

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MODERN BUILDING MATERIALS, INC.

and

TEAMSTERS UNION LOCAL 43

Case 18
No. 46532
A-4857
(Mieloszyk Suspension)

Appearances:

Mr. Charles Schwanke, President, Teamsters Union Local No. 43, 1624 Yout Street, Racine, WI 53404 appearing on behalf of the Union.

Mr. Mike O'Connor, President, Modern Building Materials, Inc., 8011 Green Bay Road, Kenosha, WI 53142 appearing on behalf of the Company.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Teamsters Union Local No. 43 (hereinafter referred to as the Union) and Modern Building Materials, Inc. (hereinafter referred to as the Company) requested that the Wisconsin Employment Relations Commission designate a member of its staff as arbitrator of a dispute over the suspension of Norman Mieloszyk. A hearing was held on January 13, 1992 in Kenosha, Wisconsin at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. The parties rested on closing arguments, and the record was closed as of January 13, 1992. Now, having considered the evidence, the arguments of the parties, the contract language, and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties stipulated that the following issue was to be determined herein:

"Was the three (3) day suspension justified? If not, what is the appropriate remedy?"

RELEVANT CONTRACT LANGUAGE

ARTICLE 16. DISCIPLINE AND DISCHARGE

The right to discipline and discharge for just cause and to maintain order and efficiency is the sole responsibility of the company, subject to the grievance procedure herein provided.

EXHIBIT "B"

WORK RULES

The work rules which follow have been established for your benefit and protection. These rules are not intended to restrict or impose on the privileges of anyone. They are installed to insure the right and safety of all employees.

<u>RULES</u>	<u>FIRST</u>	<u>SECOND</u>	<u>THIRD</u>
	<u>OFFENSE</u>	<u>OFFENSE</u>	<u>OFFENSE</u>

8. Refusal to carry out a reasonable order	3 Days off	Discharge	
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Time off must be given within a three week period from the offense.

An employee's record will be cleared of any offense when nine (9) months have elapsed since disciplinary action was taken in that case.

These rules are not intended to be a complete listing, but are merely examples of the common offenses; therefore, changes in these rules, as well as new rules, may be adopted by the company from time to time. If the union considers a new or changed rule to be inconsistent or in conflict with any provisions of this agreement, it may be challenged through the grievance procedure.

The company reserves the option of imposing a lesser or greater penalty than that indicated, based on the circumstances involved.

BACKGROUND

The Company manufactures precast concrete products in Kenosha, Wisconsin. The Union is the exclusive bargaining representative for the Company's non-probationary employees, excluding supervisors, guards and office clericals. At the time of the suspension in issue here, the grievant was employed by the Company as a Coring Assistant.

On September 16, 1991, the Company instituted a new procedure whereby the Coring Assistant would report to the Dispatcher at 1:00 p.m. each day to review the work priorities. This procedure was put in place because priorities would change during the course of the work day, as customers called in orders. The new procedure was explained to the Dispatcher, the Coring Operator and the Coring Assistant. It was presented as being a task which would take precedence over other duties.

On October 3rd, the grievant did not check in with the Dispatcher at 1:00 p.m. Michael O'Connor, one of the owners of the Company, suspended him at 2:00 p.m. for failing to carry out orders under Work Rule #8. The instant grievance was thereafter filed:

I received a 3 day suspension for not going to the office at 1:00 o'clock to check the priority of work for the afternoon of Oct. 3. I received the suspension at 2:00 o'clock of Oct. 3.

I was working with Don Hoff and Tom Sorenson at the time. Loading and unloading the coring machines and booting the pieces for both employees. At that same time I was instructed to remove a plastic step and replace it with a cast iron one along with bringing in a shipment of boots to put away.

After lunch there was a few stacks of piece to catch up with, because Tom worked from 12:13 to 12:43, which was when I had lunch.

This is a new procedure as of approximately Sept. 27 or so.

Monday Sept. 30 - Mike O'Connor set up the priority for that afternoon.

Tuesday Oct. 1 - I went to the office and fulfilled this procedure with Bruce.

Wed. Oct. 2 - I was not working on the coring machine in the afternoon.

I received my suspension, first without the presence of a Union steward. To which I left the office to get Don. Then with Don present I was told the situation again.

After being dismissed early from work per Mike O'Connor, I stopped by Don Hoff

to get a grievance form and find out my options where and to clarify my position. To which I was told to leave Don alone and stop wasting his time and union work on my time by Mike O'Connor and not on company time.

/s/ Norman Mieloszyk

The Company denied the grievance, responding to the Union on October 4th:

On September 16, 1991 a procedure was instituted whereby the "Coring Assistant" reviewed priorities of assigned work at 1:00 p.m. everyday with the dispatcher. Mr. Mieloszyk has served in the role of Coring Assistant since August of 1991. The procedure was explained as one which takes precedent over all other tasks except where safety would be an issue.

The procedure was explained in detail to Mr. Mieloszyk on September 16, 1991. Subsequently on September 19 and 26, Mr. Mieloszyk failed to perform the procedure. He was verbally reminded and reprimanded at the time. On Monday, September 30, 1991, Mr. Mieloszyk again failed to go complete the assigned task. Once again he was verbally reminded and reprimanded.

Finally, on October 3, 1991 Mr. Mieloszyk again failed to complete the procedure. At 2:00 p.m. Mr. Mieloszyk was given 3 days off as a disciplinary measure. The reason for the suspension was explained to Mr. Mieloszyk individually and again in front of the Union Steward.

Sincerely,

/s/ Michael J. O'Connor
Modern Building Materials, Inc.

At the hearing in this matter, the Union introduced evidence that the grievant was not reprimanded for failing to check priorities on September 19th and 26th. The grievant testified that he was working on moving stock on the 19th, and presented a leave slip showing that he was out sick on the 26th. The Union further argued that the Company had not enforced the work rule against those who had replaced the grievant after his suspension. The Union argued that the grievant may have neglected to check priorities, but that the offense was minor, had not resulted in discipline for other employees and was not deserving of a three day suspension. Thus the Union argues that the suspension should be removed from his record and the grievant should be made whole for his losses.

The Company acknowledged that the dates mentioned in the memo were approximations,

but insisted that the grievant had been reprimanded three times prior to the suspension. Even though the contract specifically allows for suspensions for a first offense of failing to follow orders, the Company exercised leniency because it was a new procedure. The Company notes that the reordering of priorities during the day is vital to meeting customer demands and that this was explained to the grievant. After the grievant's failure to consistently follow the procedure, management assumed the responsibility for conveying changes in work priority during the day. This is the reason that subsequent employees in the position have not been disciplined. As for the Union's argument that the suspension is too severe, the Company notes that the contract specifically allows for suspensions in these situations, and asserts that the Union must live with the tradeoffs it has made in bargaining, just as the Company must. For these reasons, the Company asks that the suspension be upheld.

DISCUSSION

There are three questions to be addressed in resolving this grievance:

First, whether the grievant's failure to check priorities may be excused by the other tasks he was assigned on October 3rd;

Second, whether the Company's failure to enforce the procedure after the discipline of the grievant affects the legitimacy of that discipline; and

Third, whether the discipline was excessive under all of the circumstances.

As detailed in the grievance, the grievant was occupied by other tasks at 1:00 p.m. on October 3rd. Without questioning the grievant's claim that he was performing productive work at the time, the undersigned would note that the discipline was not imposed for failing to work -- it was imposed for failing to perform the precise task assigned through the check-in policy. The Company presented persuasive evidence that the check-in procedure had been established as the most important task of the day and that this had been communicated to the grievant when the policy was first put in place. Even if it had not been so communicated, the grievant should have been put on notice by the reprimands prior to October 3rd that he was absolutely required to check-in with the dispatcher at about 1:00 p.m. Even though the grievant disputed the exact dates of the reprimands, he did not deny receiving them. Like the suspension at issue here, these reprimands were issued for failing to check for changes in work priorities, rather than for failing to perform any work at all.

The grievant had been told that checking with the dispatcher took precedence over other tasks, and had been disciplined for failing to check in. Thus the undersigned concludes that the grievant may not be excused from checking in because he had other work to perform. He should reasonably understand that getting the changes in work priority from the dispatcher was his primary obligation at that time of day and he should have adjusted his schedule accordingly.

The second issue is whether the failure of the Company to enforce the policy against other employees after the suspension affects the validity of the suspension itself. It is a widely accepted principle that an employer is obliged to enforce its rules consistently against all similarly situated employees. Workers are entitled to rely on disciplinary decisions in other cases to help them conform their behavior to the Company's expectations. A finding that there has been disparate treatment of employees will generally lead to overturning or modifying the discipline imposed. In this case, the undersigned is satisfied that there has been no disparate treatment.

A claim of disparate treatment must turn on whether the circumstances were substantially similar between the cases and the employees being compared. Here the Company distinguishes the events after the filing of the grievance by pointing out that it abandoned the policy after its experience with the grievant. Actions taken after a grievance is filed are not generally considered as evidence of disparate treatment, absent some other evidence of discriminatory motive. There are two primary reasons for this. First, the employer should be encouraged to modify objectionable or unworkable procedures, without having to fear that those modifications will be taken as an admission in subsequent litigation. The second reason goes to the knowledge of the grievant. Employees are expected to conform themselves to the rules existing at any given time. At the time of the suspension, the grievant should have understood that the rules required him to check-in at or around 1:00 p.m. each day or be disciplined as he had been three times previously. That was the standard he had to meet. The fact that the employer subsequently changed those rules cannot excuse the breach, any more than changing a speed limit sign in the afternoon will excuse a speeding ticket received in the morning.

The Company has demonstrated reasonable distinctions justifying its decision to impose discipline on the grievant, while not disciplining workers after him for engaging in the same conduct. Thus the undersigned finds that there has been no disparate treatment that might justify a modification of the discipline in this case.

The final question is whether the discipline is excessive under all of the circumstances. The undersigned finds that it was not. The Company established that changing work priorities during the day was an essential function and that failure to set new priorities could cause serious difficulties. Even though the procedure of having employees get the changes during the day was new, the Company had briefed the grievant on it, and on the importance of following the procedure. The grievant had received several prior warnings from the Company when he failed to check with the dispatcher for changes in work priorities. Although the Union is correct in arguing that the contract does not obligate the Company to impose a three day suspension for failing to follow orders, the fact remains that it allows for such a suspension even in the case of a first offense. Here the Company waited until the fourth offense in order to be sure that the grievant understood his duties.

The grievant's action does not rise to the level of insubordination as that term is commonly

employed. It was, however, a willful failure to follow a reasonable order, since he should reasonably have been aware of his obligation to check-in with the dispatcher and apparently chose not to in order to complete other tasks. Given that the work rules under the contract allow for a three day suspension as the penalty for such actions, the undersigned concludes that the Company was within its rights in imposing the suspension on the grievant.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The three (3) day suspension was justified. The grievance is denied.

Signed and dated this 13th day of January, 1992 at Racine, Wisconsin:

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator