BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

AMERICAN NATIONAL RED CROSS
(BADGER-HAWKEYE REGION)

and

LOCAL 1558, AFSCME, AFL-CIO

Case 23
No. 53002
A-5359

Appearances:

Axley Brynelson, 2 East Mifflin Street, Post Office Box 1767, Madison, WI 53701-1767, by Mr. Michael Westcott, Attorney at Law, appearing on behalf of the American National Red Cross.

Wisconsin Council 40, AFSCME, 8033 Excelsior Drive, Suite B, Madison, WI 53719-1903, by Mr. Laurence Rodenstein, Staff Representative, appearing on behalf of Local Union 1558.

ARBITRATION AWARD

American National Red Cross (hereinafter referred to as the Employer) and Local 1558, AFSCME, AFL-CIO, (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen, a member of its staff, to serve as arbitrator of a dispute over the suspension of employee Jodi Draper. A hearing was held on September 8, 1995 in Madison, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. No stenographic record was made of the hearing. The parties submitted post hearing briefs and the record was closed on October 19, 1995.

Now, having considered the evidence, the arguments of the parties, the relevant provisions of the contract and the record as a whole, the arbitrator makes the following Award.

I. Issue

The parties stipulated that the following issue should be determined herein:

> Did the Employer violate the collective bargaining agreement when it suspended the grievant, Jodi Draper, for three and a half days?
>
> If so, what is the appropriate remedy?

II. Relevant Contract Language

ARTICLE 3 - MANAGEMENT

3.0 Except as may be expressly limited by their Agreement, the Employer has the sole right to plan, direct and control the working force, to schedule and assign work to employees, to determine the means, methods and schedules of operation for the continuance of its operations, to establish reasonable standards, to determine qualifications, and to maintain the efficiency of its employees. The Employer also has the sole right to require employees to observe its reasonable rules and reasonable regulations, to hire, lay off or relieve employees from duties and to maintain order and to suspend, demote, discipline and discharge employees for just cause. The Employer has the right to assign temporarily personnel to any other duties at such times as natural and man-made disasters threaten to endanger or actually endanger the public health, safety and welfare or the continuation beyond the duration of such disasters. The Employer shall determine what constitutes a natural and man-made disaster as expressed in this Article.

. . .

ARTICLE 15 - DISCIPLINE AND DISCHARGE

15.0 A discipline procedure is intended to inform employees of proper work habits consistent with the Employer's public function, and thereby to correct any deficiencies which may from time-to-time occur.

15.1 An employee may be warned, suspended or discharged for just cause. The sequence of disciplinary action shall normally be oral reprimand, written reprimand, suspension, and discharge. Employee counseling shall not be considered as a step in the disciplinary process.

15.2 The normal sequence of disciplinary action shall not apply in cases which are cause for more severe and

immediate discipline.

15.3 Any employee receiving discipline or the Union may at its option appeal such action through the grievance procedure.

15.4 Notice of any disciplinary action shall be reduced to writing and a copy shall be provided the employee and the Union.

15.5 Any written warnings shall be removed from the employee's personnel file twelve (12) months following the event. Any written disciplinary action involving suspension shall be removed from the employee's personnel file twenty-four (24) months following the event.

15.6 An employee may inspect his personnel file for non-confidential matters at any reasonable time provided he has permission from his supervisor which shall not be unreasonably denied.

15.7 When a supervisor is going to discuss a matter of discipline with an employee, the employee shall have the right to request the presence of a steward or officer of the Union.

IV. Pertinent Work Rules

Work Rules

Work rules are necessary for the orderly operation of our organization as well as for the benefit and protection of the rights and safety of you, the employee. Since the Dane County Chapter/Badger Regional Blood Services wants to be fair and impartial in its employee relations, this published list of work rules and penalties for violation is outlined to prevent misunderstandings.

