BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
TEAMSTERS LOCAL UNION NO. 43	Case 8 No. 43839 A-4621
and	
BIG BUCK BUILDING CENTERS	

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller and Brueggeman, S.C., Attorneys at Law, by Mr. John Brennan, appearing on behalf of the Union.
Shindell and Bartley, Attorneys at Law, by Ms. Anne Shindell, appearing on beh

ARBITRATION AWARD

The above captioned parties, hereinafter the Union and Company respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing, which was not transcribed, was held on June 14, 1990 in Kenosha, Wisconsin. The parties filed briefs in the matter which were received by July 9, 1990. Based on the entire record, I issue the following award.

ISSUE

The parties were unable to agree upon the issue and requested the arbitrator frame it in his award. 1/ The arbitrator hereby frames the issue as follows:

> Was the grievant discharged for just cause? If not, what should the remedy be?

PERTINENT CONTRACT PROVISIONS

The parties' 1989-92 collective bargaining agreement contains the following pertinent provisions:

> ARTICLE 14. SICK LEAVE
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> . . . . Employer shall be entitled to an independent medical examination of any employee absent from work, said examination to be at employer's expense. . . .
>
> Should an employee become ill, he shall immediately and as soon as practicable notify the employer thereof. The employer shall have the right to immediately interview the employee and have an independent medical exam performed to determine the employee's ability to work.
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> . . .
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> ARTICLE 17. QUITS, DISMISSAL AND LAYOFFS
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> . . . It is agreed that the Employer will notify the Union of all contemplated discharge (sic) of employees at least forty-eight (48) hours before the discharge occurs, provided, however, that discharge for proven dishonesty or intoxication by alcohol, drugs or other substances, shall not require the forty-eight (48) hours notice.

PERTINENT WORK RULE

Every organization must establish certain regulations which

1/ The Union states the issue as:

> Was the grievant discharged for just cause for his initial refusal to submit to a physical examination?

While the Employer states the issue as:

> Did the Employer have just cause to terminate grievant's employment for insubordination and refusal to comply with the direct order of both his supervisor and the Company's Chief Executive Officer; and, if not, what is the appropriate remedy?

are mutually beneficial to the Company and employees. Although this list is not intended to be all inclusive, employees of Big Buck Building Centers, Inc., are prohibited from committing any of the following acts. Appropriate discipline, up to and including dismissal, will be applied for violations.

Work Performance
1. Insubordination, including disobedience, failure or refusal to follow written or oral instructions or to carry out assignments.

FACTS

Grievant Damon Landro was employed by the Company at its Kenosha facility for about two and one-half years before he was terminated on March 9, 1990. In 1989 and early 1990, the Employer considered Landro's use of sick leave to be excessive. During that period he also received numerous oral and written warnings for lateness culminating in two suspensions for same (one day and three days, respectively). The three day suspension notice in January, 1990 indicated it was his "last warning" and that the next disciplinary step was dismissal.

On March 5, 1990 2/ Landro was absent from work and called in sick. He visited his doctor that day, was diagnosed as having a sinus infection and received a prescription for it. The next day, March 6, Landro again was absent from work and called in sick. When he reported his absence over the phone about 9:00 a.m., Supervisor Peder Brennan expressed concern over the state of Landro's health and indicated that the Company wanted him to take a physical exam with a Company appointed doctor because of his numerous absences for illness. Landro expressed disbelief at this request. He advised Brennan that he had already seen a doctor and gotten a prescription for his sinus infection so he did not see the need to be examined by another doctor. After Brennan insisted that he nevertheless take the physical Landro got upset, raised his voice and used profane language in declaring that he could not be forced to take a physical. Brennan did not raise his voice or use profane language during this conversation. The phone call ended when Landro told Brennan that he did not believe what he was hearing so he was going to call Brennan's supervisor (Val Hansen) regarding it.

At some point that morning (exactly when is disputed) Landro called Union President Charles Schwanke at his office and asked him whether he had to take a physical exam per the Company's request. Schwanke told Landro the answer would depend on what the labor contract said and that he did not have the (Big Buck) contract in front of him, but if there were language in the contract that gave the Company the right to demand a physical then he would have to take one. Schwanke also told Landro he would check the language of the contract and get back to him.

About 10:15 a.m. Landro called Company CEO Val Hansen, told her of Brennan's request that he (Landro) take a physical exam and asked whether Brennan was correct. Hansen told Landro that Brennan was correct - that the Company wanted him (Landro) to take a physical exam because his frequent absences from work due to illness were posing a hardship for the Company. Upon hearing this Landro became angry, raised his voice and used profane language in declaring that he could not be forced to take a physical exam because he thought it was unfair, unconstitutional and unlawful. Landro also felt it was unnecessary for him to take a physical exam because he had just seen a doctor the previous day and gotten a prescription for his illness. Hansen told Landro to call Schwanke regarding the matter whereupon Landro replied that he had already done so and that Schwanke had told him that if the contract provided for a physical exam then he had to take one. Hansen then located the contract language dealing with physical examinations found in Article 14 and read it to Landro over the phone. After Hansen had read the contract language Landro still refused to take a physical exam. During the course of this phone call Hansen repeatedly told Landro he would have to take a physical exam and he repeatedly refused to do so. Hansen then advised Landro that he had been progressively disciplined (by the Company) and that the consequence of refusing to take a physical exam would be dismissal, to which Landro replied that he understood but that he nevertheless would not take the exam because he believed it was unlawful and unconstitutional. Hansen then told Landro he was fired for refusing to take a physical exam.

After this phone call ended Hansen called Schwanke to give the contractual 48 hour notice for a discharge. During the course of this conversation Schwanke asked if Landro had a drug problem to which Hansen replied that she did not know. Hansen indicated that even though Landro had been fired, he could still take the physical (at Company expense) and if that exam found a drug or alcohol problem then the discharge would be reconsidered and he would be referred to the Company's EAP (Employee Assistance Program).

2/ All dates hereinafter refer to 1990.

At some point that morning (exactly when is disputed) Schwanke called Landro back and informed him that there was language in the labor contract which required him to submit to a physical exam at the Company's request. Schwanke advised Landro to take the physical.

Landro then called Hansen back and reported he would take a physical. She informed him that he could take a physical exam but since he had refused to take it in their initial phone call he was still discharged. Hansen indicated that the only way she would reverse the discharge was if the physical exam showed that Landro had a drug or alcohol problem in which case he would be referred to the Company's EAP.

Landro was examined by a Company doctor the next day, March 7. This exam was a complete physical which included drug and alcohol testing. No drug or alcohol problem was diagnosed therein.

Landro was officially notified of his discharge at a meeting on March 9 wherein he was handed his termination notice. This written notice indicated that the basis for the discharge was "refusal to take Company sponsored medical exam". The discharge was grieved and processed to arbitration.

POSITIONS OF THE PARTIES

It is the Union's position that the Company did not have just cause to discharge the grievant. In this regard the Union first notes that at the time the grievant was discharged the basis for this discipline was that he refused to take a physical exam. The Union contends the Company realized the discharge could not be upheld based solely on this reason (especially since he eventually submitted to the exam), so it added new/additional charges at the hearing, to wit: the charge that the grievant had a tardiness problem and the charge that he was insubordinate by use of his profanity over the phone. According to the Union, neither of these claims should be credited or considered in reviewing the grievance. Next, the Union contends that the grievant's refusal to submit to a physical exam was in and of itself reasonable so the discharge for that refusal is unwarranted. This position is based on the premise that the physical exam which the Company wanted the grievant to take was simply a drug test. In the Union's view, Landro's initial refusal to submit to the drug test was a reasonable reaction because the contract does not provide that the Company may demand an employe take a drug test. The Union also cites several arbitrators who have found the general "obey now, grieve later" rule inapplicable where an employe rightfully refused to take a drug test. The Union further contends that the Company could not demand a drug test without a reasonable basis and in its view, the Company had no reasonable basis here. The Union cites several arbitrators who have held that where an employer makes an unreasonable demand for an employe to submit to (drug) testing, a discharge arising from the employe's refusal to submit is not reasonable. Finally, the Union asserts the testimony shows that the grievant refused to take the exam only until such time as he could secure a definitive answer from his union representative; once he had that answer he agreed to take the exam. Thus, in the Union's view, the Company discharged the grievant before his union representative had the opportunity to get back to him and inform him of the Company's right to demand a physical exam. The Union therefore requests that the grievant be reinstated with a make-whole remedy (including full back pay).

The Company's position is that just cause existed for the grievant's discharge. In support thereof it notes that the grievant admitted he refused to comply with a Company request (supported by the explicit contract language) that he take a medical exam. It contends this was not a situation where a simple misunderstanding occurred; instead the grievant understood exactly what the Company wanted him to do yet he refused to comply. The Company further notes that in refusing to comply with the request he was abusive in his manner and his language to both of the Employer's representatives making this request. The Company views this conduct as insubordination which violated the work rules and also warranted discharge. The Company asserts that two "maxims of industrial justice" are applicable to this case. The first is that some consideration is given to the past record of a disciplined employe, specifically that an offense is mitigated by a good past work record and aggravated by a poor one. Here, the Company notes that the grievant had already reached the final step of progressive discipline and Hansen knew this when she made the decision to discharge Landro. Thus, in its view, no mitigating factors existed so the grievant's past work record justified the penalty of termination. The Employer cites several arbitrators who have upheld discharges in what were characterized as "last straw" situations. The other "maxim of industrial justice" which the Company believes is applicable here is the requirement that in the absence of jeopardy to the employe's life, health or unless permitted by contract, the employe must perform and grieve afterwards. That did not happen here inasmuch as the grievant received specific instructions from the Employer which he chose to disobey. In the Employer's view, its request that he take the physical exam does not fall within the imminent danger to himself or others exception so he was obligated to obey the directive and later grieve the matter. The Company therefore contends that the grievance should be denied and the discharge upheld. In the event the discharge is overturned though the Company believes that the

appropriate remedy would be a suspension without pay.

DISCUSSION

Inasmuch as the parties dispute the exact reason for the grievant's discharge, it follows that this, by necessity, is the threshold issue. The Union contends that the grievant was discharged for refusing to take a physical exam while the Company asserts that he was discharged for that reason and insubordination. In the Union's view, this latter reason (i.e. insubordination) was not communicated to the grievant at the time of his discharge but instead was simply a new reason added at the arbitration hearing. 3/ It is a fundamental arbitral principle that a discharge must stand or fall upon the reason given at the time of the discharge, not the reason given at the arbitration hearing. 4/ Here, the reason given to the grievant in his phone call with Hansen and stated in his written termination notice was that he was discharged for refusing to take a physical exam. The word insubordination was not used on either occasion. "Insubordination" is defined in Roberts' Dictionary of Industrial Relations as "a worker's refusal or failure to obey a management directive" and/or the "use of objectionable language or abusive behavior towards supervisors." Thus, either type of conduct can qualify as insubordination. Since insubordination can include not only what was done but how it was done, it follows that insubordination is a broader and more encompassing charge than is the charge of refusing to obey a management directive. In the context of this case the Company could certainly have used the term "insubordination" to describe the grievant's conduct on September 6 wherein he refused to obey a directive to take a physical exam and also yelled and used profane language in refusing same. Had the Company charged the grievant with insubordination, that charge would have been upheld inasmuch as the grievant admits to the conduct involved and this conduct meets both parts of the above-noted definition for insubordination. However, for whatever reason it did not do so. Instead, the Company chose to discharge the grievant for the narrower charge of failure to obey a management order rather than the broader charge of insubordination which would have included the failure to obey in addition to the grievant's yelling and use of profanity. Such was its right. Having done so though it cannot now expand the stated and defacto reason for the discharge to the broader charge of insubordination. Likewise, the Employer was certainly aware of the grievant's yelling and use of profanity in the two phone calls with management officials when it decided to discharge him, but it chose not to list those matters on the grievant's written discharge notice. By not listing them as reasons for the discharge the Employer effectively indicated the level of importance it gave to them. Accordingly then, the grievant's yelling and use of profanity toward Brennan and Hanson on September 6 is disallowed from further consideration herein as is the Employer's characterization of the grievant's offense as insubordination.

Having so found, attention is now turned to the question of whether just cause existed for the grievant's discharge. The just cause standard for employer disciplinary action, which both parties utilize in their proposed framing of the issue, involves two elements. The first is that the Company demonstrate the misconduct of the grievant and the second, assuming this showing is made, is that the Company establish that the penalty imposed herein (i.e. discharge) was justified under all the relevant facts and mitigating circumstances.

As previously noted, the Company discharged the grievant for failing to obey a managerial directive to take a physical exam. The Company wanted the grievant to be examined because of his numerous absences from work due to illness. Such was its contractual right because Article 14 expressly allows the Employer to have an independent medical exam performed on any employe absent from work.

It is a cardinal rule in the workplace that employes are to obey supervisory orders and do what they are told regardless of whether or not they agree with it. 5/ The reason for this is obvious; there can hardly be a more serious challenge to supervisory authority, and hence to the Employer's ability to direct the work force, than the refusal to obey a supervisory order. Thus, the proper course of action is for employes to obey orders they believe are improper and obtain redress through the grievance procedure. Employes can be disciplined or discharged if they fail to obey, even if they are ultimately found to be correct in their assessment of the propriety of the order. As Arbitrator Harry Shulman observed long ago: "An industrial plant is not a

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3/ The Union also contends that another reason raised by the Employer at the arbitration hearing was the grievant's tardiness problem. That matter though was not referred to in the Employer's proposed statement of the issue or specifically addressed in their brief. That being so, no need exist to address the matter further.

4/ Elkouri & Elkouri, How Arbitration Works, 3rd Ed., p. 634.

5/ Supra, p. 671. There are certain exceptions to this rule but none are applicable here.

debating society. Its object is production. When a controversy arises, production cannot wait." 6/

Under this "obey now-grieve later" principle, the grievant should have obeyed management's directive to take a physical exam. Had he done so, he could have later tested the validity of the Company's order via the grievance procedure without risking his job. However, what happened though was that the grievant repeatedly refused to take a physical exam based on his belief that he did not have to submit to one. In doing so, the grievant was just plain wrong because the Employer has the contractual right to have an employe take such an exam.

Having found that the grievant was disobedient in failing to take a physical exam when directed, the Union nevertheless offers several justifications for his refusal which it believes should excuse that conduct. The first is the Union's assertion that Landro's call to Hanson (wherein he repeatedly refused her directive to take a physical exam) occurred immediately after his call to Brennan while he was still infuriated and before he had the opportunity to consult with his union representative. I agree with the Union that had this scenario occurred, it would indeed have a bearing on whether Landro made a reasoned and informed decision. However, I find that contrary to the Union's assertion, Landro's call to Hanson did not occur immediately after his call to Brennan and before he had the opportunity to consult with Schwanke. In support thereof it is noted that Landro called Brennan at 9:00 a.m. to report his absence and this phone call lasted about 15 minutes. Hanson testified without contradiction that Landro called her at 10:15 a.m. That being the case, there was about an hour between the calls Landro made to Brennan and Hanson. Landro called Schwanke sometime during that one hour period. This finding is based on the fact that Landro never contradicted Hanson's testimony that during their first phone call she told him to call Schwanke regarding the matter and he indicated he already had. Thus, Landro had called Schwanke and been advised of his contractual rights before he called Hanson. That being so, Landro was not fired before he had the opportunity to consult with his union representative regarding the matter. Next, Landro never told Hanson during that phone call that he was waiting to hear back from Schwanke. Instead as previously noted Landro made it clear to Hanson that he had already talked with Schwanke who had told him that he had to take a physical exam if the contract language provided for same, whereupon Hanson responded by reading Landro the contract language contained in Article 14 which expressly provides for same. Given these circumstances, it cannot be said that Landro made an uninformed decision. Finally, Landro did not give Hanson a conditional response to her directive that he take a physical exam. Instead he repeatedly gave Hanson an unconditional and unequivocal response that he would not obey her directive that he take a physical exam. Therefore, inasmuch as Landro never conditioned his rejection of a physical exam on talking with Schwanke further, the Union's contention to the contrary is rejected as not being supported by the record evidence. Based on the above then it is held that Landro was advised of his contractual rights before he refused Hanson's directive to take an exam, that in doing so he made an informed (but albeit wrong) decision and that he did not give Hanson a conditional rejection.

Attention is now turned to the Union's alternative justification for Landro's refusal to take the exam, namely the contention that the grievant's refusal to submit to the exam was in and of itself reasonable so the discharge for that refusal was unwarranted. This contention is based, of course, on the premise that the exam which the Company wanted the grievant to take was simply a drug test. The problem with this contention though is that the undersigned does not accept the premise upon which it is based. Simply put, the Union's characterization of the exam Landro was to take as a drug test does not make it one. To the contrary, there is nothing in the record to suggest that the exam in question was anything other than a complete physical exam. While physical exams sometimes now include drug and alcohol testing components, it is not accurate to characterize a complete physical exam, and particularly the physical exam the Company wanted the grievant to take, as just a drug test. Landro himself understood this because one of his arguments against the exam was that he had just had a physical exam on March 5 and thus he did not think another was necessary. Moreover, at no time on March 6 did either Brennan or Hanson ever mention to Landro that they wanted him to take a drug test. Rather, the explicit term they both used was "physical exam". Furthermore, it is noteworthy that the word "drug" was not mentioned in any phone call on March 6 until after Landro had already been fired by Hanson for refusing to take the physical exam. That word was raised for the first time in Hanson's phone call to Schwanke giving him the contractual 48 hour notice for a discharge when he asked her if Landro had a drug problem. Thus, the Employer did not even raise the word "drug"; the Union did. Given the foregoing, it is held that the physical exam which the Company wanted Landro to take was not simply a drug test but was instead a complete physical exam which is permitted by Article 14. Consequently, the Union's entire line of argument concerning drug testing is rejected as inapplicable here.

6/ Ford Motor Co., 3 LA 779, 781 (1944).

Having concluded that the grievant engaged in the conduct complained of (i.e. knowingly refusing to comply with a Company order to take a physical exam) and having concluded that no justification existed for his refusal, the undersigned turns to the question of whether this conduct warranted discipline. The Company's work rules (specifically #1) expressly provide that employes are prohibited from failing or refusing to follow oral instructions and that violation of this rule will be grounds for disciplinary action. Inasmuch as that is exactly what happened here, it follows that Landro's actions constitute misconduct warranting discipline. The fact that he later conceded the issue to management and took a physical exam does not in any way excuse or remedy his conduct.

In light of this conclusion that cause existed for disciplining the grievant for the above-noted misconduct, the question remains whether the punishment of discharge was proper. I find that it was for the following reasons. First, some offenses are so serious they are grounds, in and of themselves, for summary discharge. In the opinion of the undersigned, the grievant's misconduct herein falls into that category. Next, the grievant's work record does not serve as a mitigating factor in his favor. This is because prior to the instant incident he was already at the last step of progressive discipline. Thus, the instant matter was simply the proverbial last straw. Accordingly, it is held that the severity of discipline imposed here (i.e. discharge) was neither disproportionate to the offense nor an abuse of management discretion but was reasonably related to the seriousness of the grievant's proven misconduct.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the grievant was discharged for just cause. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 27th day of September, 1990.

By _____
Raleigh Jones, Arbitrator