, terminated for just cause? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

. . .

ARTICLE II – MANAGEMENT RIGHTS

Section 3. The management of the plant and the direction of the working force and of the affairs of the Company shall be vested exclusively in the Company as functions of management. Such functions of management include among others the following:

. . .

(b) The rights to suspend, discharge, and lay off employees for legitimate reasons.

(c) The right to supervise the work of each employee, including the right to determine production schedules, and to assign individual jobs in each department.

(d) The right to establish reasonable rules and conditions for operating the plant and covering the conduct of employees in the plant, and to determine the times when shifts shall begin and end. Notwithstanding language in this paragraph to the contrary, the Company may not during the term of this Agreement modify rules regarding attendance that were in effect as of October 28, 2001, without the written agreement of the Union, such rules are attached as Exhibit 1. Exhibit 1 is referred to and incorporated into this Agreement as if fully set forth herein.

. . .

ARTICLE XI – SENIORITY

. . .

Section 29. An employee shall forfeit all rights to seniority and be dropped from the seniority list of the Company and, if rehired, shall be placed at the bottom of the seniority list, if one or more of the following events occur:

(a) He quits, including retirees,(sic) or
(b) He is discharged for cause, or
(c) He fails to comply with this agreement, or

. . .

ARTICLE XIII – GRIEVANCES

Section 34. Individual grievances shall be dealt with according to the following procedure:

. . .

(b) In the event of an appeal to binding arbitration and the parties cannot mutually agree on an arbitrator, the parties shall jointly request the Wisconsin Employment Relations Commission to provide a list of seven (7) of its current available staff arbitrators, which shall constitute a Panel. Within one (1) calendar week from receipt of the Panel, the parties shall alternately strike names on the Panel until one (1) name remains, who shall be named the Arbitrator. In the event the Wisconsin Employment Relations Commission refuses to provide the Arbitrator as selected and requested by the parties pursuant to this

subparagraph and the parties cannot mutually agree on an arbitrator, the Arbitrator shall be the person designated by the Wisconsin Employment Relations Commission. The written decision by the Arbitrator shall be final. Expenses incident to the services of the Arbitrator shall be divided equally between the Company and the Union. Any party requesting that the hearing be transcribed by a court reporter shall bear the full cost of the transcription, except if the other party requests a copy, in which event the parties shall share equally in the costs of the transcription. All other costs, including witness fees and representation, shall be paid by the party incurring such expenses.

. . .

Section 35. As used herein, the term "grievances" means complaints about the interpretation and application of this contract, alleged violations thereof, **discipline or discharge without just cause**, abuses of discretion by supervisors in the treatment of employees, and complaints about working conditions; but it does not include dissatisfaction with the provisions of this agreement nor with the management of the Company in matters within the exclusive function of the management. The jurisdiction of the Arbitrator is limited to grievances as herein defined, which have been duly appealed to the Arbitrator in accordance with the procedure set forth in Section 34. The Company, through its Production Superintendent or his superior on the one side, and the Union, through its President or Vice President on the other side may agree to extend the time period set forth in this Article. (emphasis in original)

. . .

BACKGROUND AND FACTS

The Grievants, Mike Schultz and Steve Krohlow, were employed by the Company in the shipping area until their termination on March 27, 2012. Schultz was an 18 year employee, performing for the last five years in the capacity of Packaging and Conditioning Lead Person. Krohlow was a 22 year employee, working as Packager, Final Inspector Assistant and when needed, served as a back-up to Schultz. The Grievants' immediate supervisor was Dave Hawley, Company Shipping, Packaging and Conditioning Supervisor. At all times relevant herein, the Production Manager was Brad Smith.

On March 26, 2012, both Schultz and Krohlow were working an eight hour shift with the scheduled ending time of 3 p.m. At approximately 2: 40 p.m., an unknown truck driver entered the south loading dock from the driveway. Schultz approached the driver, spoke to the

driver, opened the shipping door and invited the driver to back his trailer into the Company shipping dock area. Schultz did not ask for a bill of lading. The driver was difficult to understand and used gestures to communicate. The driver had trouble maneuvering the trailer into the dock area and both Schultz and Krohlow assisted with hand signals.

Once the trailer was in the loading dock area, Schultz engaged in a second conversation with the driver. The driver communicated to Schultz that the load in his trailer needed to be redistributed and offered compensation for the assistance. The content of the trailer was not Company product, but rather was steel crates wrapped in shrink wrap and stacked one on top of the next. The load was located in the front of the trailer, closest to the cab, and it was apparent that the load had shifted or moved during transit resulting in an imbalanced load. Schultz unilaterally decided to assist the driver and redistribute the product in the trailer. Schultz spoke to Krohlow and Bill Davidson, both of whom were in the loading area at the time, and asked if either of them were interested in assisting. Krohlow agreed while Davidson declined.

