

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
LOCAL LODGE 1855 OF DISTRICT 150

and

KRC (HEWITT), INC.

Case 42
No. 51499
A-5286

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Mr. Frederick Perillo, appearing on behalf of the Union.
Godfrey & Kahn, S.C., by Mr. Dennis W. Rader, appearing on behalf of the Company.

ARBITRATION AWARD

The Company and Union above are parties to a 1994-97 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the discipline grievance of Randy Slomski.

The undersigned was appointed and held a hearing on November 28, 1994 in Neenah, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs and reply briefs, and the record was closed on February 21, 1995.

Stipulated Issues

1. Did the Company violate the collective bargaining agreement by suspending Randy Slomski without just cause?
2. If so, what is the remedy?

Relevant Contractual Provisions:

ARTICLE XI
Discharge

Section 1. No employees will be discharged, disciplined, or suspended without just cause.

Discussion:

On June 21, 1994 Randy Slomski, an Assembly Department employe, was given a three-day disciplinary layoff for allegedly making a threat to a supervisor on the previous afternoon. The grievant had been employed by the Company for eight years (including both the period the Company was owned by KRC Rolls and its previous ownership by Hewitt Machine Company) and had no previous record of discipline. While the exact statements made during the conversation in question are somewhat disputed, as shown in the transcript sections reproduced below, it is undisputed that a conversation took place on June 20, 1994 to which only the grievant and his supervisor, Greg Siebers were present, and that immediately after this conversation Siebers told another management official that he believed a threat had been made against his life. It is also undisputed that Slomski and Siebers have at all previous times had a good working relationship, and that Siebers was even in the habit of discussing personal matters with Slomski, beyond those which might have been the subject of conversation with employes generally. Also undisputed is the fact that the conversation arose in the context of a hot and humid day in the plant, on which mandatory overtime was being required of the grievant, and that mandatory overtime had been an issue of some importance in a strike which had been resolved only a few weeks previously.

Siebers testified to the content of the disputed conversation, which began by Siebers indicating that Slomski might be required to work overtime that day, in the following terms:

A He wasn't real happy about it.

Q How did you come to that conclusion?

A By -- he told me that the only way he'd work any overtime is if he was forced through contract.

Q And what was your response to that statement of his?

A I told Randy I would see what I could work out and get back to him a little bit later and let him know what we would come up with.

Q Okay. And did you, in fact, get back to him later?

A Yes, I did.

Q And what conversation did you have with him with respect to required overtime?

A I told Randy that because he was working on the job he would be -- he would have to stay.

Q Okay. Was there any grievance filed by Mr. Slomski or the

union regarding his requirement that he work the overtime?

A Not that I'm aware of.

Q And when you told Mr. Slomski that he had to work the overtime, what then took place?

A He got very upset and very verbal with me. He told me that there were people that had -- there were people that had access to AK-47's in the parking lot and anybody could go (sic) out there and grab one and take out anybody in the office, and he pointed to the supervisor's office. And he said then when they're done with that, he could go and go to the main office and do the same thing.

He told me basically that everybody has a breaking point, look what happened to O.J. Simpson, and people can be pushed just so far and he had -- wasn't going to be pushed, and he pointed his finger at me and told me that "may God have mercy on your soul."

Q You indicated that you felt he was upset. What brought you to that conclusion?

A By his uses of -- his verbal use and his tone of voice.

Q What, for example, in the verbal?

A "Fuck you" this and that. He was very upset, he was stone faced and abusive.

Q Okay. What did you do then?

A I didn't know what to do at the time. I went up to the office. There was a gentleman standing there. I told that gentleman I felt as though my life was just threatened. Immediately after that I went and talked to Jerry, told him exactly what happened.

Q And after you spoke with Jerry, did you write up the incident?

A Yes, I did.

In direct examination, the grievant described the same incident in the following terms:

Q Tell us what you can recall of that incident.

A Well, it was the 20th of June that I told Greg that -- it was late afternoon, that if you're going to keep pushing people, it's very possible that something could happen, that somebody could go off the deep end and, you know, come in here, possibly with a weapon, and somebody could get hurt.

