132 LA 1089
Heinz NA
Decision of Arbitrator

FMCS Case No. 130430/02026-4

November 12, 2013

In re HEINZ NA, DIVISION OF HJ HEINZ COMPANY, LP, HOLLAND, MICHIGAN and LOCAL UNION 705 OF THE RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, UFCW

Arbitrator(s)

Arbitrator: Lee Hornberger, selected by parties through procedures of the Federal Mediation and Conciliation Service

Headnotes

UNION ACTIVITIES

[1] Insubordination ▸118.6527 ▸118.815

Employer did not act arbitrarily or capriciously in discharging union president, who was working under last chance agreement, for his conduct in discussion with supervisors over production matters involving other employees, where grievant's conduct was not protected; discussion occurred in open area of plant, and was not during heat of formal grievance proceeding, in contract negotiations, or during organizing campaign.

[2] Insubordination ▸118.6527

Employer did not act arbitrarily or capriciously in discharging union president, who was working under last chance agreement, for his conduct in discussion with supervisors over production matters involving other employees, despite contention that grievant was on equal playing field with supervisors when he used "boisterous, disrespectful or improper language or conduct" in dealings with supervisors, where supervisors acted in courteous, dignified, and respectful manner.

EVIDENCE

[3] Witnesses ▸94.60519

Arbitrator will not draw adverse inference from employer's failure to call two employees as witnesses to union president's conduct in discussion with supervisors, where they were bargaining-unit employees who were equally available to both parties.

Attorneys

Appearances: For the employer—Robert H. Shoop Jr. (Clark Hill/Thorp Reed), attorney. For the union—Katherine Smith Kennedy (Pinsky, Smith, Fayette & Kennedy LLP), attorney.

Opinion Text

Opinion By:

HORNBERGER, Arbitrator.

Introduction

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between Heinz NA Holland Factory (Company) and Retail, Wholesale and Department Store Union, Local 705 (Union). The Union contends that the Company discharged Grievant M__ in violation of a Last Chance Agreement (LCA). The Company maintains that M__'s discharge was justified by his alleged violation of a LCA.

Issue

According to the Company, the issue is "were the actions of the Company in disciplining M__ for his actions on February 21, 2013, arbitrary and capricious?"

According to the Union, the issue is "whether or not the Company has proven that M__ violated the terms of the LCA."

Factual Outline

BACKGROUND AND 2012 LAST CHANCE AGREEMENT

Grievant M__ was hired on May 7, 1987. He is a maintenance employee and has been the Union President for 17 years.

M__ was terminated by the Company on February 14, 2012. M__, the Company, and the Union entered into a Last Chance Agreement suspending the February 14, 2012, discharge subject to certain terms and conditions. Among those conditions was that M__ would be "immediately terminated should there be any future occurrence of any boisterous, disrespectful or improper language or conduct." M__ agreed that in the event the discharge was reinstated the issue would be processed through the grievance and arbitration procedure but limited to the question of whether the reinstatement of such discharge was "arbitrary or capricious." According to M__, he signed the LCA because he had to feed his family.

Second Shift Maintenance Supervisor G__, Third Shift Maintenance Supervisor Barry Haugh, and Plant Manager Jon Popey were not involved with the LCA.

THURSDAY, FEBRUARY 21, 2013

Second Shift Maintenance Supervisor G__ was hired in February 2011. He was the only second shift supervisor. He worked the second shift on Thursday, February 21, 2013.

Third Shift Maintenance Supervisor Haugh was hired on December 10, 2012, has ten direct reports, oversees the maintenance operations, and his hours are from 9:30 p.m. to 7:00 a.m.

Initially that day all went well during the second shift. At the end of the shift, there was a conference between G__ and Mr. Haugh prior to G__ leaving. There is an overlap with the third shift. When Mr. Haugh reported to work, he went to the War Room to meet with out-going Supervisor G__.

The War Room is a small meeting room with a table but no chairs. It is a place to get off the plant floor and have some quiet. The War Room is isolated so there can be a good discussion.

Messrs G__ and Haugh discussed production matters and various work related situations.

INITIAL ISSUES CONCERNING MECHANIC D__

Hourly employees L__ and P__ came to see G__ in the War Room. [The Company's Post-Hearing Brief refers to "two female employees." The Union's Post-Hearing Brief refers to "employees P__ and L__,", and "the women." I have resolved this by not utilizing Mr. or Ms. for L__.] They raised issues concerning line mechanic D__. They said there had been a confrontation between them and D__. They said that D__ was making adjustments that did not have to be made on a machine. They said unnecessary adjustments were made and the machine would not run anymore. P__ told them that D__ had some type of physical contact with her.

Mechanic D__ was hired in July 2000. He works the second shift. In 2013, he was the Chief Steward. He is presently Secretary/Treasurer of the Union.

Messrs G__ and Haugh went to Line 1 to question D__ to see what the problem was. They asked D__ why the machine was down. D__ was quite upset. He kept referring to the six foot rule. G__ had no idea what

was going on with the six foot rule. This was at a critical shift switch time. It was obvious that D__ was quite upset.

According to D__, all was fine until the end of the second shift. He was then called to the Line 1 Labeler machine. The bottom was jammed on the head. The operator was packer of Line 1. D__ looked for the problem. Then P__ and employee L__ came from the Labeler to the War Room. D__ opened the machine door to see what was going on. Three fingers were missing from the head. According to D__, "they were so excited that they wanted to run the machine and finish." They were behind him and wanted him to go away. He told them to stay away.

D__ told Messrs G__ and Haugh that three fingers were missing from the machine. He told G__ that, when he is working on a machine, production employees should stay six feet away. D__ told G__ that he should tell his people to stay away from the machine while a mechanic is working on it. G__ responded that he had never heard of the six foot rule.

D__ was "pretty excited" and upset. This was probably because P__ was within six feet of the machine D__ was working on. D__ started talking about a six foot clause in the CBA. Mr. Haugh did not know of such a clause.

D__ said he was making some timing adjustments. He "was very animated." Messrs Haugh and G__ asked D__ to come to the War Room with them. Messrs G__, Haugh, and D__ walked to the War Room so they could discuss the situation.

As Messrs Haugh, G__, and D__ walked to the War Room, D__ was pretty upset. D__ left the War Room and went to the front of Line 1 and then headed left to Lines 9 and 10.

Messrs G__ and Haugh walked to the Line 1 Packer machine. Mr. Haugh saw D__ walking to the left towards Lines 5, 9, and 10. Messrs G__ and Haugh started to walk to the War Room.

Messrs G__ and Haugh went to the Line 1 packer area. This was on the wall to the right.

SIX FOOT RULE

G__ did not know about a six foot rule. He had "never heard of the six foot rule."

According to Mr. Haugh, it was possible that M__ was talking about a six foot rule. It

is possible that the six foot rule is a safety rule. There is no six foot rule that Mr. Haugh is aware of.

D__ thinks that the six foot rule comes from OSHA and some from common sense. It used to be a written rule. It was taught in the training CDs.

M__ does not know if the six foot rule is written down. He believes the six foot rule came from previous management.

According to Mechanic Chuck Atwood, the six foot situation came up in training years ago. It was a "rule of thumb."

UNION PRESIDENT M__ GETS INVOLVED WITH D__ SITUATION

According to D__, he called M__ to come. D__ first saw M__ by the War Room. D__ called M__ because M__ was the Union President. M__ came. D__ told M__ about the situation.

Mr. Haugh does not recall if M__ had his tools with him at the "confrontation." D__ was with him.

According to G__, "Things are getting out of control. Repeated six foot rule."

They headed back to the War Room so they could discuss the situation.

Messrs D__ and M__ approached. M__ was between Line 5 and Line 10. The Maintenance Office is further to the left by line 9.

M__ was heading to the right towards Messrs Haugh and G__. G__ heard M__ yelling from between Lines 5 and 10. Employees have to wear earplugs and machinery is running. "To be heard you have to wear earplugs." According to Mr. Haugh, M__ was "really angry" and "speaking in a very loud voice." Mr. Haugh could not specifically tell what M__ was saying. M__ was concerned that there was a long history of trying to undermine D__. M__ was "very loud."

At that point G__ heard M__ say "BS … going to take it over his head." G__ had ear plugs in, but could hear it. M__ walked close to G__. M__ said "This is BS. You got to let him learn. As a mechanic, have to let him learn."

M__ approached G__. M__ went from very loud to "hand gestures." M__'s finger was close to G__'s nose. There was a swing of M__'s finger. Messrs M__ and G__ came close. M__'s finger was in G__'s chest.

Mr. Haugh does not recall M__'s words. The equipment has a loud noise. But Mr. Haugh could hear M__. Messrs M__ and G__ were three to four feet apart. G__ believes M__ had his tools with him and M__ switched the tools from his right to left shoulder before M__'s finger pointing. G__ was leaning back. After a few seconds, M__'s finger was jabbing into G__'s chest. M__ jabbed his finger into G__'s chest. This lasted a minute and a half to three minutes.

According to G__ "it was obvious anger." M__ was addressing G__. M__'s hands were moving more and more. He was starting to do "this" with his finger. G__ moved his head back three or four times. G__ "would tilt" his head back. According to G__, M__ was tapping G__ on his shoulder. This lasted one and a half to two minutes. While this was going on D__ was walking back and forth. G__ told M__ "Don't touch me again." According to G__, everybody was just stopped and just looking. G__ could not find any willing witnesses. But they made a list of who might have seen what happened.

Ms. Morales was just north of Line 2. G__ did not see Ms. Morales during the incident.

According to D__, M__ arrived. There were loud voices. There were fans and machines running. Messrs G__ and Haugh were there. According to D__, "we were all talking louder." In addition, Ms. Morales was on the other side. D__ said he did not see any aggression. M__ did not appear angry. M__ was not doing gestures to Messrs G__ or Haugh. D__ was surprised at Messrs G__ and Haugh's testimony at the arbitration hearing.

SITUATION ACCORDING TO M__

On February 21, 2013, M__ began work at 3:00 p.m. The line was running pretty well. At the end of the shift, there were some problems on Line 1.

M__ was standing by Line 1 by the War Room. He was there three or four minutes. Nobody was with him "by the War Room." M__ saw a bunch of people waving their hands. P__ and L__ were by Line 1. M__ then went back to the Maintenance Office and told Mr. Atwood. Mr. Atwood said "no shit, we have to do something."

M__ got a call from D__. D__ said "I need your help." M__ thought D__ was still working on the problem. Messrs D__, G__, and Haugh were coming from Lines 1 and 2. D__ was talking about "six feet … six feet." D__ said "I'm working on a machine." According

to M__, his status changed from being an employee to being the Union President function of letting supervisors know there is a six foot rule, and he was now acting in his Union President position.

M__ said "it has to be six foot" to G__. G__ responded "You did not tell me this." G__ said "You should have told me of this rule." G__ told M__ the line was out too long. M__ responded that employees have to stand back while D__ works on the machine.

They then went back to discussing the six foot rule.

M__ had his tools on while this was going on. Messrs D__, G__ and Haugh, and Ms. Morales were there. Mr. Haugh said a word, and the conversation ended.

M__ does not know of any reason why Messrs G__ and Haugh "would lie about me." According to M__, "G__ and I had a good relationship in working things out."

SITUATION ACCORDING TO MS. MORALES

Leadperson Yolanda Morales was hired thirteen years ago. She was a Leadperson. She has no position in the Union.

On February 21, 2013, she began work at 2:30 p.m. She went home at 1:15 a.m. the next morning. She was in charge of Lines 1 and 2. There was a problem at the end of the second shift. She stopped the plastic bottles. Then she saw D__ there.

According to Ms. Morales, the employees do not like D__ to touch the machines. They would rather have another maintenance employee.

Ms. Morales went to look for G__. At that time P__ came in the War Room and said D__ pushed her. Ms. Morales told G__. G__ did not say or do anything.

Messrs G__ and Haugh went to see D__. D__ was at the Packer Machine.

M__ was not on the scene or involved at this time. M__'s involvement was later.

Around fifteen minutes later there was the Messrs M__, D__, G__, and Haugh conversation. They stopped in front of the War Room. M__ was coming. Ms. Morales was standing behind Lines 1 and 2. They were each talking. Line 2 was still running. Ms. Morales had to stay behind Line 2. She did not see M__ hit, poke, or get angry at G__. There was nothing unusual. "Everything was normal." This lasted around two or three minutes.

According to Ms. Morales, around five minutes later, G__ came and asked Ms. Morales if Ms. Morales had seen M__ push him. Ms. Morales said no. According to G__, he did not talk with Ms. Morales shortly after the event occurred about the event, and Ms. Morales was not in the immediate area that night.

According to G__, the next day Ms. Morales asked G__ why she was not asked about the events the prior evening. G__ told her he did not see her in the area and therefore she was not on the list. G__ told her if she had something to say to go see Plant Manager Popey.

SITUATION NEAR WAR ROOM ENDS

After the event outside the War Room, Messrs M__ and D__ went to the Maintenance Office. Messrs Haugh and G__ went to the War Room. They compiled and went over their notes together.

On Friday, G__ came to Ms. Morales and talked about the incident. That is when Ms. Morales asked G__ why did he not ask her what happened. G__ said he knew Ms. Morales would defend M__.

On Tuesday or Wednesday of the next week, Plant Manager Popey asked Ms. Morales about the situation. Ms. Morales told Mr. Popey the same as she testified at the arbitration hearing.

Ms. Morales does paperwork while the line is running. G__ came to Ms. Morales right after the incident occurred and asked if Ms. Morales had seen M__ hit G__. Ms. Morales does not know why G__ asked her this.

When P__ reported to G__ that D__ had hit her, she was laughing.

MEETING IN MAINTENANCE OFFICE

M__ walked back to the Maintenance Office. He sat down there. Eventually, Messrs D__, Haugh, and Atwood were there. There was a discussion of D__'s hat color. During this conversation, "they made fun of [D__'s] orange hat." There was discussion of how D__'s hat color affected employees' ability to recognize D__ as a maintenance person. There was no mention of the War Room area situation.

M__ went to G__'s office, which is right next to the Maintenance Office. M__ talked

with P__, who said that D__ had pushed her in the arm. There was a discussion of D__ doing his job. M__ then went to get D__.

M__ then had a closed door meeting with D__. D__ said they "touched me." M__ then went back to the Shop. It was close to time for M__ to go home. M__ clocked out. He left but then came back to get his pay check.

G__ AND HAUGH GO TO WAR ROOM

Messrs G__ and Haugh then went to the War Room. Messrs M__ and D__ went to the Maintenance Office.

G__ first reported the incident to Plant Manager Jon Popey. G__ put it in writing.

The incident was defused that night. What, if anything, to do with M__ was not a decision for G__ to make.

Mr. Haugh did not know that M__ was on a LCA. Messrs G__ and Haugh discussed the situation. They decided they had to document what happened.

Mr. Haugh wrote down the details of what happened. He sent this document to his Manager. Mr. Haugh went to his supervisor and showed him what he had written. Mr. Haugh told his supervisor that M__ had laid his hands on G__. It was "threatening."

Messrs Haugh and G__ provided names of observers. Ms. Morales was not on the list.

G__ had no prior incidents with M__.

Mr. Haugh had not dealt with a union setting before.

After around ten minutes in the War Room, Mr. Haugh went to the Maintenance Office. The mood in the Maintenance Office was pretty hostile. Mr. Haugh wanted to defuse the situation and the anger that was going on. He did not know of what was going on with D__.

Mr. Haugh went to the Maintenance Office because he was concerned that the emotions would boil over to the crew. This was the situation involving D__. At the Maintenance Office "meeting," Mr. Haugh did not mention anything about Messrs G__ and M__.

Mechanic Atwood was hired in May 1981. He worked the Second Shift from 3:00 p.m. until 11:30 p.m. He witnessed nothing on the floor. At 10:30 p.m. to 11:00 p.m. he went into the Maintenance Office to get ready to leave early if they would let him. He was by himself. Mr. Haugh was discussing how to make D__ more acceptable to employees on the line. Mr. Atwood brought up the orange hat situation. At that time, no one mentioned M__'s altercation. Mr. Haugh said he did not realize employees were not working with D__ or D__ being a problem. There was a discussion about D__. No allegations about M__ came up at that meeting. P__ came in and asked to talk with M__. Mr. Atwood did not see M__ again that night. According to Mr. Atwood, M__ was not angry.

M__ RETURNS TO PLANT THAT NIGHT

Later that evening Mr. Haugh went back to his office. M__ came to Mr. Haugh's office. M__ told Mr. Haugh that M__ had received a call that Plant Manager Popey was looking into the situation. Mr. Haugh said to M__ "reports had been made…. Go home and get some sleep."

According to M__, after M__ returned to the Plant, Mr. Haugh did not tell M__ that Mr. Haugh had prepared a report. Mr. Haugh told M__ to go home and get some sleep.

M__ went back to the floor to find Messrs McPherson and Haugh. M__ found Mr. Haugh. M__ told Mr. Haugh that they are saying M__ pushed G__. Mr. Haugh responded "No. Don't worry. Go home and get some sleep."

SITUATION REPORTED TO PLANT MANAGER JON POPEY

Jon Popey is the Plant Manger. He was hired on July 1, 2012. He did the overall investigation of the situation. There was not a Human Resources manager at that time.

Mr. Popey was provided with names. He interviewed those employees. He asked the employees to elaborate on the M__ situation and the D__ situation. Apparently some employees said they could hear M__ yelling. They were 75 feet away. Mr. Popey had information from Messrs G__ and Haugh. According to Mr. Popey, Messrs G__ and Haugh's written statements were the same as they testified at the arbitration hearing.

Ms. Morales approached G__ and asked why she was not part of the investigation. Mr. Popey then interviewed Ms. Morales. He asked Ms. Morales the same things he asked the other employees. He decided her testimony was less than credible. She approached G__ the day after Mr. Popey contacted the other interviewees. She started talking about

why she was not interviewed. Ms. Morales said she was in the area between Lines 1 and 2 for five minutes. She was "finishing up her shift." She said she was completing her paperwork. She said Messrs M__, G__ and Haugh were standing in front of the War Room. "Just standing there talking … for five minutes." She was doing both paperwork and listening at the same time. According to Mr. Popey, "this is impossible."

After the interviews, Messrs M__ and D__ were suspended via telephone calls pending investigation.

After the investigation, including considering the LCA, the decision was made to discharge M__.

D__ was notified the next day by phone that he was suspended. He was returned to work five days later and got back pay. The Company determined that D__ had been just holding P__ back from being in the

machine area and did not intend in any way to physically strike her.

RYAN McPHERSON

According to M__, Ryan McPherson is some kind of a supervisor, M__ has had issues and problems with Mr. McPherson before, Mr. McPherson wrote a false statement during the 2012 attempted discharge, and the Company is trying to destroy the Union.

According to Mr. Popey, Mr. McPherson was the Production Manager as of October 2012, and Mr. McPherson had nothing to do with M__'s discharge.

GRIEVANCE

M__ was terminated effective February 22, 2013. A grievance was filed on February 28, 2013, grieving the termination. The Company denied the grievance during the step proceedings on March 13, and April 2, 2013.

The Union filed an arbitration demand on April 4, 2013, and the matter proceeded to arbitration.

Contentions of the Parties

1. For the Company

The Company contends that LCAs which waive the requirements for just cause and progressive discipline have been consistently upheld by arbitrators if the terms are clear and unambiguous and are fully understood by all the parties, even if the terms of the LCA are unreasonable. Under settled principles of arbitration law, LCAs constitute valid and enforceable modifications to the CBA just cause language.

The instant matter is an issue of the credibility of the witnesses. M__, having an interest in the outcome of the proceedings, should have his credibility questioned. Also the Union's witnesses lack credibility.

There was no grievance outstanding or allegations of misconduct on the part of the Company. M__ was objecting to fellow Union employees criticizing a maintenance employee. M__'s actions would lose whatever protection the National Labor Relations Act provided. The incidents taking place on the plant floor and not in a grievance meeting would lose the protection of the Act. The physical threats against the supervisor, particularly considering the LCA, rule against any protection.

Supervisors G__ and Haugh both testified on direct and were subject to cross-examination concerning the February 21, 2013, incidents. Their testimony was credible and unprejudiced. Their relationship with M__ was limited or non-existent until the evening in question. As recognized by all parties, the two Supervisors are good and honest people and have no reason to fabricate a story. Their testimony supports the fact that the Company's reinstatement of M__'s original discharge was not arbitrary or capricious. The grievance must be denied.

2. For the Union

The Union contends that the behavior that M__ was accused of doing did not occur and he did not violate the LCA. In addition, he was acting in his capacity as a Union representative and thus the LCA did not apply to the situation. The Company did not prove that M__ violated the LCA.

The Union asserts that the discussion between M__ and G__ was manufactured after the incident by certain members of management into a supposedly loud and violent dispute by those wanting to get Union President M__ terminated from the Company. M__ was acting in his capacity as a Union representative at the time of the alleged incident.

The Union argues that the evidence shows that M__ did not lay his hands in any way on any one during the discussion in question; and M__ was acting in his official capacity as a

Union representative, and therefore was on an equal playing field with the supervisor. Hence, if there was a heated argument or words exchanged between them, it would not be insubordination.

The Union also contends that the Company acted in an arbitrary and capricious manner when it terminated M__ who had been a hard-working loyal employee for three decades.

The Union requests that I conclude that M__ did not violate the LCA, that his employment be reinstated, and that he be made whole for his losses.

Discussion and Decision

INTRODUCTION

The LCA provides that M__ shall be "immediately terminated should there be any future occurrence of any boisterous, disrespectful or improper language or conduct" and the standard will be "arbitrary or capricious."

For the following reasons, I conclude that the action of the Company in disciplining M__ for his actions on February 21, 2013, was not arbitrary or capricious, and the Company has proven that M__ violated the terms of the LCA.

Arbitrator Dworkin in *Butler Mfg. Co.*, 93 LA 441 (1989), upheld the discharge of an employee pursuant to a LCA. He indicated:

> Just cause is a negotiated benefit. Its primary purpose is to enhance job security-to guarantee that no employee will be arbitrarily, whimsically, or discriminatorily dismissed from his/her job. Just cause requires an employer to observe fundamental fairness in its discipline treatment of employees, to avoid pettiness and disparity, and to comply with substantive and procedural prerequisites.
>
> While just cause is a requirement in most labor management agreements, it is not essential to the formation of such agreements. A company and union could negotiate to eliminate the benefit. In such case, an arbitrator would be compelled to apply the contract without regard to fairness. A union also can enter into a last-chance bargain relieving an employer of some or all of its just cause obligations to an employee. The common motivation for such agreements is to settle grievances. Last-chance settlements occur when a company believes it has adequate reason to discharge an individual and the union is willing to sacrifice contractual entitlements in order to preserve the job. *Id.*, p. 445. Accord *Cleveland Electric Illuminating Co.*, 130 LA 101, 107-108 (Cohen, 2011).

Arbitrator Roberts stated in *Porcelain Metals Corp.*, 73 LA 1133, 1138 (Roberts, 1979):

> First of all, [LCA]s are supported by consideration and may, therefore, be taken as a modification of the master [CBA], in their application to special employees. The Company gives valuable consideration for such agreements by giving up a contended right to discharge an employee at the time reinstatement is made pursuant to such an agreement. Being supported by valid consideration, such agreements are a valid contractual novation to the [CBA].
>
> Secondly, [LCA]s are supported as a matter of public policy. They serve a useful social function of salvaging the employment of employees whose jobs would otherwise be lost. Many times, the impact of a "Last Chance" Agreement will have sufficient shock value to rehabilitate an errant employee. If arbitrators did not enforce [LCA]s, employers would cease to enter them, and the beneficial, social purpose which they serve would be lost to society generally—and to members of the bargaining unit specifically.

It has been indicated that:

> It is not uncommon for management to agree with a union request that it not discharge an employee for certain misconduct, but to give him or her one last chance…. A [LCA] generally provides that if the employee commits another offense within a certain period of time, he or she shall be subject to discharge…. Arbitrators should and do enforce [LCA]s as long as the facts support the claim that the employee engaged in further misconduct covered by the agreement. These agreements offer to management and the employee an opportunity to salvage an employee and demonstrate a positive benefit the union brings to the work force…. Abrams, Inside Arbitration (2013), p. 220.

The Company met its "arbitrary or capricious" burden of proof that M__'s "boisterous, disrespectful or improper language or conduct" violated the LCA.

> An arbitrator must abide by the terms of a [LCA] fairly negotiated between an employer, an employee, and (where applicable) the union representing the employee. The Common Law of the Workplace (2d ed), §6.3. Accord Elkouri & Elkouri, *How Arbitration Works* (7th ed.), pp. 15-48 to 15-53.

The parties do not dispute that (1) M__ was afforded union representation prior to signing the LCA, (2) the LCA requirements are reasonable, (3) M__ signed the LCA of his own free will, (4) M__ understood the provisions of the LCA, and (5) the "probationary period" was of a reasonable duration.

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CREDIBILITY OF WITNESSES

One of my duties is to decide how credible each witness was. It is up to me to decide if a witness's testimony was believable, and how much weight I think it deserves.

I started my credibility analysis with the viewpoint that all witnesses are equal and deserving of equal deference concerning their recollections. At the onset, neither Company nor Union witnesses should be given higher deference. "[S]upervisors should not necessarily be given greater credibility…. [It has been suggested that] neither the discharged employee, the steward, nor the supervisor who made the discharge decision [is] inherently more credible…." Elkouri & Elkouri, pp. 8-95 and 8-96.

Here are some things I consider in evaluating witness testimony. (A) Was the witness able to clearly see or hear the events in question. Sometimes even an honest witness may not have been able to see or hear what was happening, and may have an incorrect recollection. (B) How good the witness's memory seemed to be. Did the witness seem able to accurately remember what happened? (C) Was there anything else that may have interfered with the witness's ability to perceive or remember the events. (D) How the witness acted while testifying. Did the witness appear honest? Or did the witness appear to be mistaken? (E) Did the witness have any relationship with any party, or anything to gain or lose from the case that might influence the witness's testimony? Did the witness have any bias, prejudice, or reason for testifying that might cause the witness to testify incorrectly or to slant the testimony in favor of one side or the other? (F) Did the witness testify inconsistently while on the witness stand, or did the witness say or do something or fail to say or do something at any other time that is inconsistent with what the witness said while testifying? If I believe that the witness was inconsistent, I ask myself if this makes the witness's testimony less believable. Sometimes it may; other times it may not. I consider whether the inconsistency was about something important, or about some unimportant detail. I ask myself if it seemed like an innocent mistake, or if it seemed deliberate. (G) How believable was the witness's testimony in light of all the other evidence? Was the witness's testimony supported or contradicted by other evidence that I found believable? If I believe that a witness's testimony was contradicted by other evidence, I realize that people sometimes forget things, and that even two honest people who witness the same event may not describe it exactly the same way.

These are some of the things that I consider in deciding how believable each witness was. I also consider other things that I think shed some light on the witness's believability. I use my common sense and my everyday experience in dealing with other people. Then I decide what testimony I believe, and how much weight I think it deserves.

I do not make a decision based only on the number of witnesses who testified or quantity of evidence presented. What is more important is how believable the witnesses were, and how much weight I think their testimony deserves; and which evidence seems to me as being most accurate and otherwise trustworthy. Abrams, pp. 189-192; Elkouri & Elkouri, pp. 8-91 to 8-96. See generally WD Mi Civ JI 2.07.

I have considered all the circumstances of all the witnesses when assessing which testimony is the most credible.

I have considered the totality of the circumstances. On one side was M__ who was a seasoned, long-term 17-year Union President. During the shift transition period, a serious situation had been brought to his attention concerning perceived violations of the six foot safety rule, keeping production employees away from a machine on which a mechanic was working, and campaigning against perceived inappropriate treatment of a long-term mechanic. On the other side were two relatively short term supervisors with the Company, G__ with two years and Mr. Haugh with three months. The supervisors had never heard of either the six foot rule or some production employees' apparent wish of not having mechanic D__ work on their machinery. In the heat of the moment, while campaigning for the interests of the mechanic and the six foot rule, M__ may have forgotten that there was a LCA or the terms of the LCA. M__ may have

instinctively gone into campaign mode on the work floor outside of the War Room. His campaign mode activity included activities that allegedly violated the LCA. This alleged activity included shouting "BS" and then in confrontation mode jabbing G__ in the chest with his finger. G__ had to tell M__, "Don't touch me again."

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Elkouri & Elkouri quotes Umpire Shulman as saying:

> If there is no evidence of ill will toward the accused on the part of the accuser and if there are no circumstances upon which to base a conclusion that the accuser is mistaken, the conclusion that the charge is true can hardly be deemed improper. *Ford Motor Co.*, 1 ALAA §67,274, at 67,620 (Shulman, 1945). Elkouri & Elkouri, p. 8-95.

M__ VIOLATED THE LCA

I find that the LCA was violated by M__ for the following reasons (1) the recollections of Messrs G__ and Haugh were internally consistent and consistent with each other; (2) there is no evidence that the recollections of Messrs G__ and Haugh were inconsistent with their contemporaneously written statements; (3) there is no evidence of union animus or M__ animus by Messrs G__ and Haugh; (4) there is no explanation as to why Messrs G__ or Haugh would make up their testimony; (5) M__ testified that he does not know of any reason why Messrs G__ and Haugh "would lie about [M__]," (6) D__'s recollection of not seeing or hearing the situation is correct and understandable because D__ was involved with defending himself from a machine shut-down allegation, a hitting/striking another employee allegation, and deeply engaged in a pitched oral situation concerning the six foot rule situation; (7) Ms. Morales's recollection of not seeing or hearing the situation is correct and understandable because Ms. Morales was involved with running her line, completing paperwork, and not being in the immediate vicinity of the situation; (8) Mr. Atwood was not in the vicinity of the War Room during the situation; (9) the LCA; (10) the CBA; and (11) the totality of the circumstances.

There is no evidence or allegation that the Company failed to enforce the terms of the LCA or lulled M__ into a false sense of security. Elkouri & Elkouri, p. 15-50.

M__'S STATUS AS UNION PRESIDENT

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), states that employers commit an unfair labor practice if they "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157." Section 157 guarantees employees the right "to engage in … concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), states that employers commit an unfair labor practice if they "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157." Section 157 guarantees employees the right "to engage in … concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157.

The National Labor Relations Board uses four factors to determine whether an employee's otherwise protected conduct is so opprobrious that it loses the protection of the Act: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practices. *Atlantic Steel Co.*, 245 NLRB 814, 816 [102 LRRM 1247] (1979). I have carefully balanced these factors.

[1] The place of the discussion in the case at bar was on the workroom floor just outside of the War Room. Apparently the goal of supervisors G__ and Haugh was to have a discussion with M__ in the relative privacy of the War Room. M__'s conduct did not allow that to happen. All of this occurred in an open area of the plant. The discussion was not during the heat of a formal grievance proceeding, in contract negotiations, or during an organizational campaign. This weighs in favor of M__'s conduct not being protected. *Id.*, pp. 816-817.

The subject matter of the discussion was the six foot rule and the perceived treatment of D__. The incident did not occur during a grievance meeting. The subject of the incident could have been grieved. Setting aside the requirements of the LCA, this factor probably weighs in favor of M__'s conduct being protected. *Id.*, p. 817.

Part of the nature of the M__'s outburst was poking G__ in the chest. In addition, the nature of M__'s conduct was proscribed by the LCA. This weighs in favor of M__'s conduct not being protected. *Id.*

The outburst was not provoked by any unfair labor practice. There was no unfair labor practice. Supervisors G__ and Haugh were innocent of any provocative, discourteous, or inappropriate

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activity. This weighs in favor of M__'s conduct not being protected. *Id.*

Thus at least three of the four factors utilized by the Board in these situations weigh in favor of M__'s conduct not being protected.

In addition, there is the issue of whether the prohibitions of the LCA apply to M__ when he is functioning as Union President on the workroom floor concerning working conditions, poking a supervisor, when neither reacting to an employer unfair labor practice nor provoked by management.

The Company and the Union submitted powerful comprehensive post-hearing briefs that address all the issues in this case. Neither brief cites any case or award where the issue of the scope of the LCA on an employee who is a union official is discussed. There is no evidence concerning past practice or negotiating history of the LCA. In light of this I will analyze the wording of the LCA on this issue.

The LCA provides, in part;

> The parties hereto agree that M__'s actions on February 14, 2012, provided the Factory with proper cause under the [CBA] and otherwise, for his discharge. However, in consideration of the unique facts and circumstances involved in this case, the parties hereto agree that the discharge shall be suspended, subject to the following terms and conditions. Accordingly, the parties agree as follows: …
>
> 2. Upon returning to work, M__ will be placed on a [LCA] for *any type of future boisterous, disrespectful or improper language or conduct* … [S]hould *any future incident* occur during said two year period, he will be immediately terminated.
>
> 3. Any grievance challenging the reinstatement of the discharge shall be processed through the Grievance and Arbitration Procedure … but shall be limited to the question of whether such reinstatement was *arbitrary or capricious*. Emphasis added.

The LCA covers "any type of [proscribed] conduct." It covers "any future incident…." The parties, including M__, agreed in the LCA that any future violation would violate the LCA. There is no limitation in the LCA that indicates that some "boisterous, disrespectful or improper language or conduct" at work would be covered by the LCA but other "boisterous, disrespectful or improper language or conduct" at work would not be covered by the LCA.

It has been indicated that, under appropriate circumstances:

> … when the behavior of a union official exceeds the limits of workplace propriety, even when the charged action itself appears to have been in the furtherance of legitimate union leadership interest or action, discipline-including discharge-has been sustained. Elkouri & Elkouri, p. 15-80.

The case at bar is a jabbing at the supervisor case with no provocation. It is more than an "ungentlemanly" language case. *Id.*, pp. 5-69 to 5-72.

Arbitrary means "unrestrained and autocratic in the use of authority." *New Oxford American Dictionary*, p. 80 (3d ed.) (2010). Capricious means "given to sudden and unaccountable changes of mood or behavior." *Id.*, p. 259. Elkouri & Elkouri, pp. 9-23 to 9-25. Given the totality of the circumstances and my factual findings, the Company's discharge decision was neither an unrestrained and autocratic use of authority nor an unaccountable change of mood or behavior.

The Company's action in disciplining M__ for his actions was not arbitrary or capricious, and the Company has proven that M__ violated the terms of the LCA.

UNION'S ARGUMENTS

The Union makes several serious arguments concerning the situation. I have seriously considered each of them.

The Union argues that "Why would [M__] be screaming, angry, and swearing across the plant if he had no knowledge of any incident between employees until he reached the area next to the [W]ar [R]oom?" This argument does not control for the following reasons. First, there was no evidence that M__ was swearing. G__ testified that M__ was saying "BS." No one at the hearing translated or interpreted "BS" to be a swear word. This is an in-the-supervisor's face and jabbing the supervisor on the work floor without provocation case/"boisterous, disrespectful or improper language or conduct" case, not a "swearing" case. Second, M__ would not have been moving from the left area of the plant towards the War Room area if he had not already known of some issue concerning D__. Third, M__ knew as he moved across the plant floor that D__ wanted him because of a six foot situation. Fourth, M__ was not going from the left side of the plant to the War Room area on the right side of the plant to help D__ do maintenance work on a machine. D__ testified that he called M__ as Union President. Fifth, the

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first time M__ started to walk from the left area of the plant to the Line 1 right area, M__ walked back to the Maintenance Office, not the War Room. This is when M__ talked with Mr. Atwood in the Maintenance Office and Mr. Atwood said "no shit, we have to do something." D__ testified that M__ came to the War Room area because of a communication from D__. On this occasion, according to D__, M__ was being summoned as the Union President, not to help out or work as a co-employee. On this occasion, D__ testified, "We were all talking louder."

The Union argues that "[M__] was using his left arm to hold back [D__]. If [M__'s] left arm was holding his tool bag, which hand was doing the supposed poking?" This argument does not control for the following reasons. First, no one had to hold D__ back. D__ was not jabbing anyone in the chest or physically touching anyone in the vicinity of the War Room. Second, the situation outside of the War Room escalated from M__ shouting "BS," etc. while on the way to the War Room area to jabbing G__ once M__ arrived to just outside the War Room. The initial "BS" shouting did not overlap with the ultimate jabbing.

The Union argues that "Why was [M__] not walked out of the building like other employees have been previously for such behavior?" This argument does not control for a number of reasons. First, there is no evidence in the record that other employees had been previously walked out of the building for such behavior. Second, Messrs G__ and Haugh were relatively new and inexperienced supervisors with the Company and felt that, it being the end of the second shift, they did need not to remove M__ from the plant. The shift change would inherently remove second shift employee M__ from the plant for them. Third, the plant did not have a Human Resources Manager at that time. Fourth, the supervisors were not only facing the unexpected M__ situation at that moment in time on the work floor during a shift change but also the D__ six foot rule and alleged battery on employee situations. There was a lot going on at the same time during that shift change. Walking M__ out of the plant was not on Messrs G__ and Haugh's plate at that time.

The Union argues that "If the incident happened the way management employees testified, why, during the meeting in the [M]aintenance [O]ffice directly following the violence, was there no mention of any hostility or physicality?" This argument does not control for a number of reasons. First, it is reasonable to conclude that no one involved with the outside of the War Room situation wanted to move what happened by the War Room to other areas of the plant. Second, there was no appropriate reason for the supervisors to mention the outside the War Room incident to individuals in the Maintenance Office. This would only have been provocative and prolonged the agony. Third, other than communicate the situation to higher management, the supervisors were still involved with the six foot rule, who can work on the machine and when, and an hourly employee being struck allegations. It was not in the supervisors' interest to prolong the outside the War Room situation to a later discussion in the Maintenance Office. To do so would have been inappropriate, counterproductive, and provocative.

The Union argues that "If the incident happened the way management employees testified, why would [M__] be able to use … G__'s office to conduct union business with employees behind closed doors then?" This argument does not control for a number of reasons. First, Messrs G__ and Haugh were inexperienced supervisors with the Company. Second, no Human Resources person was available. Third, other than reporting the incident to upper management, the supervisors did not want to prolong the incident. Fourth, once the second shift completely ended, M__ would leave the plant. Fifth, M__ and P__ walked into G__'s empty office and closed the door.

The Union argues that "If the incident happened the way management employees testified, why, when P__ accused [D__] of hitting her soon after the alleged incident, would no one mention the supposed assault of G__ at the hands of [M__]?" This argument does not control for the following reasons. First, it was not in

the interest of M__ or any hourly employee to mention the M__ situation. Second, even assuming that D__ saw the M__ situation it was not in the interest of D__ to mention the M__ situation. Third, the inexperienced supervisors who did not have the benefit of a Human Resources person during an 11:30 p.m. shift change situation had no interest in recreating or transferring the outside the

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War Room M__ situation in or to the Maintenance Office. Fourth, it would have been neither necessary or appropriate for supervisors to report M__'s jabbing of G__ to other hourly employees. It is undisputed that the supervisors reported the M__ situation to upper management.

The Union argues that "If the incident happened the way management employees testified, why weren't any incident reports written up by … G__ and … Haugh entered into evidence?" This argument does not control for a number of reasons. First, at the arbitration hearing Messrs G__ and Haugh testified that they wrote incident reports that night. There was no questioning of them concerning their not doing this. Second, there is no evidence in the hearing record that the reports were or were not made available to the Union. Third, there is no evidence that Union either did or did not ask for the incident reports. Elkouri & Elkouri, pp. 8-16 to 8-17. Fourth, the preponderance of the evidence is that G__ and Haugh wrote incident reports, the incidents reports were consistent with their testimony, and nothing untoward happened concerning the Union's potential access to the reports. Elkouri & Elkouri indicates that:

> There is a question of whether an adverse inference should be drawn against a party whose witness does not produce contemporaneous notes at a hearing. One arbitrator [*Chevron Phillips Chemical Co.*, 121 LA 1386 (Eisenmenger, 2005)] rejected that contention where the witness testified without notes and appeared to have adequate recall of his interview of the grievant, and the union did not ask at any time that his notes be produced for examination. Elkouri & Elkouri, p. 8-37.

The Union argues that *Cheltenham Convalescent Home, Inc. v. Local 1034, Drug and Hosp. Div.*, 1987 WL 10706, 128 LRRM 2726 (ED Pa 1987), should be followed in this case. This argument does not control for a number of reasons. First, *Cheltenham* does not involve a LCA. Second, *Cheltenham* involved a just cause standard, not an arbitrary or capricious standard. Third, *Cheltenham* did not involve physical contact by the union official with a supervisor. Fourth, in *Cheltenham* the management official "became angry and yelled" at the union official. Fifth, in *Cheltenham* management provoked the union official. Sixth, the *Cheltenham* incident was in the supervisor's office, not on the work room floor.

[2] The Union argues that M__ was on an equal playing field with the supervisor; and, if there was a heated argument or words exchanged between them, it would not be insubordination. This argument does not control for a number of reasons. First, the issue in this case is whether there was "any boisterous, disrespectful or improper language or conduct" by M__. Second, there is no evidence that the supervisors engaged in "any boisterous, disrespectful or improper language or conduct." Third, the supervisors respected "an equal playing field" by treating all involved in a delicate and difficult situation with courtesy, dignity, and respect. Fourth, there is no evidence or allegation of any "heated argument or words" from the supervisors.

[3] The Union argues that the fact that the Company failed to produce P__ and L__ to testify supports the Union's position concerning the creditability of witnesses. This argument does not control for a number of reasons. First, P__ and L__ are bargaining unit employees who may or may not have witnessed the activity in the vicinity of the War Room. The record is silent as to whether they are Union officials. Second, they were equally available to both sides as witnesses. They were not peculiarly within the Company's control. Third, given the fact that these bargaining unit employees were equally assessable to the Union, I do not make an adverse inference against the Company for not calling them.

Conclusion

The action of the Company in disciplining M__ for his actions on February 21, 2013, was not arbitrary or capricious. The Company's reinstatement of M__'s original discharge was not arbitrary or capricious.

The Company has proven that M__ violated the terms of the LCA.

This decision neither addresses nor decides issues not raised by the parties.

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in

light of the above discussion, I deny the grievance.

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- End of Case -

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