BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
GENERAL TEAMSTERS UNION LOCAL 662	Case 12 No. 51183 A-5252
and	
ASSOCIATED MILK PRODUCERS, INC.	

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Mr. Scott D. Soldon, appearing on behalf of the Union.

Felhaber, Larson, Fenlon & Vogt, Attorneys at Law, by Mr. Edward J. Bohrer, appearing on behalf of the Employer.

ARBITRATION AWARD

General Teamsters Union Local 662, hereinafter referred to as the Union, and Associated Milk Producers, Inc., hereinafter referred to as the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the Employer, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a discharge. The undersigned was so designated. The parties waived that portion of the grievance procedure calling for a panel of arbitrators. Hearing was held in Blair, Wisconsin on August 10, 1994. The hearing was not transcribed and the Employer filed a post-hearing brief on September 1, 1994, and the record was then closed.

BACKGROUND

The grievant was employed by the Employer as General Labor commencing on January 11, 1991. On Saturday, May 28, 1994, the grievant was working the second shift from 2:30 p.m. to 10:30 p.m. Also, working that day were Bernie Jensen and Marvin Buttke. At about 4:30 p.m., the grievant told Marvin Buttke to tell Bernie Jensen that the grievant wanted Jensen to give the grievant a "blow job". Buttke waived Jensen over because the plant is noisy and employes wear ear plugs. Jensen came over to Buttke and Buttke told Jensen that the grievant wanted Jensen to give the grievant a "blow job". Jensen said nothing but went over by the grievant and kicked him in the buttocks with the side of his foot and told him this was the only "blow" he was going to get and any further discussion about "blow jobs" would be in the upstairs office, meaning management's offices. The Employer investigated this incident on May 31, 1994, and got statements from the grievant, Buttke and Jensen. On June 1, 1994, the grievant was terminated for abusive language of a sexual nature directed at a fellow employe. The termination report also stated that the grievant had a previous warning on January 11, 1994, involving inappropriate behavior and verbal abuse of other employes with some sexual connotation. Jensen was suspended for three days for sidekicking the grievant in the buttocks, and Buttke was suspended for three days for his participating in the horseplay and verbal abuse toward Jensen. The grievant appealed his discharge to arbitration.

ISSUE

Did the discharge of the grievant violate the labor agreement? If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE X
Discharge

Section 1. The Cooperative shall not discharge any employee without just cause, but in respect to discharge shall give at least one (1) warning notice of the complaint against such employee to the employee, in writing, and a copy of the same to the Union affected, except that no warning notice need be given to an employe before discharge if the cause of such discharge is dishonesty or drunkenness or reporting for work under the influence of illegal drugs or alcohol or other grave offenses. An employee may be disciplined (including discharge) for violation of Company rules so long as those rules are not in conflict with any of the terms and provisions of the contract. Copies of the Company rules and any changes or additions will be forwarded to the Union. Discharge must be made by proper written notice to the employee and the Union affected. Any employee may request an investigation as to the discharge. Should such investigation prove that an injustice has been done, the employee shall be reinstated and compensated at his or her usual rate of pay while he or she has been out of work. Appeal from discharge must be taken within ten (10) days by written notice and a decision reached within fifteen (15) days from the date of discharge. If no decision has been rendered within fifteen (15) days, the case may then be taken up as provided for in Article VII of this Agreement.

Section 2. All discharges shall be discussed with the Steward and/or Shop Committee as soon as possible, either before or after discharges.

Section 3. Warning letters to an employee will be cancelled nine (9) months from the date of the warning letter.

EMPLOYER'S POSITION

The Employer contends that the Union's position is this matter is to downplay the grievant's actions, characterizing them as "trivial teasing." It asserts that such characterization in the 1990s is unacceptable. It submits that the grievant had been repeatedly warned and also suspended because of his attitude and the way he treated his fellow employes and that discipline was not grieved. It notes that the grievant understood how he was to treat his fellow employes. The Employer points out that it has established a sexual harassment policy which the grievant was clearly aware of and it prohibits demeaning and derogatory action toward any fellow employe. It argues that generally derogatory and vulgar language is not equal to the grievant's conduct which was specifically directed toward Jensen as his language was very personally insulting. It claims that the evidence failed to establish that the entire work force conducted itself in the same manner as the grievant. The Employer

alleges that the so-called kicking incident was an act of frustration by the victim, and Jensen was only given a three-day suspension because he was not the perpetrator and did not have an active warning letter in his file. The Employer claims that the Union's attempt to downplay and trivialize a very serious situation is to condone conduct which is unacceptable in the 1990s, conduct which leads to expensive claims and lawsuits against the Employer. The Employer contends that it has the right and obligation to maintain an environment free of sexual harassment. It argues that the Union is attempting to make Jensen the "wrongdoer" but it maintains that the grievant was responsible for Buttke's comment to Jensen. It points out that less than five months earlier, the grievant was suspended for three days for walking off the job and for verbal abuse of another employe. It maintains that the grievant was warned that any further incident may result in termination. The Employer alleges that even had the grievant not been warned, no warning was required as the incident was a "grave offense" and violated the Employer's sexual harassment policy both of which justify discharge without a warning notice. According to the Employer, the grievant had been given a specific warning, so even if the incident was not a "grave offense," discharge was appropriate.

The Employer contends that the grievant was harassing Jensen for a couple of months before the incident. It claims the kick did not injure the grievant and although the grievant initially sought permission to see a doctor, he never did and never made a report to anyone that he was injured.

The Employer submits that it investigated the matter thoroughly and obtained written statements from the grievant, Buttke and Jensen. It claimed that the grievant was terminated because of the severity and continuous nature of his actions as well as his prior record. It points out in the testimony of Jensen that the grievant had been harassing him about "blow jobs" since shortly after the 1993-94 Christmas season and continuing for the first four months of 1994.

The Employer asserts that it had just cause to discharge the grievant. It insists his conduct was a grave offense and the sexual harassment policy prohibits:

" ... unwelcome ... verbal ... conduct of a sexual nature including ...

abusing the dignity of an employee through insulting or degrading sexual remarks or conduct.

... the creation of a hostile environment ...

The Employer asserts that it carefully investigated the incident, and the grievant had a warning about "abusive conduct" within nine months of this incident. It submits that it is not required to accept this type of conduct.

UNION'S POSITION

The Union did not file a post-hearing brief, so its position is taken from its opening statement. The Union contends that the grievant should not have been fired. It claims that the contract requires just cause to discharge an employe plus one warning notice of the complaint against the employe. It points out that Article X, Section 3 provides that warning letters will be cancelled after nine months and cannot be used to support a discharge. It asserts there was no warning notice of the complaint. The Union notes that where there is grave offense, no warning notice is required but the grievant's conduct is not a grave offense.

The Union describes the incident as trivial teasing which is common in the plant. With respect to the "blow job" comment, it submits that another employe, Buttke, made the remark, "Dave wants you to give him a blow job," to Jensen According to the Union, Jensen then came up behind the grievant and kicked him. It notes that Jensen got a three-day suspension but the grievant got fired. It also notes that Buttke was the middleman who was doing the talking and he too got a three-day suspension. It maintains that this was disparate treatment.

It claims that the discharge of the grievant does not add up. It asserts that this was a trivial teasing incident, not a grave offense, with no letter of warning and disparate treatment. The Union argues that the Employer did not have just cause to discharge the grievant.

DISCUSSION

Generally, the Employer has the burden of proving the elements of "just cause" in discharging an employe. These elements include proving: the employe engaged in the conduct which is the basis for the discharge; the employe was aware of the employer's rules, which must be reasonable and evenly applied; the Employer fairly investigated the matter; and the penalty must be appropriate to the offense and applied in a similar manner to all employes in the same circumstances.

A review of the evidence establishes that the grievant told Buttke to tell Jensen that the grievant wanted Jensen to give the grievant a "blow job." This conduct was the reason for the grievant's discharge and it is concluded that the Employer has proven that the grievant engaged in the conduct on which it based his discharge.

