

IN THE MATTER OF AN ARBITRATION

BETWEEN

BABCOCK & WILCOX INDUSTRIES LTD.
- the Employer

and

UNITED STEELWORKERS OF AMERICA, LOCAL 2859
- the Union

AND IN THE MATTER of a grievance of Harry Lark

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Bruce Binning - Counsel
Murray Sanderson - Supervisor, Industrial Relations
Rick Filsinger - Industrial Relations Officer
James Clark - General Foreman
James Fitzsimmons - Welding Supervisor
Debra Winkles - Nurse

On behalf of the Union:

John Beveridge - Union Representative
Harry Lark - Grievor
Keith Worley - Grievance Committee
Derek Mills - Grievance Committee
Pat O'Brien - Grievance Committee

Hearings held in Cambridge, Ontario on May 2 and May 29, 1995.

AWARD

I. INTRODUCTION

In this grievance Harry Lark (the grievor) seeks reinstatement in his employment. The Collective Agreement provision applicable to this dispute reads as follows:

8.04 An employee shall lose his seniority, his employment shall be terminated, and his name shall be removed from all seniority lists for any of the following reasons:

....

(g) If an employee has been absent without leave for three consecutive working days unless a satisfactory reason is provided.

There was no dispute that the grievor had been absent without leave for three consecutive working days. However, the parties disagreed as to whether the reasons were satisfactory. The grievor provided different, although somewhat related, reasons for each absence.

The grievor was scheduled to work on Sunday, March 5, 1995, beginning at 11:00 p.m. On Sunday afternoon he decided to take a pleasure trip by car to the area near Georgian Bay. The weather was good when he set off on the trip, but during the trip the grievor got caught in a "white out" from a snow storm and his car ended up in the ditch. Because the road was not well travelled, and because of the storm, the grievor was a long time in securing assistance and getting his car out of the ditch. When the car was eventually removed from the ditch, the front rim was bent and the grievor was only able to drive back to Kitchener at a slow speed. He arrived home shortly after 5:00 a.m. Monday, March 6 and called the Employer to report why he had not attended work as scheduled.

The grievor then rested for a couple hours early Monday morning. However, his daughter was sick and was not able to go to school that day and the grievor spent the day, beginning at about 7:30 a.m., looking after his daughter. His wife went to work and returned at about 5:00 p.m. and they then had dinner. The grievor rested on the couch from about 7:30 in the evening, intending to go to work, but he slept through his entire shift. He called the

Employer on Tuesday, March 7 and inquired as to what he should do. The grievor was advised to contact his foreman and he indicated he would call his foreman, Mr. Fitzsimmons, later in the evening. The grievor did not do so. Instead he rested in the evening, as he had done the previous day, and again he slept through his entire shift.

The Employer terminated the grievor's employment by letter dated March 8, 1995, following his absences from work for the three shifts scheduled to begin at 11:00 p.m. on March 5, 6, and 7, 1995. The March 8 letter concludes:

As you have failed to provide a satisfactory reason for your absence, you are hereby terminated from the employ of Babcock & Wilcox effective the date of this letter.

As noted, the parties disagreed as to whether the reasons which the grievor provided for his absences were satisfactory. The parties also disagreed as to the legal effect of Article 8.04(g). Most of the legal argument was directed to the outcome if the grievor had failed to provide satisfactory reasons for his absences.

If the grievor's reasons were not satisfactory, then the Employer submitted that termination under Article 8.04(g) was automatic. In other words, the Employer did not treat this as a case of termination for cause. If the reasons for absence were not satisfactory, the Employer said the Agreement provided for the outcome of termination of employment, and a termination under Article 8.04(g) was not one where an arbitrator had discretion to vary the outcome, as would be the case in a dismissal for cause. Consistent with that approach, if Article 8.04(g) was not applicable, that is if I concluded the grievor's reasons were satisfactory, then the Employer said I should direct reinstatement.

The Employer referred me to *The Regional Municipality of Ottawa-Carleton Health Department and The Ottawa-Carleton Public Employees' Union, Local 503* (Lacelle grievance, unreported, May 12, 1993, Thorne); *The Great Atlantic & Pacific Company of*

Canada Limited and United Food and Commercial Workers International Union, Local 175/633 (Horricks grievance, unreported, June 29, 1993, Hinnegan); and *Re Horizon Poultry Products Inc. and Schneider Employees' Association* (1993), 34 L.A.C. (4th) 7 (Brent).

The Union submitted that Article 8.04(g) did not lead to an automatic termination where an employee has been absent for three days without satisfactory reasons. In addition, the Union submitted that the Article incorporated a just cause approach allowing me to substitute a lesser penalty if I agreed with the Employer that the grievor did not provide satisfactory reasons for his absences. As for the disposition if I were to conclude that the grievor had provided a satisfactory reason and thus that the Article was not applicable, the Union agreed with the Employer that the grievor should be reinstated.

The Union relied on *Re Canada Brick and Aluminum, Brick, & Glass Workers Union, Local 251* (1990), 13 L.A.C. (4th) 436 (Dissanayake) and *Re Brink's Canada Ltd. and General Teamsters, Local 979* (1990), 11 L.A.C. (4th) 395 (Freedman).

I now address the reasons provided by the grievor for his absences, as an assessment of those reasons is crucial to the disposition of this case.

II. WERE THE REASONS PROVIDED BY THE GRIEVOR SATISFACTORY?

In assessing the reasons provided by the grievor for his absences, I find it easier to examine the second and third absences before the first. The grievor slept through work on both Monday, March 6 and Tuesday, March 7. The grievor testified he was taking medication which made him excessively tired, but that alone does not explain why he was unable to work the shifts which began on Monday and Tuesday. There was no medical evidence provided, although the hearing scheduled for May 2 was adjourned in part so that the Union

could secure medical testimony. I am thus left simply with the grievor sleeping through his two shifts. I do not believe that the grievor had taken reasonable steps to awaken for, or to attend, work. In particular there was no evidence that the grievor took any steps to increase the likelihood that he would attend work on Tuesday, steps which I would have expected since the grievor knew he had slept through the Monday shift. With respect to the Tuesday shift, the grievor's entire evidence was simply that he "slept through again". In my view, sleeping through work is not a satisfactory reason for being absent from work. As a result, I have no difficulty in concluding that the grievor did not provide a satisfactory reason for missing the second and third days of work, that is the shifts beginning on Monday and Tuesday, March 6 and 7.

The situation with respect to the shift which began on Sunday, March 5 is different and causes me much more difficulty. There was no disagreement as to the facts which I set out above. When the Employer was considering the issue of the grievor's status on March 8, James Clark, the General Foreman in the Boiler Shop, undertook an investigation. As part of that investigation Mr. Clark phoned the grievor at home to indicate he was investigating and that the grievor should stay at home. Mr. Clark did not seek further details from the grievor as to the reasons for his absences, and the grievor did not volunteer any further details. Mr. Clark thus had available to him only the record made when the grievor called the Employer. That record indicates the grievor called at 5:20 a.m. on Monday and reads "Stuck up north re weather. Just got home." The explanation which I heard was fuller than the notes made of the call, and thus fuller than the information available to Mr. Clark, but the two are similar in their basic nature. I am thus left to decide whether the grievor provided a satisfactory reason for missing work on the Sunday.

The Employer submitted that the reasons were under the grievor's control. I agree, but I do not think that ends the matter. It was a clear day when the grievor set off on the trip. While

the grievor may have been unduly optimistic as to the weather, which is known to be quite variable in that area, especially at that time of year, I find it difficult to conclude that simply because the grievor chose to go on the trip he does not have a satisfactory reason for his absence.

In my opinion, an employee can have a satisfactory reason for an absence even if the reason for the absence was under that employee's control. I agree with the Employer only to the extent that whether the reason was under an employee's control is an important factor in determining whether the reason for absence was satisfactory. Two examples may assist. Assume first that an employee was travelling to work and came upon a fire, or a train wreck, or another tragedy. The employee was under no obligation to offer assistance, but nevertheless decided to stop and help. The employee provided first aid and comfort to the victims. When an ambulance arrived the employee was asked to travel with the victims to the hospital. The employee did this and then remained with the victims at the hospital to offer additional comfort and assistance. This employee missed work. Assume that another employee decided to go to a party and while there drank to excess and also missed work. Of the two employees, the first seems to me to have a satisfactory reason for being absent, and the second does not, although the first is as much, or more, in control of the reasons for absence.

In my view, the fact that the grievor's decision to go for a drive was a matter under his control, as was his selection of the roads on which he travelled, is not itself a sufficient basis to conclude the grievor did not provide a satisfactory reason for missing work. The situation in this case requires further examination.

I should acknowledge that my consideration of the reasons for the Sunday absence is more difficult because of two factors which intrude on my thinking. The first factor is the reasons

given by the grievor for missing the two following shifts. As I have stated, I do not view these as satisfactory reasons, and they tend to intrude on my thinking about the reason given for his absence on the first day. The second factor which intrudes on my thinking is the grievor's extensive record of previous absences (the grievor started work in 1993 and was absent some fifty-five times in the twelve months prior to his termination, fifty-five absences for reasons which are exclusive of vacation and Workers' Compensation). I mention these two points in part because Mr. Clark, who made the Employer decision to terminate the grievor's employment, was quite open that he reviewed the grievor's previous record of absences in coming to his decision. In addition Mr. Clark clearly concluded, as I have, that the reasons for the second and third absences were not satisfactory.

I think Mr. Clark was wrong to allow his assessment of the grievor's reasons for his absences to be influenced by what he referred to, quite fairly, as chronic absences. While in some circumstances the grievor's attendance record and the reasons given for his absence on the second and third days may well influence the grievor's credibility and thus whether one believes his explanation for his absence, in this case the grievor's story was not challenged. I do not, however, think that the two issues of (1) prior attendance record, and (2) the grievor's reasons for absence on the following days, should influence the decision on whether the reason for Sunday's absence was satisfactory.

My reasons for this conclusion relate to the nature of Article 8.04(g). I agree with the Employer's basic characterization of this Article. If an employee has been absent from work for three days without a satisfactory reason, then termination is the result. I agree that there is no just cause concept in this Article and thus there is no power to modify the penalty. Article 8.04(g) follows 8.04(c) which provides for termination when a laid-off employee fails to respond to recall notices, 8.04(d) which provides for termination when an employee has been laid-off for more than 36 months, and 8.04(e) and (f) which provide for termination

because of illness for periods greater than an employee's seniority at the commencement of the illness. Articles 8.04 (c) through (f) do not incorporate a just cause concept and in my view neither does Article 8.04(g) - the provision involved in this case. The concept of just cause is included in Article 8.04(b) which provides for termination as follows:

(b) If the employee is discharged for cause and is not reinstated in accordance with the provisions of this Agreement.

In my opinion, Article 8.04(g) is a contractual deemed termination clause and I agree with the conclusions expressed by arbitrator Thorne in *Ottawa-Carleton Health Department, supra*, at page 15, as follows:

Collective agreements quite commonly include provisions to the effect that all seniority shall be lost after a certain period of absence from work and some also provide that employment is to cease in such circumstances. When such clauses are included in a collective agreement they can be effective and, once the requirements of such a provision have been met, considerations of just cause and other mitigating factors do not arise.

Similar conclusions are expressed in *Great Atlantic & Pacific, supra*, at page 5, and in *Horizon Poultry Products, supra*, at page 12.

Because the termination is one which is not subject to variation by an arbitrator, the outcome, in cases involving provisions like Article 8.04(g), has been described as harsh. See, for example, *Horizon Poultry Products, supra*, at page 12, and *Canada Brick, supra*, at page 440. As a result of the harshness "arbitrators have generally interpreted deemed termination clauses narrowly and strictly against the employer because the consequences of the application of such a clause is so drastic" (quoting from arbitrator Dissanayake in *Canada Brick, supra*, at page 440.) Consistent with the nature of the outcome, the lack of discretion to vary the penalty, and the general approach to interpreting these clauses narrowly, I think it is also necessary to ensure that other matters, such as the grievor's prior record of absences, are not factored into the decision as to whether the reason provided for the absence was

satisfactory. The grievor should be treated like other employees in the assessment of his reasons and should not be disadvantaged by his record of chronic absenteeism or by the reasons for his other two absences.

Thus, if the grievor's reason would be a satisfactory reason if it had been provided by an employee with a perfect prior attendance record, or if it had been given by an employee who had not slept through his next two shifts, then I think it would be a satisfactory reason for the grievor. While the grievor's record was very poor, I do not think the grievor should be held to a different standard than other employees in the evaluation of the reasons for his absences for the purpose of the deemed termination provision in Article 8.04(g).

Returning to my assessment of the grievor's reason for his absence on Sunday, March 5, I note first that many people enjoy a drive in the country. I cannot fault the grievor for deciding to take a drive, or for taking the drive in the area he did. Had it been another employee who was caught in a sudden snow storm while on an afternoon drive in the country, another employee who went into the ditch because of that snow storm, who then had trouble getting out of the ditch, and who finally had to drive home at a slower speed due to the damage to his car, then I think this would be an acceptable explanation for not attending work. I do not think employees are to be held to a level of perfect attendance, or to a level of foresight about weather patterns or driving conditions which would require them to predict this sort of event and take steps to avoid it. Since I view it is an acceptable reason for some employees, then in my view it is a satisfactory reason for the grievor's absence. I thus conclude that the reason provided by the grievor for the first of the three absences (i.e. for March 5) is a satisfactory reason under the terms of Article 8.04(g) of the Agreement.

III. CONCLUSION

I have found that the grievor provided a satisfactory reason for only one of the three days on which he missed work, and that he missed work on two days without a satisfactory reason. However, termination under Article 8.04(g) requires three days of absence without a satisfactory reason. The requirement necessary to bring Article 8.04(g) into effect has not been met in this case as only two work days were missed without a satisfactory reason. As Article 8.04(g) is not applicable, and considering the submissions of the parties noted above and my own earlier conclusions about the operation of this Article, I direct the reinstatement of the grievor.

Ordinarily the Employer would be ordered to reinstate the grievor with full compensation and without the loss of any seniority or benefits to which he would have been entitled had his employment not been terminated. However, the hearing was originally scheduled for May 2, 1995 and was adjourned at the request of the Union and pursuant to an agreement between the Employer and the Union. As part of the agreement regarding the adjournment, the parties agreed that any liability of the Employer under this grievance would end as of May 2, 1995. I thus direct the Employer to provide compensation to the grievor for the period from the grievor's termination until May 2, 1995.

If this had been a case of the application of a just cause standard, I would have concluded that the conduct of the grievor on the Monday and Tuesday merited discipline. However, given the positions of the Employer and the Union, and my own earlier conclusions, this is not a case for me as an arbitrator to substitute a lesser form of discipline. The grievor is thus to be returned to work without any discipline even though he missed work without a satisfactory reason on two consecutive days. While that may seem unusual, it is nevertheless the result mandated by the collective agreement.

In summary, I order the Employer to reinstate the grievor with compensation for the period from his termination until May 2, 1995. I remain seised of the matter should the parties have any difficulty in determining compensation, or to resolve any other matter arising from this award.

Dated in London, Ontario, this _____ day of June, 1995.

Howard Snow, Arbitrator