Schultz and Krohlow, using Company forklifts, removed all of the product in the trailer and stacked it in the Company shipping area. Once completely removed from the trailer, they began repacking the product in the trailer in a more secure and stable manner until interrupted by the end of their shift. Both Schultz and Krohlow stopped reloading the trailer, punched out on the Company time clock at approximately 3 p.m. When Schultz was returning to the loading area, he was stopped by his supervisor, Dave Hawley. Hawley asked Schultz what was going on and Schulz explained that they were redistributing the driver's load and further, that they were going to be paid for doing so.

When the reloading was complete, Hawley, Schultz, and Krohlow were approached by the driver. The driver asked something to the effect, "what do I owe you?" Hawley was physically located closest to the driver with Schultz and Krohlow standing behind him. In response to the driver's question, Schulz held up his index finger signaling a one followed by two circles or zeros using both his index finger and thumb. Schultz intended to communicate $100 to the driver. The driver put $60 on Hawley's clipboard. Hawley immediately stated that he "didn't want anything to do with this," extended the clipboard in Schultz's direction, and Schulz took the three twenty dollar bills. Schultz asked Krohlow if he "had a $10." Krohlow gave Schultz a ten dollar bill and Schulz gave Krohlow two twenty dollar bills and both Grievants went home.

After the incident, Hawley returned to his office, described the incident to a fellow supervisor and decided to inform Company Production Manager Bill Smith. The Company initiated an investigation and the Grievants were interviewed the following morning. Later that day, the Company issued Schultz the following letter:

RE: Termination

Mike,

This letter is to confirm that your employment with Voith Paper Fabric & Roll Systems is terminated effective immediately, March 27, 2012. This action is a direct result of our investigation into the incident on Monday, March 26, 2012 in the shipping and receiving area which you were directly involved. Misuse of company time, accepting money on the side from a third party to perform unauthorized work on company time, using company equipment, and withholding information during an investigation are all unacceptable behaviors which are not and will not be tolerated by the Company.

Please make arrangements with your supervisor, Dave Hawley, to obtain any personal property located on company premises. You will receive your final pay stub in the mail, and if there is any accrued unused vacation days left, it will be included with your final paycheck. Information regarding benefits continuation will be sent shortly.

If you have any questions, please contact Human Resources directly.

Respectfully,

/s/

Brad Smith
Production Manager
Voith Paper Fabric & Roll Systems

Krohlow received a letter very similar to Schultz's, except it did not contain the phrase "withholding information during an investigation" as a reason for Krohlow's termination.

Both Krohlow and Schultz grieved their terminations describing:

I (we) was terminated for an incident that occurred on 3/26/12 in the shipping area. I (we) do not believe the termination was justified; the discipline was excessive. I (we) am asking to be reinstated to my job, and made whole.

The grievances were denied at all steps placing it properly before the Arbitrator.

Additional facts, as relevant, are contained in the DISCUSSION section below.

DISCUSSION

The parties have elected to combine these two grievances for purposes of hearing, testimony and arguments. While there are shared deeds, the Grievants' behaviors during the incident are not the same. As such, I will first address the joint issues and arguments, but will ultimately take up the Grievant's circumstances individually.

I accept Arbitrator Richard McLaughlin's explanation of just cause as articulated in Brown County, Case 655, No. 60134, MA-11535 (2002) wherein he stated that, "…first the Employer must establish conduct by the Grievant in which it has a disciplinary interest. Second, the Employer must establish that the discipline imposed reasonably reflects the interest."

The Grievants were terminated for an incident occurring on March 26, 2012. The terminations were premised on three infractions: 1) misuse of company time, 2) accepting money on the side from a third party to perform unauthorized work on company time, and 3) using company equipment. Schultz's was additionally found to have withheld information during the investigation and therefore his discharge was based on four infractions.

Misuse of Company Time

The facts support the conclusion that the Grievants misused Company time. The Grievants elected to remove the non-Company contents of a trailer and reload the trailer during their work hours on March 26, 2012. The Grievants failed to obtained permission to perform this task and there is no evidence in this record which suggests that the Company has allowed this type of activity in the past.

The Union argues that shipping staff regularly unload and reload non-Company products and therefore the Grievants actions are no different. While it is true that Company employees regularly remove non-Company product from trailers, that task is distinguishable from the Grievants' behavior because in the instances upon which the Union relies, staff are either unloading and reloading the non-Company product in order to make room for the Company's products on the trailer or unloading and reloading the non-Company product in order to get to the Company's product which is located behind the non-Company product on the trailers. These tasks are solely for the benefit of the Company. Conversely, there was no benefit to the Company when the Grievants unloaded and reloaded the trailer on March 26, 2012 and in fact, their decision to perform this work took them away from the work they should have been performing for the Company.

The Union's argues that Supervisor Hawley granted the Grievants permission to finish the redistributing job because he did not direct them to stop. Hawley came upon the Grievants after they had already unloaded the steel crates from the driver's trailer and were in the process of reloading them onto the trailer. Even if Hawley had wanted to order Schultz and Krohlow

to immediately stop assisting the driver, he was not in a position to do so since the driver's crates were on the Company loading dock and the trailer was in the shipping bay.

The Union next argues that the Grievants' decision to punch out rather than continue in overtime status evidences both their respect for the Company rules and their lack of intent to defraud the Company. There is no question that the Grievants' had the wherewithal to recognize the end of their shift and the need to punch out, but I do not find that that decision absolves their behavior. Rather, it appears from this record that overtime utilization rules are well-known by Company employees and that overtime is meticulously monitored. Given this bright line rule to avoid unauthorized overtime, I find the Grievants' actions were more about avoiding management intervention should they violate the overtime rule than an indicator that they were concerned about defrauding the Company.

Accepting Money on the Side from a Third Party to Perform Unauthorized Work on Company Time

The Grievants each received $30 for unloading and reloading the unknown driver's trailer. During Schultz's initial conversations with the driver, he discussed compensation for unloading and reloading the product. When Schultz spoke to Krohlow and Davidson, he communicated to both that they would be paid for completing the redistribution of the unknown driver's trailer. Krohlow offered to assist with the knowledge that payment was forthcoming. The actual amount due was negotiated by Schultz on the loading dock after the job was completed. The Grievants' were therefore engaged in work for profit at the same time that they were being paid for completing job duties for the Company – otherwise known as "double-dipping."

The Union suggests that the Grievants motives were altruistic. I disagree. Had the Grievants elected to assist the driver gratis, this would be an entirely different case. Instead, the driver offered to pay, Schultz communicated to Krohlow that a fee would be paid for doing the work, and after the work was completed Schultz and Krohlow accepted compensation. Moreover, I do not find Schultz's claim that he told the driver "not to worry about it" to be credible. Had that been the case, he would have had no reason to inform Krohlow, Davidson, and Hawley that the driver was willing to pay them for moving the steel crates in the trailer, would not have told Hawley that they (Schultz and Krohlow) would be paid for the redistribution, and Schultz would not have engaged in non-verbal hand gesture negotiations for the actual fee to be paid.

The Union posits that the $60 offered by the driver and accepted by the Grievants is similar to the gifts offered by carriers and contractors of the Company. These are not comparable situations. The driver paid Schultz and Krohlow $60 for unloading and redistributing his non-Company product. It was not a gift, but rather was compensation consistent with a negotiated agreement. The gifts offered to shipping department employees by transportation carriers represented a "thank you for business" and the gifts were of limited

value including pens, knives, calendars, pizza and soda. Neither the intent nor value are alike and therefore I do not find these parallel situations.

While not specifically argued by the Union, I have concerns with Hawley's inaction when the driver and Schultz discussed the amount of payment that the driver would pay and when Hawley received the monies from the driver on his clipboard and gave the money to Schultz. I appreciate that Hawley was attempting to absolve himself from any guilt or involvement in the Grievants' situation, but his decision to sit by and do nothing is troubling. Having said that, I have no reason to conclude that Hawley's involvement would have changed the outcome nor modified the Grievants' behavior in this incident.

Using Company Equipment

The Grievants used the Company forklifts and loading dock area to complete the unloading and reloading of the steel crates. The Grievants did not seek permission from Hawley or any other member of the Company's management team before commencing the job and lacking permission, the work was unauthorized.

The Union argues that Company employees use Company forklifts and other Company property for personal use and therefore it is insincere to claim that the Grievants' use was a disciplinable offense. While this is one of the stronger Union arguments, I find the circumstances sufficiently different to not be comparable. The record shows that the Company allows employees to take, at no cost, deadhead or damaged felt, but there is a process that must be followed when this occurs. The employee interested in the deadhead felt must request the product from a foreman and then a time is scheduled for the employee to enter the Company premises to pick up the product. The Company is therefore integrally involved in the use of its equipment, has acquiesced to use of the equipment, and there is a benefit to the Company for the deadhead felt to be removed from the facility.

Was the Level of Discipline Imposed Excessive?

It is well-settled that "the degree of penalty should be in keeping with the seriousness of the offense." Elkouri and Elkouri, "How Arbitration Works", 6th Ed. (2002) p. 964 citing Capital Airlines, 25 LA 13, 16 (Stowe, 1955). Further,

> Offenses are of two general classes: (1) those extremely serious offenses such as stealing, striking a foreman, persistent refusal to obey a legitimate order, etc., which usually justify summary discharge without the necessity of prior warnings or attempts at corrective discipline; (2) those less serious infractions of plant rules or of proper conduct such as tardiness, absence without permission, careless workmanship, insolence, etc., which call not for discharge for the first offense (and usually not even for the second or third offense) but for some milder penalty aimed at correction. Huntington Chair Corp., 24 LA 490, 491 (McCoy, 1955).

The Union's primary complaint in this case is the quantum of discipline imposed. It is here that I will consider the Grievants' cases separately.

Mike Schulz

Schultz was terminated for the three infractions discussed above and the additional charge of "withholding information during an investigation." When Schultz was interviewed and questioned by the Company on March 27, 2012 about the incident of March 26, he denied having received any money from the driver for redistributing the steel crates on the trailer. Schultz later modified his position on this specific issue and said that he accepted $1 for a soda. The facts establish that Schultz accepted $30. Schultz not only withheld information, but he lied to his employer on this specific issue twice. Schultz therefore was guilty of all four infractions for which he was disciplined.

The Union argues that the penalty imposed, termination, was excessive. Schultz was a 19 year veteran of the Company and the record is silent as to whether he had a disciplinary history. Schultz was entrusted with a position in authority. Yet, Schultz masterminded the March 26 incident and the infractions for which he was terminated are serious. In addition to exercising poor judgment and acting in conflict with the Company's interests, he intentionally concealed information during the Company's investigation and breached the Company's trust. While I recognize that Grievant Schultz's employment history was essentially unblemished, his actions and decision-making are sobering and therefore the Company's decision to terminate the Grievant was justified.

The Union argues that the Grievants did not violate a specific work rule as part of the March 26, 2012 incident and that ultimately, lacking such a rule, the Company exceeded its authority and disciplined the Grievants for behaviors for which they did not know they could be disciplined. While I agree with the Union that the "Voith Values" do not constitute work rules for the facility, the specific behaviors for which the Grievants were disciplined are inherently improper and need not be expressly prohibited.

Steve Krohlow

The Grievant is a 22 year employee of the Company with no known disciplinary record. He had been promoted to serve in a back-up leadership capacity, declined the promotion and later accepted the promotion. This is a much harder case than Schultz's.

Krohlow's failure was that he "went along" with Schultz. There is no question that the Grievant was guilty of the three offenses for which he was disciplined and further that they are serious infractions, but he lacked Schultz's motivation and origination. I therefore must consider whether termination was justified, given the circumstances, or whether a less serious penalty will rehabilitate Krohlow. Krohlow was unable to evaluate the circumstances presented and instead "went along" with Schultz's decision to assist the unknown driver by

redistributing the steel creates for a fee while on the Company clock using the Company's forklift and facilities and willingly accepted compensation. Davidson immediately refused to participate in the escapade and Eric Kuehno's testimony that when he was presented with a similar situation – redistribution of a driver's load and an offer for compensation – he obtained supervisory approval to perform the task and refused compensation. Thus, Krohlow's peers were able to ascertain right from wrong, but he was not on March 26. Yet, I cannot find in Krohlow the corrupt motive that Schultz exhibited.

Ultimately, Krohlow was not the instigator of the March 26 incident and he was honest with the Company when questioned. He is a 22 year employee with a good work record and while I do not condone his inability to independently evaluate and determine the proper course of action, I find that his termination was excessive.

AWARD

Yes, there was just cause to terminate Mike Schultz and his grievance is dismissed.

No, there was not just cause to terminate Steve Krohlow. The appropriate remedy is for Mr. Krohlow to re-pay the Company $30 and for the Company to reinstate Mr. Krohlow without back pay.

Dated at Rhinelander, Wisconsin, this 9th day of May, 2013.

Lauri A. Millot /s/
Lauri A. Millot, Arbitrator

LAM/gjc
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