Violation of the following rules is considered serious and will subject the offending employee to disciplinary action up to and including immediate termination of employment without prior warning:

. . .

12) Threatening, intimidating or coercing employees or volunteers on ARC property at any time for any purpose.

. . .

Violation of the following rules will subject the offending employee to progressive disciplinary action. The normal progressive disciplinary process shall be: Oral reprimand, written reprimand, suspension and termination of employment. These rules are viewed as a common group and violation of any rule in this category shall be considered cause for the appropriate disciplinary step. An example of the application of disciplinary action for violation of work rules in this category would be: First violation of any rule in this category results in oral reprimand, second violation of any rule in this category results in written reprimand, third violation of any rule in this category results in suspension, etc.

. . .

18) Loitering, loafing or disruption of normal work activity.

. . .

Since it is impossible to list all forms of behavior that could be interpreted as employee misconduct, the employer reserves the right to take appropriate disciplinary action should conditions or acts of questionable conduct occur that are not included herein.

IV. Background

The Employer supplies blood and blood products to hospitals in the Midwest from facilities in Madison and Green Bay, Wisconsin. The Union represents the non-professional employees of the Employer, including those in the Madison laboratory. The Employer has acted as an autonomous region of the American Red Cross in the past, but has recently been part of a nation-wide centralization process. This process has been prompted by a federal court consent decree in litigation brought by the Food and Drug Administration to safeguard the blood supply. One side effect of the centralization process is the planned closing of the laboratory in Madison and the transfer of its work to Minnesota. This closing will result in the loss of many jobs at the Madison facility. Another impact of the consent decree has been the establishment of a quality assurance function at the national level with responsibility for, among other things, independently monitoring work in the regional operations. Quality assurance officers have the authority to close regional laboratories if required procedures, including documentation of procedures, are not

adhered to. Such a closing may be temporary or permanent, depending upon the severity of the defects in the operation. Another part of the quality assurance process was a requirement that all employees sign statements agreeing to report errors by other employees or be disciplined for failing to report. Employees came to refer to this requirement as "the snitch rule" and it was the focus of much controversy when it was introduced.

In 1995, there was continuing concern about a high rate of errors in the Madison lab, and it was made known to employees that on-going errors might lead to an early closing of the lab. On May 22nd, employees of the lab met with Dr. William Shafer, Senior Principal Officer of the National office. Shafer stressed the need to be accurate, and reinforced concerns that an early closing might result from bad quality work. He advised the technologists that they would be required to submit additional paperwork for review, and also announced that the permanent closing of the viral lab would take place in August, somewhat earlier than had been expected.

The grievant, Jodi Draper, has been employed as a laboratory technologist in Madison for four years. She was not present at the meeting with Shafer. When she came to work the next day, her co-workers apprised her of Shafer's comments. Afterwards she was in the lab doing some paperwork. Julie Tans-Kersten, another technologist, was also present, and the two chatted about the Shafer meeting and the future of the lab. As they were talking, Chris Ballenger, a Quality Assurance Specialist, entered the lab. The grievant knew Ballenger, who had previously been employed by the Region as her supervisor. She interrupted her conversation with Tans-Kersten and said to Ballenger: "What would it take, sabotage-wise, to close down the lab?" Ballenger responded "Close the lab or end your career?", to which the grievant replied "To hell with my career, I want to close the lab".

Ballenger left the lab and reported the grievant's comments to Geri Schmitz, the Laboratory Director. Schmitz asked her if she believed the grievant was serious, and Ballenger told her "I take everything seriously." As part of the quality assurance program, Schmitz was required to take action in response to the comments of Quality Assurance Specialists such as Ballenger. Schmitz became concerned because Ballenger seemed to feel the grievant was serious, and because the grievant was in a position to carry through on a threat to the lab. Schmitz saw that discipline was a possibility, so she and the grievant's immediate supervisor, Vicki Kennedy, went to the Human Resources Department to consult with HR Joane Kranz and Dr. Hibbart, the facility's Medical Director, on how to proceed.

The four people discussed the situation. They considered the possibility of terminating the grievant, but disregarded it in part because it was too severe a penalty and in part because the grievant would have been too hard to replace. After reviewing the grievant's file and noting that she had two written warnings -- one from July of 1994 for noting incorrect times on an HTLV-I incubation and one from February of 1995 for using an incorrect pipetting procedure -- they settled on a suspension of three and a half days. Schmitz met with the grievant and advised her that she would be suspended. The grievant protested the suspension. She acknowledged that her

comments might have been inappropriate, but asserted that they were made in a joking manner and were meant to be taken seriously.

The grievant served her suspension and filed the instant grievance. After her return from suspension, she returned to her normal duties in the lab. The Employer did not take any steps to monitor her activities upon her return, other than to review her documentation of tests more carefully than in the past. Additional facts, as necessary, will be set forth below.

V. Positions of the Parties

A. The Position of the Employer

The Employer takes the position that the grievant was suspended for just cause, and that the grievance should be denied. The sufficiency of the employer's case is established by a review of Arbitrator Daugherty's familiar seven question test of just cause. The first element of the test is whether the employee had knowledge of the rules, and the grievant was in possession of a copy of the work rules which clearly prohibit the types of threats that she made. Even if there was no specific rule, conduct which any reasonable person knows is obviously wrong will still support discipline. The second question is whether the rule is reasonable, and the rules involved here are standard rules of conduct in virtually any work place. Moreover, the employer is operating under a stringent consent decree aimed at safeguarding the integrity of the blood supply. Responding to threats of sabotage is obviously a reasonable action in these circumstances.

The third, fourth and fifth legs of the Daugherty test look to the sufficiency of the investigation and the information supporting the conclusion that the grievant was guilty as charged. In this case, Ms. Schmitz questioned Ms. Ballenger and then asked Ms. Draper for her side of the story. These two were the principals to the conversation. Draper admitted the conduct, confirming Ballenger's story. Plainly the investigation was above reproach and it conclusively established the grievant's guilt.

The sixth question posed by Daugherty is whether the rules have been applied even-handedly, and this is not a factor in this case. The Human Resources Director, Mr. Ridgely, testified without contradiction that all rules have been uniformly and consistently enforced.

The final question goes to the severity of discipline in relation to the seriousness of the offense. Notwithstanding the fact that the rules would have allowed a summary discharge for threatening the operation of the lab, the Employer applied the principles of progressive discipline to the grievant. She had already received two written reprimands within the preceding year, and the normal progression would have been to a suspension. That is the progression the Employer followed. Despite attempts by the Union to paint this grievant as an outspoken employee advocate who was the target of either animus by the employer or personal hostility from Ms. Ballenger, there is simply no credible evidence that she was treated differently than any other worker would

have been under the same circumstances. She may have held strong views on labor relations, but she had never filed any retaliation charges against the Employer, which strongly indicates that there was no retaliation. As for her relations with Ms. Ballenger, the Union utterly failed in its effort to show that Ms. Ballenger had tried to have Ms. Draper fired at some point in the past. The only record evidence on that incident is that Ms. Ballenger campaigned to have the grievant retained as an employee.

The Employer rejects the efforts of the grievant and the Union to mitigate her conduct. Even though the Union argues that her remarks should not have been taken at face value because no reasonable person would deliberately close the lab that provided their employment, the Employer notes that the grievant had just learned that the closing had been moved up to August, and did not know at that time whether she would be laid off. Draper claims, after the fact, that her comments were a joke, but she never indicated that to Ms. Ballenger and the evidence shows that far from being in a lighthearted mood, the grievant was very angry at the time these comments were made. She also claims, in the alternative, that she was just venting her frustrations. Frustration does not cloak an employee with the right to make threats. Apparently as a third possibility, she claims she was merely asking Ballenger what level of innocent mistakes would finally cause the Quality Assurance personnel and/or the federal government to close down the lab. None of these explanations is credible, and the Employer was not only justified in taking her threats seriously, it was obligated to take them seriously.

Regardless of whether the grievant was joking, venting or speaking in earnest, her comments were inappropriate in the environment of the consent decree and the tension in the lab. She was in a position to carry through on her threats, and the Employer had every right to treat them as a serious matter. The decision to discipline her was more than justified, and a three and a half day suspension is a reasonable penalty. Thus the grievance should be denied.

B. The Position of the Union

The Union takes the position that the suspension was not supported for just cause and should be rescinded. The grievant is accused of making threatening comments about the laboratory. While the Union concedes that she made at least a portion of the statement attributed to her by Ms. Ballenger, no reasonable observer could have interpreted her comments as more than black humor and exasperation at the uncertain future of her work place. She asked what it would take to close down the lab. This question was directed to the supervisor responsible for quality control, a person viewed as the "cop on the beat". Surely, the Union argues, a person who seriously intended to do some sort of harm would never announce that intention to a supervisor, much less ask the supervisor how to accomplish it. Just as surely, an employee would not conduct an act of sabotage which would close the lab in which she was employed. The grievant's question was obviously rhetorical in nature, and the two listeners -- Ballenger and Tans-Kersten -- at least initially took it as such. Tans-Kersten took as kidding and ignored it. Ballenger, despite her claim that she thought the grievant might do some harm to the lab, took no steps to have her monitored

or to safeguard the laboratory from her.

The Union notes that arbitrators have long understood the difference between shop talk and serious threats. What constitutes a threat in one set of circumstances may simply be blowing off steam or joking in another. Applying this real world standard, arbitrators have excused or reduced discipline in many cases where the alleged threatening comments were far more inflammatory, abusive and purposeful than those made by the grievant.

Even if some measure of discipline were justified by the grievant's comments to Ballenger, the Union argues that a three and one-half day suspension is far too severe a response. The grievant's work record shows two written reprimands for procedural errors in the lab. The general rule is that a progression of discipline requires some clear relationship between offenses, and neither of the grievant's reprimands can be made to somehow relate to a charge of making threats against the employer. Thus there is no justification for the employer's decision to use a suspension, much less a suspension of three and one half days, to correct her behavior in this case.

The Employer obviously over-reacted to the grievant's comments. They cannot credibly be characterized as a threat and the discipline should therefore be set aside and the grievant made whole for her losses.

VI. Discussion

Discipline for speech unaccompanied by any action must be carefully examined in the context of working pressures and accepted standards in order to determine whether it is meant seriously or merely reflects the rough and tumble way of communicating common to many work places. The grievant was suspended for three and a half days for making threats in violation of the work rules #12 and #18:

> 12) Threatening, intimidating or coercing employees or volunteers on ARC property at any time for any purpose.
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> . . .
>
> 18) Loitering, loafing or disruption of normal work activity.

Clearly an employer in so sensitive a field as processing and distributing blood products has a duty to safeguard its product, and if the grievant actually threatened to sabotage the lab she is subject to severe discipline. She claims to have been engaging in black humor, and she told Schmitz she was joking when she was asked what she meant by her comments. There is no way to know what her state of mind truly was when she spoke to Ballenger, but the arbitrator is not required to engage in the hopeless task of determining actual subjective intent. The test instead is whether a reasonable person in Schmitz's place would have concluded, under all of the circumstances, that the grievant was making a serious statement of intent to sabotage the lab.

There are several factors that could have led Schmitz to believe the threat might have been

sincere. Morale at the facility was by all accounts terrible, particularly in the wake of Shafer's visit the day before. There was general hostility to the national organization and its takeover of the regions. Employees in the lab, including the grievant, had good reason to believe that their careers would come to an abrupt end in the near future. In this environment, a threat of sabotage would not be as unthinkable as would normally be the case, and the grievant was in a position to carry out such a threat.

Balanced against the factors supporting the possible sincerity of the threat is the fact that it was made to the Quality Assurance Specialist, the person charged with insuring that deficiencies, deliberate or inadvertent, did not appear in the lab's work. The parties to this dispute all analogized the QA Specialist to a cop on the beat in the lab. Carrying this analogy forward, one comes very close to the old formulation of the English M'Naghten Rule -- would the suspect have taken his action if he had a constable at his elbow? This rule, of course, was the test for insanity in criminal cases. In this case the question would be phrased as whether a person who was seriously contemplating sabotage would discuss her intentions with the person in charge of preventing such actions. I find it very difficult to answer this question "yes", and I frankly do not see how Schmitz could have done so.

The grievant assured Schmitz that she was not serious. Julie Tans-Kersten, the only other person present when the comment was made, took it as venting frustrations rather than serious talk. 1/ The circumstances in which the comments were made were not consistent with a serious threat. There is nothing in the grievant's background to suggest that she would engage in sabotage. Even the Employer's actions in merely suspending the grievant and allowing her to then return to work without close monitoring were inconsistent with a belief that she seriously intended to do any harm.

Certainly Schmitz had every right to call the grievant in and question her about her comments. She was not in a position to simply ignore the matter, particularly when it was being taken seriously by a QA Specialist with the independent authority to shut down the lab. However,

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1/ The record does not reflect that Schmitz ever asked Trans-Kersten what she saw and heard during the exchange between Ballenger and the grievant. Instead, in her meeting with the other managers, Schmitz arrived at a penalty and then spoke with the grievant solely to determine whether the statements were made. As noted, the grievant confirmed the general content of the statement but disclaimed any serious intent. Where there is a material disagreement between two parties to a conversation, interviewing the only other witness as to her understanding of what was meant is a fairly basic step. The discipline in this case was supposedly imposed not just for what was said, but for what was meant. The failure to interview Tans-Kersten strongly suggests that Schmitz simply took Ballenger's version of the conversation at fact value and was not concerned with other, possibly innocent explanations for the grievant's comments.

the QA Specialist does not have the authority to impose discipline, and her sense of the situation cannot control the response of the region's management. When Ballenger was asked whether the grievant should be taken seriously and said in response "I take everything seriously", it should have been a strong indication that someone with a more balanced perspective was needed to make the judgment.

There are circumstances in which even a statement which is obviously meant as a joke will lead to sanctions, without regard to intent. The most commonplace example is talking about bombs in an airport. Where such rules are in effect, people are given clear notice of them. The Employer's work rules do not give that type of notice to its employees. Neither work rule #12 nor #18 are susceptible to a reasonable reading which imposes discipline for making a joke or venting frustration unless the manner in which it is done is itself disruptive. The grievant here is being disciplined for the content of her comments rather than the manner in which they were being made. If the Employer wishes to regulate the content of employee speech it must, at a minimum, give clear notice of such regulation.

The Employer may believe that only a jackass would make the type of comments made by the grievant, given the tension in the workplace and the sensitive nature of the work. There is a difference between proving that someone is a jackass and proving that she is an aspiring saboteur. The Employer's burden in this case is to prove the latter proposition and since a reasonable person under all of the circumstances could not have viewed her conversation with Ballenger as a serious threat to sabotage the lab, I have concluded that there was not just cause for discipline.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The Employer violated the collective bargaining agreement when it suspended the grievant, Jodi Draper, for three and a half days. The appropriate remedy is to immediately rescind the suspension, remove any reference to it from the grievant's personnel file and make her whole for all wages and benefits lost as a result of the suspension.

Dated at Racine, Wisconsin this 30th day of October, 1995.

By Daniel J. Nielsen /s/
Daniel J. Nielsen, Arbitrator