



EMPLOYER WORK RULES

Any employee who engages in a fight or physical altercation will be subject to immediate suspension and discharge.

Any employee who intimidates or threatens a fellow employee or member of management either verbally or physically or exhibits disorderly conduct will be subject to immediate suspension and discharge.

CONTRACT PROVISIONS

Section I. Adjustment of Grievances

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8.c. The Company agrees that it shall not, in an arbitration proceeding subpoena or call as a witness any bargaining unit Employee or retiree. The Union agrees not to subpoena or call as a witness in such proceedings any non-bargaining unit employee or retiree.

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9.e. Should the arbitrator determine that an Employee has been suspended or discharged without just cause, the arbitrator shall have the authority to modify the discipline and fashion a remedy warranted by the facts.

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Section J. Management Rights

The management of the plants and the direction of the working force, including the right to hire, transfer and suspend or discharge for proper cause, and the right to relieve employees from duty, is vested exclusively in the Company.

In the exercise of its prerogatives as set forth above, the Company shall not deprive an Employee of any rights under any agreement with the Union.

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## FACTS

The Coatesville facility involved in this case has been in operation for many years. In 2003, the facility was purchased by the Employer.

The Grievant worked at the Coatesville facility for approximately eight years. At the time of the incident giving rise to his discharge, the Grievant worked as an Operating Technician in the steel making area.

On the morning of Tuesday, February 1, 2005, the Grievant was scheduled to work at 6:00 a.m. That morning, however, he appeared early at work. The Grievant then proceeded to the D Furnace Pulpit, where he knew another bargaining unit employee, Ron Wilson, was working. Also present in the D Furnace Pulpit at that time was bargaining unit employee Russell Washington. An altercation then took place between the Grievant and Wilson. The cause of the altercation was a personal matter involving the Grievant's wife, who was also an employee at the Coatesville facility. Exactly what happened during this altercation is now a matter of dispute.

Management was initially unaware of the February 1 altercation. Later that week, however, management began hearing that there was a fight on the morning of February 1 between the Grievant and Wilson.

Management then conducted an investigation of the February 1 incident. Among those interviewed were the Grievant, Wilson, and several other employees who may have witnessed the incident, including Washington.

The Grievant initially contended that the incident on the morning of February 1 revolved around a football bet between he and Wilson. The Grievant denied that there was any physical conflict between he and Wilson or that he had made any threats.

Wilson, however, gave a sharply different account as to what occurred. Wilson contended he had been threatened by the Grievant and that the altercation was physical. More specifically, in a statement Wilson signed on February 14, he gave the following written account:

On Tuesday, February 1, I, Ron Wilson, was working at D-Furnace. When around 5:20 a.m. Bill Jones walked thru the back door to D-Furnace. He directly walk (sic) up to me shouting that he is going to beat my ass and kill me. I told him that I didn't have time for this type of behavior on my job and that he needs to leave me alone. I tried to stand up from the sitting position I was in but he pushed me back into the chair. He continued to stand over me until I got up out of the chair. I walked over to the desk by the door still saying get away from me. I went to pick up my hard hat off the table. He knock (sic) it on the floor, as I was bending down to pick it up, he grab, and push me into the wall. I told him that I have to do my work. He continued to block my passage to the door. I finally forced myself out onto the floor and put the \_\_\_\_\_ into the bucket. I look back at the door of the Pulpit, he was still standing there looking and waiting for me to return. So I went to the back door. That when he started walking towards me. LeRoy Hoggard stepped in front of me saying that if you fight, you're gonna get fired. I estimate the whole situation lasted about 20 minutes.

Other bargaining unit employees who were interviewed during the Employer's investigation provided little insight into what occurred during the February 1 incident. Those employees either denied having knowledge of the incident or were not forthcoming about what they knew.

At a meeting on February 15, the Employer formally placed the Grievant on a five day suspension pending discharge for violation of Company Rules relating to fighting and disorderly conduct. Although during this meeting the Grievant initially continued to deny that there had been any physical contact between he and Wilson, later during the meeting, the Grievant changed his account of what occurred. More specifically, the Grievant stated that he was called at home on the evening prior to the altercation by Wilson. The Grievant contended that the purpose of Wilson's call was to advise that he (Wilson) had a relationship with the Grievant's wife. The Grievant further stated that the following morning he went to the Pulpit to address the matter with Wilson, and as he entered the Pulpit, he and Wilson grabbed each other and tried to wrestle each other to the ground.

The Employer then decided to do further investigation of the matter while maintaining the Grievant in a suspension status. Thereafter, on March 11, the Employer advised the Grievant and Union that the Grievant was being placed on notice that his suspension was being converted to a discharge.

On March 22, 2005, a third step grievance meeting took place concerning the Grievant's discharge. On this occasion, the Grievant gave a different account of the incident of February 1. The Grievant stated that the reason he came in to speak with Wilson on the morning of February 1 was because Wilson had asked him to come in early and discuss the situation between he (Wilson) and the Grievant's wife. According to the Grievant, Wilson became angry

when he (Grievant) informed Wilson that he (Grievant) still had an intimate relationship with his wife, and Wilson then initiated a physical altercation. In addition, the Grievant continued to deny making any threats against Wilson.

The dispute over the Grievant's termination subsequently proceeded to arbitration. At the arbitration hearing, the Grievant testified in his own behalf. Wilson and Washington did not appear to testify. At the conclusion of the hearing, both sides presented vigorous argument in support of their positions.

#### POSITIONS OF THE PARTIES

The Employer contended as follows: it has, to the extent permitted by the Contract, presented testimony and evidence establishing that the Grievant violated Employer Work Rules, most notably by threatening Wilson. The Grievant's account as to what occurred on February 1 is completely incredible, changing repeatedly and lacking logic. The Grievant's proven misconduct on February 1 created proper cause for his termination. Finally, if the Grievant is reinstated, it should be without back pay and benefits and on a "last chance" basis, as this was the position advocated by the Union while the grievance was pending before arbitration.

The Union asserts as follows: the Employer has not met its burden of establishing that the Grievant engaged in any misconduct which created proper cause for his termination. The Employer did not present credible evidence to establish that the Grievant acted

improperly. Having failed to establish any misconduct by the Grievant, the question of penalty for the alleged misconduct is therefore moot. Finally, back pay is justified in this case, as positions taken by the Union during the grievance process prior to arbitration are not relevant.

#### OPINION

It is important to note what is not in disagreement in this case. Both parties agree that the Employer has a duty to provide a safe workplace. The Employer and Union also agree violence and threats of violence cannot be tolerated. The dispute in this case is therefore one of facts and evidence, not principle.

In analyzing the facts and evidence presented to me, I am of course aware of the role of the Contract in a case such as the instant one. More specifically, the Contract specifies in Section 9 (Adjustment of Grievances), Section 8C that the Employer will not subpoena or call as a witness any bargaining unit employee in an arbitration proceeding. Thus, when all of the participants and/or witnesses to an incident are bargaining unit employees and they do not volunteer to testify, the Employer is placed at a distinct disadvantage in its efforts to meet its burden of establishing proper cause for termination.

That is the dilemma which exists in the instant case. All of the participants and/or witnesses to the incident of February 1 are bargaining unit employees. While bargaining unit employee Wilson made very serious allegations against the Grievant, contending that

the Grievant physically assaulted him and threatened him, Wilson declined to support those allegations with his testimony at the arbitration hearing. The Employer could not, consistent with the terms of the CBA, compel him to testify. Furthermore, while another bargaining unit employee, Washington, could have perhaps shed light on what occurred on the morning of February 1, Washington also declined to testify, and the Employer could not compel his testimony.

The result is that the Employer's case against the Grievant, insofar as it concerns what actually occurred on the morning of February 1, is essentially based on hearsay testimony. While Wilson gave a statement during the course of the investigation, the allegations he made in that statement were not subjected to scrutiny through cross examination at the arbitration hearing. Furthermore, while the Employer correctly notes that the Grievant has given evolving accounts of what occurred on the morning of February 1, he has never made an admission of misconduct which could lead to a finding of proper cause for his termination, while Wilson received no discipline whatsoever for the same incident.

Moreover, as stressed by the Union, Wilson is not a disinterested individual concerning the incident of February 1. If he was a willing participant and/or the aggressor in the altercation, as now claimed by the Grievant, he (Wilson) could be subject to discipline and/or termination.

It is well settled that a discharge cannot normally be based upon hearsay evidence. This is particularly true when, as here,



the hearsay evidence comes from an individual who is not a disinterested party. While the allegations made by Wilson against the Grievant are indeed a very serious matter, the termination of the Grievant's livelihood is also a very serious matter. Given that inadequate proof exists to support Wilson's allegations, that discharge must be rescinded.

It follows that the Union has here won the Grievant the right to reinstatement with full seniority. The question therefore becomes whether the Grievant is also entitled to back pay and other benefits lost as a result of his termination. I conclude the Grievant is not entitled to such a make whole remedy. More specifically, it was not until the arbitration hearing that the Grievant maintained it was Wilson, not he, who became angry on the morning of February 1 and initiated the physical altercation. Having waited so long to give this account, the Grievant cannot reasonably expect back pay for the period of time he was telling a completely different story about what occurred.

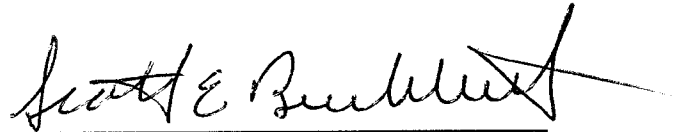
Moreover, the Grievant's current claim of complete innocence concerning the incident of February 1 is highly suspect. The evolving and inconsistent accounts the Grievant gave the Employer concerning what occurred during and around the incident of February 1 make suspect the credibility of all those accounts, including the one the Grievant testified to at the arbitration hearing. While the Grievant's actions on the morning of February 1, and his culpability for the incident cannot now be established by the Employer with certainty, I am convinced, based in large part upon

the Grievant's inconsistent accounts of what occurred, that he did have at least some culpability for that unfortunate incident. Thus, given the seriousness of that incident, it is appropriate that the Grievant's reinstatement not be accompanied by back pay, and that it be on a "last chance" basis.

AWARD

The grievance is sustained in part. As a remedy, the Employer shall reinstate the Grievant, on a "last chance" basis, to his former position with full seniority. The Grievant's reinstatement shall be without back pay or other benefits lost as a result of his termination.

Signed this *27th* day of July, 2005.



SCOTT E. BUCHHEIT, ARBITRATOR