And I also brought it up, I said in particular, look at southern California. It doesn't necessarily have to be southern California; it could happen right here at Neenah, Wisconsin.

Q Did you tell Mr. Siebers at any time that you yourself would take any action against him?

A I did not.

Q Did you tell him that you had such a weapon?

A I did not.

Q Did you mention any particular weapon?

A No, I -- assault weapon, weapons.

Q Did you use the reference to AK-47 --

A I did not.

Q I take it -- did you name any employee who -- that you thought would do this?

A No, I did not.

Q Then how did you put it to the best of your memory using your actual words?

A That each and every one of us has a breaking point, a boiling point, where it's possible somebody could snap. I don't know in particular any one individual, but it could happen to any one of the employees.

Q Was this your first and only conversation with Mr. Siebers on that day?

A No, it was not.

Q What other conversations did you have with him?

A Early that morning in the a.m. hours Greg and I had talked.

Q Okay. What happened in that conversation? This would be before the --

A Yes.

Q -- conversation you just testified to?

A Yes.

Q What happened in that conversation?

A Well, we were talking about personal problems at home, and he did the majority of the talking.

Q Without mentioning any of the details of what he told you, I mean, because I don't want to get into his personal affairs, did he confide something in you that day?

A Yes.

Q Did he tell you anything about his state of mind or his state of emotions about this incident?

A Not his, no.

Q He told you something about his family?

A Yes.

On cross-examination, the grievant was asked to what extent he disagreed with Siebers' account of the incident, as written up later the same day:

Q Okay. Now, I'd like to have you take a look at the statement of Mr. Siebers here. Go down about halfway down the page where it says, "Randy made the statement as follows," and I'd like to have you indicate what items -- where you agree or disagree with Mr. Siebers in his statement as written here.

Did you indicate that "we have access to AK-47 guns of all sorts"?

A I had -- I don't agree with that. I said that assault weapons are readily available.

Q Okay. Mr. Siebers indicates and writes, he said that, "He said what do you think if someone went into the shop office, and pointing in that direction, and then went over to the main office and took care of things?" Did you say that?

A I did not. I told him, I said, it's very possible that someone could come in the shop and start, whether it be the shop office or the main office.

Q Did anybody tell you that they were going to do that?

A No.

Q Why did you say this? Why did you say this to Mr. Siebers if no one had told you this? You were the sole source of this information; is that correct?

A Uh-huh.

Q You brought up the matter of assault weapons?

A Yes.

Q And this was in a situation involving overtime; is that correct?

- A That's correct.
- Q There is nothing in the shop that deals with any type of weapons, is there?
- A No.
- Q You didn't mention anybody else's name as someone who would bring in an assault weapon?
- A I did not.
- Q You didn't indicate that someone had told you that they would bring in an assault weapon?
- A No.
- Q As a matter of fact, no one had even told you that they would bring in an assault weapon?
- A No.
- Q And yet you mentioned to Mr. Siebers that this situation could be -- could generate a situation -- or a succeeding situation where someone could come in with a --
- A It could be possible, yes.
- Q Why did you say that comment, make that comment to Mr. Siebers?
- A Because at the time the tensions were very high in the shop, the weather and the fact that I was being forced to work overtime.
- Q Okay. Your being forced to work overtime, you didn't like that, did you?
- A I did not.
- Q And are you saying that when you were asked to work

overtime and you -- strike that. You indicated you didn't want to work the overtime; is that correct?

A I said, "I will not work overtime unless being forced and I would abide by that."

Q But immediately after that you brought up the matter of assault weapons?

A Yes.

Q Okay. Then let's go down further. Mr. Siebers indicates, "I told him I would think that person would be nuts -- or was nuts." Do you recall him making that comment?

A I do not recall.

Q Are you saying he didn't make it?

A I don't recall.

Q Mr. Siebers writes further, "Randy said everyone has a breaking point, everyone." Did you say something to that effect?

A Yes, I did.

Q Did you, in making that comment, refer to any specific individual?

A I did not.

Q Were you at a point of crisis yourself?

A No.

Q You were upset, however, about --

A I was upset, yes.

Q Okay. And do you feel you have a breaking point?

A Yes.

Q And have you gotten upset about working overtime previously?

A No.

Q Has the issue of overtime been a matter of concern which you have discussed with other people?

A No.

Q Was the matter of overtime an issue in the strike?

A I believe so.

Q And what position did the union take during the strike on overtime?

A I don't recall.

Q Would it be fair to say, however, that the union opposed the notion of mandatory overtime; isn't that correct?

A Yes, it is.

. . .

Q Okay. Now, Mr. Siebers approached you specifically to work overtime; isn't that true?

A That's correct.

Q Mr. Siebers didn't discuss with you the contract negotiations regarding the -- this provision; he didn't go into any discussion about how this impacts on everybody, did he?

A No.

Q Mr. Siebers then writes, "He went on to say that he was going" -- "he wasn't going to put up with this in no way whatsoever and he was going to do something about it." Did you say anything like this?

A Yes, I did.

Q Okay. And what were you -- when you were saying -- referring to "this", you weren't going to put up with "this", I'm presuming that it means being forced to work overtime;

isn't that correct?

A That's correct.

Q And you indicate you were going to do something about it.

A Yes.

Q And "it" means being forced to work overtime?

A Yes.

Q Now, you understand that there is really nothing that you can do about it under the contract; isn't that correct?

A No.

Q You agree that you can't do anything under the contract?

A Seek other employment.

Q You didn't indicate that you were going to seek other employment in your conversation with Mr. Siebers, did you?

A I did not.

Q Would it be fair to say that you were upset in your conversation with Mr. Siebers?

A Yes.

Q Would it be fair to say that you were very verbal?

A Yes.

Q You used vulgarities?

A Well, again, when we talk, it's off the record where him and I can use vulgar language.

Q Okay. And you have known Greg Siebers for a number of

years, haven't you?

A Yes, I have.

Q And you feel that you know each other quite well?

A Yes.

Q And have you had a situation where you have become upset and heated in this type of situation with Mr. Siebers previously?

A No.

Q So wouldn't it be fair to say that this would be a first-time situation for Mr. Siebers in dealing with you under this type of circumstance?

A Yes.

Q Mr. Siebers then indicates, "He ended by saying, 'May God have mercy on your souls'." Did you say that?

A Yes, I did.

Q Was this statement said immediately after your discussion with Mr. Siebers about the overtime?

A I believe that was my final statement.

Q Okay. What relationship does -- this seems like maybe a statement that a minister or a clergyman would make in a church. What relationship does this statement have to the situation of your being requested to work overtime?

A Simply may God forgive people like you.

Q What did Mr. Siebers do wrong?

A He forced me to per contract work overtime.

Q But that's not wrong, is it?

A No.

Immediately after the incident, Siebers informed Manufacturing Manager Gerald Poss of the matter. Poss instructed Siebers to write down what he thought had happened, and Siebers did so. The following morning, Poss reviewed the report, and called in the grievant. In the employee warning record then given to the grievant, under "Company Remarks", Poss filled in

"Randy S. made threatening statements to Greg Siebers. He referred to a (sic) AK 47 gun and walking into both supervisor office or main office. He stated everyone has a breaking point. He said he was going to do something about it after referencing AK 47." The grievant commented on the form under "Employee's Remarks": "I, Randy Slomski, did not make such threats or statements!"

Poss then informed the grievant that he had violated Work Rule Level 2, number 7, and that he was suspended for the remainder of the week, June 21 through 24. At about the same time, Poss called the Neenah Police Department and reported the matter. Officer Michael McKinnon was dispatched to investigate, and took a statement from Siebers and interviewed Slomski by telephone. McKinnon testified at the hearing, and stated that the grievant had denied making any threat. McKinnon's report stated in pertinent part as follows: "Mr. Slomski totally denies making any of these threats at (sic) stating that this is a payback for him being on strike a couple of weeks ago when KRC Rolls was on strike. Mr. Slomski stated that he never made any of these statements and that he had informed the Company when he was called in at 11:30 a.m. this morning that he did not make any of these statements."

McKinnon testified that because it was a situation in which one individual's word against another's, the Police Department determined not to proceed further, because the matter could not be proven beyond a reasonable doubt. McKinnon described the grievant as "very cooperative".

The section of work rules the grievant was accused of violating reads as follows:

WORK RULES

A minimum number of Plant Rules have been established. These are intended for the welfare and protection of each and every employee and are basic to the orderly conduct of daily business. Each rule has been carefully considered and will be enforced uniformly and fairly on a plant wide basis.

There are three levels of violations of these work rules:

Level 1 - Violations will result in immediate termination

if it is determined an employee has violated one or more of these rules.

...

Level 2 - Violation will result in suspension and/or termination.

...

7. Threatening another employee

The Company presented evidence to the effect that on a previous occasion, in March, 1994, the grievant had become upset over overtime in a different context, and another employe, Tim Cason-Gossett, had become sufficiently concerned about the grievant's attitude to approach management about it. No discipline was assessed against the grievant upon that occasion, and Cason-Gossett testified that he felt in retrospect that the incident had gotten out of proportion. Since Poss testified that he heard about this incident only after he had decided on the three-day suspension for the June 20th incident, I find it to be of very limited relevance.

Both parties filed extensive briefs analyzing and re-analyzing the testimony of the grievant and Siebers, and drawing analogies and distinctions to prior arbitration cases. In essence, the Company contends that Siebers should be credited as to the incident involved, that the grievant's own testimony substantiates Siebers' account, and that given the context, the grievant's statements can only be reasonably interpreted as a threat. The Company further contends that the grievant has given inconsistent statements at the hearing herein and to the police, such that where his account differs from Siebers', Siebers' version should be preferred. The Company argues that the fact that the Police Department did not pursue the charges has no bearing on the lesser standard of proof required of the Company in a just cause discipline proceeding, and that a three-day disciplinary layoff was an appropriate penalty for this offense even though the grievant had no prior warning on his record. In its reply brief, the Company contends that the Union improperly assumes that the Company has the burden of proving both that the grievant intended to threaten his supervisor and that he had the means upon which to carry out the threat, and that the "reasonable doubt" standard does not apply.

The Union contends that the grievant performed the overtime required of him, and that he agreed to do it under protest. The Union notes that the grievant had the right to refuse to volunteer, just as management had the right to "force" the overtime. The Union contends that there is no evidence that the grievant ever stated that he personally would attack any management member with or without any weapon, and that the most that can be said is that the grievant predicted that some employe might do so. The Union contends that the Company has the burden under arbitral precedent of demonstrating that a statement constitutes a threat, and that indispensable elements of such proof include a demonstration that the individual making the statement proposes to carry out the action himself, that he has the means to do so, and that the statement should be read as something more than "loose talk". The Union points to the fact that another supervisor at about the same time issued a letter of recommendation concerning the grievant, which the grievant had sought in preparation for seeking other employment, and that the

recommendation praised his good attitude. The Union notes that there is undisputed testimony that at least one employe in the plant is a gun dealer, and that this demonstrates that Slomski's statement was true on the facts. The Union contends that the Cason-Gossett incident represents material "piled on" in an effort to bolster a sagging suspension case. The Union contends that other arbitrators have found that a threat must be proved beyond a reasonable doubt, or at least by clear and convincing evidence, and that each element of the offense must be proved, including any required intent or state of mind. Ambiguous statements, argues the Union, are not enough. The Union argues that the statements attributed to the grievant are not threats, citing a number of cases distinguishing between a prediction and a threat under various circumstances. The Union further contends that a "major part" of the Company's case is based upon drawing inferences forbidden by federal and state law, referring to the Company's questioning of the grievant regarding what he meant by using the phrase "may God have mercy on your souls". In its reply brief, the Union cites several allegedly similar cases in which a threat was not found to have been made, and contends that "while it is true that a threat is still an offense even if not taken seriously by the intended victim, the words spoken must be intended as threat and not as a joke or a merely ambiguous statement. The effect upon the victim is only relevant to the extent that it bears upon the reasonableness of a conclusion that the statement could be comprehended in a threatening manner". The Union also notes that "Arbitrators have always however recognized that tasteless jokes or explosive but empty expressions do not constitute threats. That the supervisor in question does not feel threatened because he believes the statement is a joke is highly relevant; that he does not feel threatened because he is excessively macho is not relevant." The Union contends that in sum and substance, the grievant's statements cannot be construed as a threat. The Union requests that the grievance be sustained and the discipline overturned.

The crux of this case is obviously whether or not the grievant's statements on June 20th could reasonably be regarded as a threat to Siebers or other members of management. In evaluating the record, and particularly the detailed recounting of other cases supplied by the parties, I must note immediately that whether a specific statement should fairly be viewed as a threat is a matter particularly subject to judgment calls based on the apparent meaning to the particular people at the particular time. The danger in following the wording with great attention to detail but too little attention to circumstance is that the result may be a ludicrous misinterpretation of commonly-understood language. For example, the gangster-film cliché "you could meet with an unfortunate accident" fails every one of the tests the Union would have me apply. Yet in the circumstances in which the phrase keeps arising, it is universally interpreted as a threat.

More persuasive than the technical question of whether the individual speaking was speaking in the first or the third person is the issue of how the remark was received, and whether the person receiving it might have misinterpreted it. As the Union notes in its reply brief, "that the supervisor in question does not feel threatened because he believes the statement is a joke is highly relevant. . . ." In this case, however, it is indisputable that the supervisor did not feel the statement was a joke. This has significance because the grievant was clearly agitated at the time

and because Siebers knew him well. While the Union alleges that the statement should have been read as mere "loose talk", it is apparent that Siebers did not hear it that way; and there was no testimony to support the implied contention that such talk was not all that extreme in the environment of this plant.

Moreover, where the grievant differs in his version of the conversation from Siebers, I find it difficult to credit the grievant, in view of his statement to the police. That statement, according to McKinnon's testimony and his notes, was to the effect that he had said nothing at all similar to what Siebers ascribed to him. But at the hearing herein, the grievant's account of the disputed conversation differs from Siebers' account only in detail, and on cross-examination in particular he admitted many of the elements which had concerned Siebers. This undercuts the Union's contention that Siebers had unrelated reasons to be particularly sensitive that day, and read too much into the grievant's statements. Thus the grievant admitted that he referred to some employee obtaining an automatic weapon and attacking members of management. And while other employees had apparently been displeased by the mandatory overtime the Company was requiring, there is no evidence that the grievant was engaged in concerted activity at the time, or that any other employee's preferences were part of the particular discussion he was having with Siebers. It was the grievant who was working overtime only at the Company's insistence, and the grievant who expressed resentment about this in heated terms. For Siebers to conclude that the grievant's statements represented a veiled threat was not, on this record, unreasonable.

The grievant can fairly claim the benefit of a good work record and of no prior discipline or event of this nature. I have considered this in the context of this award. I believe, however, that the Company may already have considered this in assessing the grievant a three-day suspension: the level and likelihood of execution of a threat are certainly factors in the seriousness with which it is to be regarded, and if the grievant had referred to personal and immediate introduction of an automatic weapon into the plant for purposes of an attack upon named members of management, and had done so in a fashion demonstrating seriousness to his audience, I think it unlikely that the Company would have contented itself with a three-day suspension. I note that the agreement allows for a range of penalties from suspension through discharge for violation of the class of offenses involved here, and conclude that the Company's imposition of a three-day suspension is not out of proportion to the seriousness of the grievant's statements.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the Company had just cause for the three-day suspension given the grievant.
2. That the grievance is denied.

Dated at Madison, Wisconsin this 16th day of May, 1995.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator