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ENTERPRISE WIRE CO.—

Decision of Arbitrator

In re ENTERPRISE WIRE COMPANY [Blue Island, Ill.] and ENTERPRISE INDEPENDENT UNION, March 28, 1966

Arbitrator: Carroll R. Daugherty

DISCHARGE

— Absenteeism — Unsatisfactory work—Tests for 'just cause' ▶118.6361 ▶118.651

Employer was justified in discharging employee for record of unexcused absences and for failure to tag materials correctly as required by his job. Employer's action meets tests for "just cause" for discharge: (1) Employee was forewarned of consequences of his actions; (2) company's rules are reasonably related to business efficiency and performance employer might expect from employee; (3) effort was made before discharge to determine whether employee was guilty as charged; (4) investigation was conducted fairly and objectively; (5) substantial evidence of employee's guilt was obtained; (6) rules were applied fairly and without discrimination; and (7) degree of discipline was reasonably related to seriousness of employee's offense and employee's past record. (C. Daugherty)—Enterprise Wire Co., 46 LA 359.

Appearances: For the union — Philip R. Davis, attorney. For the company—Jay G. Swardenski, Seyfarth, Shaw, Fairweather, and Geraldson, attorney.

TESTS FOR 'JUST CAUSE'

Factual Background

DAUGHERTY, Arbitrator:—On October 8, 1965, the Company communicated to grievant X— an employment termination notice, signed by the plant manager and by the assistant plant superintendent and giving as the reasons for X—'s dismissal unsatisfactory work, including absenteeism, plus insubordination or refusal to work as directed.

The aggrieved employee had been hired on April 13, 1965, and had been trained as a wire rod cleaner in the Cleaning Department, second shift. The Company receives coils of wire rod from its suppliers, and said coils vary in diameter and metallurgical composition. Before the coils reach the cleaner employee, they are welded together at the ends in sets of three to form a "pin" and are tagged for identification as to diameter and composition. The cleaner's job is to clean the pins in an acid tank, preserve their identities, and respectively to re-tag them after they have been so pickled and as they are left suspended from a sort of beam called a "yoke." The tag is a rectangular piece of carboard with spaces to be filled in as to size and other characteristics of the wire rod in the pin and as to the identity of the wire-drawing machine to which the pin is to go. At the top of the tag is a reinforced hole through which a fine, flexible wire is placed by the cleaner, fastened to a strand of rod in the pin, and wound or twisted to prevent detachment.

Failure properly to tag each pin results in production delays, cost increases, and customer dissatisfaction (when orders for wire are not filled according to specifications). Alleged continued failure to tag some of his pins properly—either through allegedly not tagging some pins at all or through allegedly not marking the machine number on some of them—was the immediate cause of X—'s discharge.

Other material facts are set forth below under *Findings and Opinion* in respect to the issue of "just cause."

Contract Provisions

The provisions of the Parties' controlling Agreement cited by the Company read as follows:

ARTICLE IV
Hours of Work and Overtime

Section 10. Absence From Work. Any employee absent from work for any cause is required to report at once to the Superintendent and arrange his next scheduled work shift. Any employee unable to report on his regularly scheduled shift shall notify his foreman or the Superintendent at least two hours prior to the start of the shift. Any employee failing to report as described above will, on the second offence, be given disciplinary layoff of one shift. Repetition of this practice

without proper cause will be considered basis for discharge.

ARTICLE VII
Management

The Union hereby recognizes that the management of the plant and the direction of the working forces, including, but not limited to the right to direct, plan and control plant operations, to establish and change working schedules, to hire, transfer, suspend, discharge or otherwise discipline employees for cause, to promulgate, administer and enforce plant rules, to relieve employees because of lack of work or for other legitimate reasons, to introduce new or improved methods or facilities and to manage its properties, is vested exclusively in the Company. It is understood that the aforesaid rights of management shall not be exercised in a manner inconsistent with the other provisions of this Agreement.

Any rights not specifically abridged, qualified or limited by this Agreement are reserved exclusively to the Company

ARTICLE VIII
Discipline

Section 1. Proper Cause. No employee shall be discharged or otherwise disciplined except for proper cause.

Section 2. Discharge or Discipline Grievance. Any case of discharge or other discipline may be taken up through the grievance procedure, but any such grievance must be presented within three working days after the disciplinary action occurs.

Section 3. Notice to Union. The Union shall be notified within one working day of any disciplinary action taken against any employee covered by this Agreement.

The Union contends that the Company's disciplinary action violated the Agreement but cites no provisions thereof alleged to have been breached.

Arbitrator's Findings and Opinion

Article VII, quoted above, affirms the Company's right to discipline for "cause"; and Article VIII, Section 1, requires "proper cause" for discipline, including discharge. No provision in the Agreement defines these terms; that is, no contractual criteria exist for determining from the facts of any disciplinary case, including this one, whether or not the Company had just cause for its decision. Therefore it is necessary for the Arbitrator to supply and apply his own just cause standards. Same are set forth in detail as an Appendix to this decision. In what follows, the Arbitrator makes findings of fact from the evidence of record in respect to each criterion.

Question No. 1: The record establishes that the Company gives to each employee a copy of a booklet labeled "INTRODUCTION TO ENTERPRISE WIRE CO." Pertinent portions thereof are reproduced just below:

PLANT INFORMATION AND RULES

In order to have our plant operate at maximum efficiency and insure the safety of the individual and plant property, it is necessary for all workers to abide by certain rules and regulations. We believe this will provide for our mutual protection and benefit. Rules cover the following areas: instructional, standard practice, and disciplinary.

GENERAL INFORMATION AND RULES

ABSENTEEISM: Employees are required to notify or call their foreman or superintendent when, for any reason, they are unable to be present or anticipate a late arrival. (Shop employees are referred to Article IV, Section 10 of the union contract.)

ADMINISTRATION OF DISCIPLINE: The welfare of the company as a whole must be considered first, because it represents the total welfare of the entire group. Rules and regulations are established for the guidance and protection of all employees. Employees should be familiar with the rules and govern themselves accordingly. Failure to do so will result in disciplinary action, including suspension and discharge.

Disciplinary action may be in the form of verbal reprimand or written notice type. Our written notice type is based upon three notices within a twelve month period. The first warning notice is issued as a serious warning when verbal reprimand has failed. The second written warning notice carries a time off penalty related to the seriousness of the offense. The third notice requires suspension or discharge.

Disciplinary action will be taken in the following instances:

16. Insubordination, inability or refusal to perform assigned duties.

18. Unsatisfactory performance of duties assigned to the employee.

From the above the Arbitrator must find that X— had been put on notice in respect to (1) the necessity for notifying the Company about impending absence or tardiness; (2) the necessity for satisfactory compliance with job requirements and supervisory directions when actually at work; and (3) the possible disciplinary consequences of failing to fulfill said requirements.

In addition to the above finding, which is general in nature, the evidence of record supports the firm conclusion that X— had been put on much more specific notice in respect to absenteeism, absence notification and work performance: (1) On June 16, 1965, X—'s foreman spoke to him about his absences and placed in his personnel file a written memorandum (not a formal warning

notice) summarizing said interview. (2) On July 27, 1965, a formal written warning notice was issued to X— (and placed in his file) and a one-day suspension was imposed for his having been absent on two preceding days and for his not having notified the Company thereon. Said notice also promised further discipline for repetition of the offense. (3) On September 13, 1965, X— received a second such notice and one-day suspension for the same offense. He was also then put on a three-month probation. "Further action" was promised for his next "warning for any Reason." (4) During the first week in October, 1965, X— received four oral communications from three management persons—his two immediate foremen (who divided supervision of X—'s shift) and the assistant plant superintendent—in respect to his alleged failure to tag some of his cleaned pins or properly to mark some of the pins he did tag. Neither of the foremen explicitly warned him that continued dereliction of tagging duty would lead to discipline; but on the evening before the discharge the assistant superintendent told X— that if he (the assistant superintendent) found the next morning that X—'s pins were not identified, the assistant superintendent would have to discharge him.

From all of the above, the Arbitrator must find that the answer to Question No. 1 is clearly and strongly "Yes."

Question No. 2: The record contains no evidence, nor indeed does the Union contend, that the Company's rules and warning against absenteeism, against failure to notify the Company on same, and against tagging laxity were and are not reasonably related to Company efficiency and X—'s work capability. The answer to the second criterion must also be a strong "Yes."

Questions Nos. 3 and 4: On this Question the weight of the evidence of record warrants the following conclusions: (1) As to absenteeism and failure to notify: (a) The offense is of such a nature that, given X—'s records thereon, a prior further investigation into the fact was unnecessary. (b) But there was no explicit testimony about whether or not the Company asked X— to explain or excuse his lapses in this area. (2) As to X—'s alleged tagging failures: (a) This offense was of a different sort. At the hearing there was no controversion of the Company's evidence that on the three mornings preceding the date of X—'s discharge some of the pins that he had cleaned the prior evenings either lacked tags entirely or, if tagged, lacked wire-drawing - machine identification. Then, given the Company-conceded possibility that X— *might* have tagged all his cleaned pins properly those evenings and some one else or some post-shift occurrence *might* have caused the tickets to be removed or lost after X— went home, the Company would be on firmer ground here if it had taken the pains to question material handlers and other employees who conceivably might have been involved in order to remove as much doubt in this area as possible. On the other hand, if some of the tags that X— did attach on those evenings did not bear machine numbers, no further inquiry into this portion of his alleged offense was needed. (c) X—, at the times he was spoken to by management, had ample opportunity to try to justify or explain his tagging deficiencies if same existed. The Company cannot be held to have been seriously remiss in this field of its investigation. The Company is not shown actively to have solicited from X— any justification for his alleged sins of omission; but the Company may not rightly be found *to have denied* him such opportunity. (d) A relatively detached management official, higher than X—'s foremen, made the determining inquiries.

On balance, the Arbitrator holds that the answer to these two Questions is a moderate "Yes."

Question No. 5: Of all the seven questions, the fifth is the crucial one here. This statement is grounded on two facts of record: (1) The evidence on this Question is in direct conflict. At the hearing the Company witnesses testified forthrightly that on the mornings of that October week, after X— had left the preceding nights, some of his cleaned pins lacked tags entirely or, if tagged, lacked machine numbers. They also testified that, although X— at first denied any tagging failures whatever, he later (twice) admitted having tagged only "most" of his pins. On the other hand, X— himself at the hearing just as forthrightly testified that he had tagged all his pins, and only two tags lacked machine numbers because some one came to take them immediately to the right machine, thus obviating any need for so

identifying them. He also denied ever conceding to the Company that he had tagged only "most" of his pins. (2) No management person checked on X—'s tagging at the ends of his shifts that week. His foreman spot-checked his tagging those evenings and found same entirely satisfactory; but his checking ended one hour before X—'s shifts ended; and no further checking was done until the next mornings. Thus the record is blank on what happened from 10 p.m. until the morning checks.

This Arbitrator has no means for resolving the conflicts in testimony or for filling in the blank area in facts. His function here is to determine whether the Company's decision-maker or "judge" (the plant manager) had reasonable, non-arbitrary grounds for accepting the word and conclusions of his managerial subordinates rather than any denials X— may have made.

On this issue the Arbitrator finds as follows: He has no proper basis for ruling that the Company's decision that X— was guilty of the alleged tagging offense was so unreasonable or arbitrary as to have constituted an abuse of managerial discretion. The record contains no probative evidence that either the Company or some fellow employee was trying to "frame" X—. The Company's evidence on the tagging matter must be ruled to have been sufficiently substantial to support its decision.

In respect to the absenteeism question, the Company must be held to have had amply substantial evidence of X—'s failures.

Given all the above, the answer to Question No. 5 must be a fairly strong "Yes."

Question No. 6: The record contains no evidence of probative value that would support a finding of Company discrimination against X— in the action it took. The answer to this Question is "Yes."

Question No. 7: This Question is a two-fold one. In the light of the Notes set forth in the Appendix hereto, as applied to the facts of record here, the answer to Question 7(a) must be "Yes." The Arbitrator has held that the Company properly found X— guilty of violating its reasonable rule on absenteeism and its reasonable shop rules Nos. 16 and 18. Such violations in the context of this case constituted a serious offense. The Company may not be found to have been unreasonable or arbitrary in deciding on discharge rather than on some lesser penalty.

As to Question No. 7(b), the Union makes two contentions: (1) X—'s record on absenteeism has no bearing on his discharge, for he had already been penalized for same. (2) The Company violated the contractual provision that three warning notices for the same offense are necessary before discharge can be imposed.

The Arbitrator is forced to reject both these contentions. As to (1), the reasons will be evident from the Appendix Notes to Question No. 7. As to (2), the following should be noted: (a) There is nothing in the Agreement about the necessity for three warning notices for the same offense before discharge. The Company's own discipline rules (previously quoted) were unilaterally issued and are not a part of the Agreement because not referred to there. (b) Even if same were in the Agreement, (i) they can not be interpreted in the manner contended for, because there is no statement that the three notices have to be for the same sort of offense; and (ii) nothing therein would prevent the Company from discharging an employee for a truly serious first offense.

The Arbitrator finds that the Company's decision here was not unreasonably related to X—'s record.

Then the answer to the whole of Question No. 7 must be held to be "Yes."

The Arbitrator has found that all seven Questions merit affirmative answers. Accordingly, he must now rule that there is no proper basis for sustaining X—'s grievance.

AWARD

The grievance is denied.

TESTS APPLICABLE FOR LEARNING WHETHER EMPLOYER HAD JUST AND PROPER CAUSE FOR DISCIPLINING AN EMPLOYEE

Few if any union-management agreements contain a definition of "just cause." Nevertheless, over the years the opinions of arbitrators in unnumerable discipline cases have developed a sort of "common law" definition thereof. This definition consists of a set of guide lines or criteria that are to be applied to the facts of any one case, and said criteria are set forth below in the form of questions.

A "no" answer to any one or more of the following questions normally signifies that just and proper cause did not exist. In other words, such

"no" means that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer.

The answers to the questions in any particular case are to be found in the evidence presented to the arbitrator at the hearing thereon. Frequently, of course, the facts are such that the guide lines cannot be applied with precision. Moreover, occasionally, in some particular case an arbitrator may find one or more "no" answers so weak and the other, "yes" answers so strong that he may properly, without any "political" or spineless intent to "split the difference" between the opposing positions of the parties, find that the correct decision is to "chastize" both the company and the disciplined employee by decreasing but not nullifying the degree of discipline imposed by the company—e.g., by reinstating a discharged employee without back pay.

It should be clearly understood also that the criteria set forth below are to be applied to the employer's conduct in making his disciplinary decision *before* same has been processed through the grievance procedure to arbitration. Any question as to whether the employer has properly fulfilled the contractual requirements of said procedure is entirely separate from the question of whether he fulfilled the "common law" requirements of just cause before the discipline was "grieved."

Sometimes, although very rarely, a union-management agreement contains a provision limiting the scope of the arbitrator's inquiry into the question of just cause. For example, one such provision seen by this arbitrator says that "the only question the arbitrator is to determine shall be whether the employee is or is not guilty of the act or acts resulting in his discharge." Under the latter contractual statement an arbitrator might well have to confine his attention to Question No. 5 below—or at most to Questions Nos. 3, 4, and 5. But absent any such restriction in an agreement, a consideration of the evidence on all seven Questions (and their accompanying Notes) is not only proper but necessary.

The Questions

1. Did the company give to the employee forewarning or foreknowledge of the possible or probably disciplinary consequences of the employee's conduct?

Note 1: Said forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed or printed sheets or books of shop rules and of penalties for violation thereof.

Note 2: There must have been actual oral or written communication of the rules and penalties to the employee.

Note 3: A finding of lack of such communication does not in all cases require a "no" answer to Question No. 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the company or of fellow employees are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.

Note 4: Absent any contractual prohibition or restriction, the company has the right unilaterally to promulgate reasonable rules and give reasonable orders; and same need not have been negotiated with the union.

2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

Note: If an employee believes that said rule or order is unreasonable, he must nevertheless obey same (in which case he may file a grievance thereover) unless he sincerely feels that to obey the rule or order would seriously and immediately jeopardize his personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his disobedience.

3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Note 1: This is the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

Note 2: The company's investigation must normally be made *before* its disciplinary decision is made. If the company fails to do so, its failure may not normally be excused on the ground

that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that time there has usually been too much hardening of positions. In a very real sense the company is obligated to conduct itself like a trial court.

Note 3: There may of course be circumstances under which management must react immediately to the employee's behavior. In such cases the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation, he will be restored to his job with full pay for time lost.

Note 4: The company's investigation should include an inquiry into possible justification for the employee's alleged rule violation.

4. Was the company's investigation conducted fairly and objectively?

Note 1: At said investigation the management official may be both "prosecutor" and "judge," but he may not also be a witness against the employee.

Note 2: It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

Note 3: In some disputes between an employee and a management person there are not witnesses to an incident other than the two immediate participants. In such cases it is particularly important that the management "judge" question the management participant rigorously and thorougly, just as an actual third party would.

5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Note 1: It is not required that the evidence be conclusive or "beyond all reasonable doubt." But the evidence must be truly substantial and not flimsy.

Note 2: The management "judge" should actively search out witnesses and evidence, not just passively take what participants or "volunteer" witnesses tell him.

Note 3: When the testimony of opposing witnesses at the arbitration hearing is irreconcilably in conflict, an arbitrator seldom has any means for resolving the contradictions. His task is then to determine whether the management "judge" originally had reasonable grounds for believing the evidence presented to him by his own people.

6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

Note 1: A "no" answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

Note 2: If the company has been lax in enforcing its rules and orders and decides henceforth to apply them rigorously, the company may avoid a finding of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

Note 1: A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past. (There is no rule as to what number of previous offenses constitutes a "good," a "fair," or a "bad" record. Reasonable judgment thereon must be used.)

Note 2: An employee's record of previous offenses may never be used to discover whether he was guilty of the immediate or latest one. The only proper use of his record is to help determine the severity of discipline once he has properly been found guilty of the immediate offense.

Note 3: Given the same proven offense for two or more employees, their respective records provide the only proper basis for "discriminating" among them in the administration of discipline for said offense. Thus, if employee A's record is significantly better than those of employees B, C, and D, the company may properly give A a lighter punishment than it gives the others for the same offense; and this does not constitute true discrimination.

Note 4: Suppose that the record of the arbitration hearing establishes firm "Yes" answers to all the first six questions. Suppose further that the proven offense of the accused employee was a serious one, such as drunkenness on the job; but the employee's record had been previously unblemished over a long, continuous period of employment with the company. Should the company be held arbitrary and unreasonable if it de-

cided to discharge such an employee? The answer depends of course on all the circumstances. But, as one of the country's oldest arbitration agencies, the National Railroad Adjustment Board, has pointed out repeatedly in innumerable decisions on discharge cases, leniency is the prerogative of the employer rather than of the arbitrator; and the latter is not supposed to substitute his judgment in this area for that of the company unless there is compelling evidence that the company abused its discretion. This is the rule, even though an arbitrator, if he had been the original "trial judge," might have imposed a lesser penalty. Actually the arbitrator may be said in an important sense to act as an appellate tribunal whose function is to discover whether the decision of the trial tribunal (the employer) was within the bounds of reasonableness above set forth.—In general, the penalty of dismissal for a really serious first offense does not in itself warrant a finding of company unreasonableness.