The Union has asserted that the grievant's conduct is "trivial teasing" and mere shop talk and such language is common in the plant. "Shop talk" is often an euphemism for profane and obscene language which is not necessarily abusive, and it is how these terms are used that distinguishes shop talk from abusive language. The statement made to Jensen was not joking and teasing but rather the undersigned concludes it was intended to demean and debase Jensen and hold him up to ridicule. This was not a broad, general statement but was pointedly directed to Jensen. The credible evidence also established that Jensen spoke to the grievant, after his suspension in January, 1994, for walking off the job and his verbal abuse of John Slaby, and told him to knock off his comments. The grievant must have known that Jensen was offended by these remarks and to direct them specifically at Jensen establishes this was not mere shop talk, but rather was intentionally malicious. Thus, it is concluded that this incident was not trivial nor was it mere shop talk.

The Employer's work rules include a policy on sexual harassment which prohibits:

> "verbal or physical conduct of a sexual nature including ... abusing the dignity of an employee through insulting or degrading sexual remarks or conduct." 1/

The grievant was aware of this policy having signed that he received a copy on November 14, 1991. 2/ Furthermore, the policy is very similar to EEOC guidelines and sexual harassment is illegal under both federal and state laws and is against public policy. The Employer is obligated to provide an environment free from such abuse and conduct so all employes have a place to work without being subject to sexually demeaning remarks.

The Employer claimed that the grievant's conduct had continued since the Christmas season of 1993. Jensen testified that during this period the grievant frequently would holler "blow job" and hold his crotch and jump around when he saw the grievant. I have not credited this testimony as it was not corroborated, and if it occurred in the plant, management should have observed it and taken action. Additionally, the termination report is too cryptic to determine if the discharge involved other incidents other than the May 28, 1994, incident and the undersigned finds that the discharge is limited to the incident of May 28, 1994.

The Employer conducted a thorough investigation before it took any action as indicated by the statements and report of the investigation. 3/ Thus, the Employer fairly investigated the matter.

The last issue to be decided is whether the penalty is appropriate. The Employer argues that discharge is appropriate because the conduct was a grave

---

1/ Ex. 11.

2/ Ex. 12.

3/ Exs. 7, 8, 9, 10

offense needing no prior written warning, and besides, the grievant had an active warning dated January 11, 1994, in his file, and that warning was, in part, for verbal abuse of another employe. 4/ One feature in this case is that the grievant never spoke directly with Jensen, rather Buttke directed the abusive statement to Jensen. Buttke aided and abetted the abuse of Jensen and should be held accountable in a similar fashion as the grievant. The record establishes that Buttke was given a three-day suspension. 5/ Buttke's suspension states he participated in the verbal abuse of Jensen and has engaged in willful harassment of a fellow employe. 6/ Additionally, the suspension states that Buttke's work history is "littered with verbal warnings, written warnings and even suspension for similar conduct." 7/ If this was a "grave offense" as argued by the Employer, then Buttke should have also been discharged. Buttke was an active participant and should be held equally accountable for verbally abusing Jensen.

There are some factors justifying a difference in discipline between the grievant and Buttke in that the grievant had an active warning on file and Buttke did not. Also, the grievant was the instigator and Buttke was not. Jensen had previously informed the grievant that he was offended by these comments. Thus, there were some factors justifying different discipline, but the undersigned finds that these are insufficient to justify Buttke getting only a three-day suspension and the grievant getting discharged. There was disparate treatment in the penalty.

As for the appropriate penalty, the undersigned concludes that the grievant should be reinstated but without back pay and benefits but with no loss of seniority. The grievant was the instigator and was guilty of the misconduct of verbally abusing a fellow employe. He had an active warning notice which was, in part, for abusing a fellow employe. The grievant deserved greater punishment than Buttke, but not a discharge. Thus, under these circumstances, the Employer is directed to reinstate the grievant without back pay and benefits because of the disparate treatment in the punishment of him and Buttke and for that basis only.

4/ Ex. 13.

5/ Ex. 5.

6/ Id.

7/ Id.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The Employer did not have just cause to discharge the grievant and it shall immediately reinstate him without loss of seniority but without back pay or benefits.

Dated at Madison, Wisconsin this 10th day of November, 1994.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator