

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL UNION 2832, MIDWESTERN
INDUSTRIAL COUNCIL, UNITED
BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA

and

EGGERS INDUSTRIES, INC.

Case 50
No. 51878
A-5312

Appearances:

Murphy, Gillick, Wicht & Prachtauser, Attorneys at Law, by Mr. George F. Graf,
appearing on behalf of the Union.

Mr. Gary Milske, Personnel Manager, appearing on behalf of the Employer.

ARBITRATION AWARD

Local Union 2832, Midwestern Industrial Council, United Brotherhood of Carpenters and Joiners of America, hereinafter referred to as the Union, and Eggers Industries, Inc., hereinafter referred to as the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The parties jointly requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a discharge. The undersigned was so designated. Hearing was held in Neenah, Wisconsin, on December 21, 1994. The hearing was transcribed and the parties filed post-hearing briefs which were exchanged on January 24, 1995.

BACKGROUND:

The grievant was employed for twenty years by the Employer and held the position of Maintenance I for the last six or seven years. 1/ On November 8, 1994, Mark Coenen, Assistant Department Manager, asked the grievant if he would come in early at 6:00 a.m. to work on a machine, and grievant agreed to do so. 2/ The grievant came in at 6:00 a.m. on November 9,

1/ Tr. 43.

2/ Tr. 7, 12, 44.

1994, and began work. 3/ The normal hours of work are from 7:00 a.m. to noon and 12:30 p.m. to 3:30 p.m. 4/ At around noon, the grievant told Coenen that he was going to leave at 2:30 p.m. 5/ Coenen then spoke with the Plant Manager, Bryan Mangan, who told Coenen that the grievant could not leave at 2:30 p.m. 6/ Coenen then told the grievant at about 1:00 p.m. that he had spoken with Mangan and the grievant would get in trouble if he left early. 7/ At 2:30 p.m., Mangan saw the grievant changing clothes by the lockers and informed the grievant that three machines were down and he needed the grievant to stay and that if he left, he would be fired. 8/ The grievant said, "so be it" and left. 9/ On November 10, 1994, the grievant was terminated for violating work rules 8 and 10 for failing to accept reasonable job assignments, refusing to obey his supervisor's orders and leaving the plant without permission during working

3/ Tr. 45.

4/ Ex. 1, p. 3.

5/ Tr. 8, 9, 46.

6/ Tr. 10, 18.

7/ Tr. 10, 11, 46.

8/ Tr. 18, 34, 47.

9/ Tr. 52.

hours. 10/ The grievant filed a grievance over his discharge, 11/ which was denied by the Employer 12/ and appealed to the instant arbitration.

ISSUE:

The parties stipulated to the following:

Was the grievant discharged for just cause? If not, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE TWO - MANAGEMENT CLAUSE

2.1 The management of the plant and direction of the working forces, including the right to hire, suspend or discharge for just cause; to assign jobs, to promote and/or transfer employees within the plant, to increase and decrease the working force, to establish standards, to determine products to be handled, fabricated or manufactured, the schedules of production and the methods, processes and means of production or handling are vested exclusively in the Company.

. . .

ARTICLE FOUR - WAGES

. . .

10/ Exs. 3 and 4.

11/ Ex. 5.

12/ Ex. 6.

4.9 It is recognized that from day to day the needs of the business may require that overtime beyond the normal work schedule be worked by entire departments, or a few employees in certain departments. Department managers will first seek volunteers from within the department to fulfill such overtime requirements. If there are not enough volunteers to meet the overtime requirements, the department manager shall notify 1st shift employees of such overtime assignments prior to the half-hour noon lunch break of the day involved, and evening shift employees prior to the half-hour supper break at 6:30 p.m. Overtime work shall first be assigned to the employee or employees who normally perform the work in question, and if such employee is unable to perform the assigned overtime work, then such overtime work will be assigned to the employee or employees with most the (sic) seniority in their department.

WORK RULES

. . .

8. Employees are to accept all reasonable job assignments and shall obey the orders of their Department Manager at all times.

1st Offense - Discharge

. . .

11. Permission must be obtained from supervisory personnel before an employee leaves the plant or Company premises during working hours. Working hours are interpreted to include (sic) the daily 10 minute rest period.

1st Offense - Discharge

EMPLOYER'S POSITION:

The Employer contends that the issues raised by the Union, namely, that the grievant was justified in leaving work at 2:30 p.m. on November 9, 1994, because he had not been posted to work overtime and because he feared he might have a seizure due to his epilepsy, were not raised on November 9 nor anytime during the grievance procedure leading up to arbitration. It argues that the Union is attempting to cloud the issues.

The Employer claims that the grievant was asked to come to work early on November 9, 1994, and the practice is that employees who volunteer to work early must work until 3:30 p.m. unless they receive permission to leave early. It insists the grievant was well aware of this practice. It points out that on November 9, 1994, the grievant indicated to his supervisor that he wished to leave early and was told he would get into trouble if he left early. It submits that the grievant ignored his supervisor's instructions and was preparing to leave at 2:30 p.m. when his department manager clearly told him he could not leave, and if he did, he would be terminated. The grievant left and according to the Employer, he accepted the consequences for his actions. It notes that the grievant never mentioned that he was concerned about his health but simply said, "so be it." It maintains that the grievant broke the Employer's rules 8 and 11 and both call for discharge for the first offense. It argues that the principle of "work now and grieve later" applies as the grievant should have worked when he was ordered to and grieve at a later time. It alleges that he knew that several machines were down and this was an emergency. It believes it acted properly in discharging the grievant and the Employer asks that the grievance be denied.

UNION'S POSITION:

The Union contends that the grievant, a twenty-year employe who had accommodated the Employer by coming in an hour early, was fired because he wanted to leave after completing his eight-hour shift rather than work an hour of overtime. It points out that the grievant was never told that he was expected to work overtime and he could not be required to do so in accordance with Section 4.9 of the contract.

The Union asserts that the Employer's position is based on the presumption that because the grievant had agreed to come in an hour early he would work overtime and it had the right to require him to stay for an extra hour; however, having failed to remain on the premises, the Employer concluded that the grievant put himself in a position to be fired even though he was admittedly a good employe with twenty years of service. The Union submits that the grievant was not only a good employe but also had an excellent work record with the only disciplinary action taken against him prior to his discharge being a warning because he called in late concerning being absent on a given day.

The Union argues that this case comes down to the simple fact that the Employer did not establish that it had a legitimate basis to fire this twenty year employe. It claims that whether the case is considered solely from the standpoint of what occurred on November 9, 1994, or from the standpoint of the contractual language on overtime or solely on the fact that the grievant was a long-term employe with a good record, the grievant did not deserve to be discharged.

The Union admits that it is arguably true that the grievant disobeyed a direct order given him by the Plant Manager at about 2:30 p.m. but the problem is that the order was in complete contradiction of the overtime procedure in Section 4.9 of the agreement. It asserts that the grievant was refusing to work overtime because he had completed his eight hour day and had not been properly notified before noon that he was required to work overtime. It maintains that the Employer had to solicit volunteers and post the notice of overtime to make it mandatory for the grievant to remain and the Employer admitted this was the proper procedure to follow.

The Union points out one other factor that makes the discharge totally unfair and that is the grievant's epilepsy. It insists the Employer was aware of this medical condition, and because of it, the grievant felt it would be dangerous to stay and argue with the Plant Manager. It notes he gave the Employer eight hours of work and deviated from his normal schedule to accommodate the Employer.

The Union contends that the Employer violated the contract by discharging the grievant and it requests that the grievant be reinstated and made whole.

DISCUSSION:

A number of issues have been raised in this case. The first issue is whether this is simply a refusal to work overtime whereby the grievant could properly refuse to work the overtime. The undersigned finds that this is not the case. The record establishes that when the grievant was asked by his supervisor if he would come in early on November 9, 1994, the supervisor never mentioned that he expected the grievant to work overtime, but the evidence of past practice establishes the understanding of the shop is that by agreeing to come in early, the grievant was agreeing to work overtime. At the time of the request, the grievant could have said he would come in early if he

could leave early, but he did not, and the Employer obligated itself to pay overtime. Therefore, although the word overtime was not used, it is concluded that everyone understood the past practice, including the grievant. The second part of the practice is that employees who come in early can leave early if they ask to do so. In this case, the grievant wanted to leave early and was told at 1:00 p.m. he could not do so. He didn't respond to this denial, so it is concluded that he knew he was required to work until 3:30 p.m. Thus, even if initially he was under the mistaken assumption he could leave early, he was clearly informed that he could not.

The second issue is whether or not he was insubordinate by his leaving work at 2:30 p.m. contrary to the Plant Manager's directive to remain at work. The evidence clearly establishes that the grievant was insubordinate and left the premises contrary to the Plant Manager's directive and nothing in Section 4.9 was contrary to this order and did not excuse his conduct. It is a cardinal principle that a grievant cannot take it upon himself to decide to disobey a proper order and leave. Therefore, the grievant was insubordinate and left work early without permission. It is noted that he was warned of the consequences of his leaving early.

The next issue is whether the grievant's epilepsy excused his failure to follow his supervisor's orders. The undersigned concludes that it does not. His epilepsy was never mentioned by the grievant at the time of the incident at 2:30 p.m. on November 9, 1994. Additionally, the grievant wanted to leave at 2:30 p.m. because he had talked to his brother the night of November 8, 1994, and his brother was going to meet at the grievant's place at or shortly after 2:30 p.m. to do some work on the grievant's garage.^{13/} This is the reason he left, and epilepsy played no part in the grievant's decision.

Based on the evidence, it is concluded that the Employer had just cause to discipline the grievant for his failure to obey reasonable orders and his leaving work early.

The last issue is the appropriateness of the penalty imposed. Just cause requires that in assessing the penalty, the seriousness of the offense as well as the employee's length of service and his past record must be considered. Another consideration is whether progressive discipline would correct the grievant's behavior. In this case, the offenses of insubordination and leaving work early are very serious, but the grievant has been employed for twenty years and his record is satisfactory. The Employer has the right to expect that everyone will follow orders and obey the work rules, but given the grievant's twenty years of service and his good record, the undersigned finds that the principles of just cause require that progressive discipline be followed. It is concluded that in this case, immediate discharge is too severe a penalty for the grievant's misconduct but a thirty-day suspension without pay is warranted for the grievant's serious misconduct. The thirty-day suspension should be sufficient to correct the grievant's behavior so

13/ Tr. 49.

that it will not be repeated.

Based on the above and foregoing, the record as a whole, and the arguments of the parties, the undersigned issues the following

AWARD

1. The grievant was not discharged for just cause.
2. The grievant shall be reinstated effective December 10, 1994, and the Employer shall make him whole for the lost pay and benefits he would have received from December 10, 1994, to the date of his reinstatement, less any compensation he has received from other employment since December 10, 1994.
3. The undersigned will retain jurisdiction for a period of thirty (30) days solely for the purpose of resolving any disputes with respect to the remedy herein.

Dated at Madison, Wisconsin, this 15th day of March, 1995.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator