WITCO CORPORATION, Plaintiff-Appellee, v. OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL/CIO; LOCAL 3-770, OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL/CIO, Defendants-Appellants.

No. 98-5652

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1999 U.S. App. LEXIS 17986

July 28, 1999, Filed

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SUBSEQUENT HISTORY: Reported in Table Case Format at: *1999 U.S. App. LEXIS 27776*.

PRIOR HISTORY: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE. 97-02609. McCalla. 3-31-98.

DISPOSITION: REVERSED and REMANDED.

COUNSEL: For WITCO CORPORATION, Plaintiff - Appellee: James B. Summers, Neely, Green, Faragarson, Brooke & Summers, Memphis, TN.

For OIL CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION AFL/CIO, LOCAL 3-770 OIL CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION AFL/CIO, Defendants - Appellants: Samuel Morris, Timothy P. Taylor, Allen, Godwin, Morris, Laurenzi & Bloomfield, Memphis, TN.

JUDGES: Before: KENNEDY, SILER, and MOORE, Circuit Judges.

OPINION BY: KAREN NELSON MOORE

OPINION

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KAREN NELSON MOORE, Circuit Judge. After an arbitrator directed the reinstatement of one of its employees, Plaintiff-Appellee Witco Corp. ("Witco") filed suit in the district court seeking review. The district court vacated the award, concluding that [*2] (1) the arbitrator's findings of fact established cause for discharge and (2) the arbitrator exceeded his authority by awarding reinstatement in the face of an express provision of the contract that precluded him from doing so if the employee was in fact discharged for cause. We conclude, however, that the arbitrator did not find that Witco had cause to terminate the employee and that the arbitrator did not make findings of fact that would unavoidably lead to a finding of cause. Thus, we perceive

no basis for concluding that the arbitrator exceeded his authority in awarding reinstatement, and accordingly we **REVERSE** and **REMAND** the case to the district court for reinstatement of the arbitrator's award.

I

This action arises from Witco's termination of an employee and an arbitrator's award of reinstatement. In August 1995 Jesse Gray was fired by Witco for, inter alia, violating safety procedures in loading chemicals onto a truck. Defendant-Appellant Oil, Chemical & Atomic Workers Union ("OCAW" or "Union") filed a grievance on Gray's behalf, and the case eventually reached an arbitrator for a determination of whether Witco had cause for firing Gray.

Under the applicable [*3] collective bargaining agreement (the "CBA"), an act of "negligence or carelessness *which might result in injury or damage to Company property or to property or person of employees or others*" constitutes cause for immediate discharge. Joint Appendix ("J.A.") at 69 (CBA Art. XVIII, Pt. B) (emphasis added). Moreover, the CBA precludes an arbitrator from reinstating an employee who was in fact discharged for cause. *See* J.A. at 28 (CBA Art. IV, Pt. B, § 6(f)).

In June 1997, after taking testimony from a variety of witnesses, the arbitrator concluded that Gray had committed "serious" and "reprehensible" safety violations, but he determined that the violations were "not to the extent . . . represented by the Company" and did not constitute "just cause" for dismissal. Thus, the arbitrator awarded reinstatement.

Pursuant to § 301 of the Labor Management Relations Act, *29 U.S.C. § 185*, Witco filed an action in the district court in July 1997 seeking to set aside the arbitrator's award of reinstatement. On cross motions for summary judgment, the district court ruled in favor of Witco and vacated the arbitrator's award. The Union filed a timely notice of appeal, [*4] and we have jurisdiction pursuant to *28 U.S.C. § 1291*.

II

This court reviews de novo an order of the district court granting summary judgment. *See Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 349 (6th Cir. 1998)*. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *FED. R. CIV. P. 56(c)*. Here, the parties agree that there are no genuine issues of material fact and that summary judgment should issue in favor of one of the parties.

A federal court's review of an arbitrator's decision is extremely deferential. *See Bruce Hardwood Floors v. Southern Council of Indus. Workers, 8 F.3d 1104, 1107 (6th Cir. 1993)*. The award should be upheld "so long as it draws its essence from the collective bargaining agreement." *United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597, 4 L. Ed. 2d 1424, 80 S. Ct. 1358 (1960)*. "As long as the arbitrator is even arguably [*5] . . . acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38, 98 L. Ed. 2d 286, 108 S. Ct. 364 (1987)*.

To be sure "narrow review" does not equate to "no review," and on numerous occasions we have explained that

> an award fails to derive its essence from the agreement [and is to be reversed] when (1) it conflicts with express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement; or (4) it is based on "general considerations of fairness and equity" instead of the exact terms of the agreement.

Dallas & Mavis Forwarding Co. v. General Drivers, Local Union No. 89, 972 F.2d 129, 134 (6th Cir. 1992) (quoting *Cement Divs., Nat'l Gypsum Co. v. United Steelworkers, 793 F.2d 759, 766 (6th Cir. 1986)), cert. denied, 506 U.S. 1051 (1993)*.

According to the district court, the arbitrator found that Gray had committed an act of negligence that might [*6] result in personal injury or property damage. Under

the CBA, such a finding equals a finding of cause and precludes the arbitrator from awarding reinstatement. Thus, the district court held that the arbitrator's award of reinstatement conflicted with express terms of the CBA and must be vacated. We disagree. We conclude that the arbitrator did not find that Gray's negligence might have resulted in injury or damage, that no preliminary finding of the arbitrator compelled such a finding, and, thus, that the arbitrator's conclusion that Witco lacked cause for Gray's termination must be respected.

The arbitrator expressly found that Gray was negligent, but negligence alone does not constitute grounds for immediate dismissal under the CBA. To constitute cause for immediate discharge it is necessary that the negligence might have resulted in injury or damage. [1] Unfortunately, the arbitrator did not clearly state whether he found that Gray's negligence might have resulted in injury or damage.

> 1 The CBA provides that the violation of any of sixteen specific rules, including this rule, constitutes grounds for immediate discharge. Violation of other posted rules are to be addressed through progressive disciplinary procedures. *See* J.A. at 67-71 (CBA Art. XVIII).

[*7] The arbitrator did find that Gray had left a vent valve open on the loaded truck. The district court concluded that the following passage of the arbitrator's report constitutes the required finding of cause:

> Mr. Garner [another Witco employee] described the condition of having the valve open created an extreme hazard, because the product could slush out through the opened vent valve. If the material struck some person, it could cause serious burns. This was an instance of gross negligence on the part of Mr. Gray.

J.A. at 88. Because this passage was included in the decision section of the report and because the arbitrator stated that this act constituted gross negligence, the district court concluded that the arbitrator adopted as a finding of fact the testimony of Garner that the product could escape from the truck through the open valve.

However, the arbitrator also cited evidence that suggested that product could not escape through the open valve. At another point in his testimony, Mr. Garner stated that product could not be blown out through the open valve. Of course, it is possible that product could splash out of the valve but could not be blown out, so there [*8] is no real conflict in this testimony. In his conclusion section, however, the arbitrator noted that "the Union introduced evidence that no product could escape through the one-half inch opening on the valve." J.A. at 93. This evidence, which the arbitrator does not describe, is in direct conflict with the testimony of Mr. Garner that product could splash out. There is no indication that the arbitrator resolved this conflict, and thus we cannot conclude that the arbitrator made a finding that product could have escaped from the open valve. Without that finding, of course, there is no basis for a further finding that Gray's negligence might have resulted in personal injury or property damage.

Although the arbitrator did not expressly find whether Gray's negligence might have resulted in injury or damage, it is clear that the arbitrator was well aware of the applicable standard for discharge for cause. He quoted the language of the CBA accurately on the first and seventeenth pages of his decision. *See* J.A. at 75, 91. For this reason, the present case is distinguishable from *International Brotherhood of Firemen, Local No. 935-B v. Nestle Co., 630 F.2d 474 (6th Cir. 1980)*. [*9] There, we held that the arbitrator had found specific facts that constituted insubordination on the part of a terminated employee and that, because the CBA provided that insubordination *shall* be cause for discharge, the arbitrator had exceeded his authority in reinstating that employee. *See id. at 475-77*. In *Nestle*, however, the arbitrator misstated the contract language as providing that "insubordination *may* be just cause for discharge." *Id. at 476*. Thus, even though the arbitrator in *Nestle* did not specifically find that the employee had been insubordinate, the arbitrator's apparent misapprehension of the contractual standard for discharge justified this court's conclusion that the award did not draw its essence from the CBA.

Even ignoring the arbitrator's misstatement of the contract language in *Nestle*, that case is distinguishable. This is so because the *Nestle* arbitrator made specific findings of fact, e.g., that the employee refused orders, disobeyed orders, and called his foreman a "son-of-a-bitch," that could be compared objectively with the standard for discharge for cause -- insubordination. *See id. at 476*. [*10] The disposition of the present case,

by contrast, turns on a very specific factual question -- whether product could have escaped from the open valve -- that cannot be answered from the ambiguous or incomplete fact finding of this arbitrator. Thus, while *Nestle* can be read for the proposition that an arbitration award is invalid if based on a conclusory assertion that directly conflicts with the arbitrator's specific fact finding, no such conflict exists in the present case.

Another case relied upon by the district court, *International Brotherhood of Electrical Workers, Local 429 v. Toshiba America, Inc., 879 F.2d 208 (6th Cir. 1989)*, is similarly distinguishable. There, the CBA precluded the arbitrator from altering the discipline imposed on employees who violated a no-strike clause. Because the union stipulated that the employees had violated that clause, we concluded that the arbitrator ignored the plain language of the contract and exceeded his authority in considering whether a purported oral agreement modified the CBA. *See id. at 209-10*.

As Witco notes, the Sixth Circuit cases cited by the OCAW also are readily distinguishable from the [*11] present case. In each of these cases we determined that the contract permitted the arbitrator to impose a lesser discipline *despite* his having made certain factual findings that supported the employer's disciplinary action. *See Timken Co. v. United Steelworkers, 492 F.2d 1178, 1180 (6th Cir. 1974)* (arbitrator could construe contract to permit him to determine whether employee who was found to have hit supervisor was properly discharged); *Bruce Hardwood Floors, 8 F.3d at 1108* (under arbitrator's permissible interpretation of CBA, provision requiring fair and equitable treatment modified provision permitting immediate discharge for sleeping); *Dixie Warehouse & Cartage Co. v. General Drivers, Local Union No. 89, 898 F.2d 507, 511 (6th Cir. 1990)* (no contractual provision precluded arbitrator from modifying employer's discipline); *Eberhard Foods, Inc. v. Handy, 868 F.2d 890, 892 (6th Cir. 1989)* (same). The CBA in the present case, by contrast, expressly precludes an arbitrator from reinstating an employee if the arbitrator determines that cause existed for the discharge. Thus, this case, unlike those cited by the OCAW, [*12] turns on the facts actually found by the arbitrator.

In his award the arbitrator held that the company lacked "just cause" to dismiss Gray. The arbitrator did not expressly find that Gray's negligence might have resulted in injury or damage, nor did he make preliminary findings, e.g., that product might have escaped from the open valve, that would lead unavoidably to that conclusion. It is unfortunate that the arbitrator did not make a clear finding on these critical points, but in the absence of these specific findings this court must assume that the arbitrator's findings and his conclusion are consistent. As the Supreme Court has stated, "[a] mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award." *Enterprise Wheel, 363 U.S. at 598*.

III

For the foregoing reasons, we **REVERSE** the order of the district court granting summary judgment to Witco and **REMAND** the case for reinstatement of the arbitrator's award.