BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL UNION NO. 140

and

SPARTA MANUFACTURING COMPANY

Case 37
No. 53827
A-5450

Appearances:

Arnold and Kadjan, Attorneys at Law, by Mr. Donald D. Schwartz, appearing on behalf of the Union.

Lindner & Marsack, S.C., Attorneys at Law, by Mr. Dennis G. Lindner, appearing on behalf of the Company.

ARBITRATION AWARD

Laborers' International Union of North America, Local Union No. 140, hereinafter referred to as the Union, and Sparta Manufacturing Company, hereinafter referred to as the Company, 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 Company, 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. Hearing was held in Sparta, Wisconsin, on March 27 and April 11, 1996. The hearing was transcribed and the parties filed post-hearing briefs which were exchanged on May 29, 1996.

BACKGROUND:

The Company is a grey iron foundry which makes cylinder sleeves for small and medium size reciprocating engines. The grievant was hired by the Company on May 28, 1973, and was employed in maintenance the entire time he worked for the Company. The grievant was the shop steward since 1978. The Company does business with a vendor named Advanced Electric of LaCrosse, Wisconsin, which supplies electrical equipment, primarily electric motors and provides repair services to various equipment used by the Company. Advanced Electric would send a deliveryman on a route from its LaCrosse shop to deliver and pick up equipment that had been repaired or needed repairs and the deliveryman would stop at customers on a regular basis, usually

once a week, whether or not there were any deliveries or pickups. On January 25, 1996, Jodi Paul, Advanced Electric deliveryman stopped at the Company's maintenance shop. Paul had no delivery to make nor was there any equipment for him to pick up. Paul encountered the grievant at the maintenance shop, and according to Paul, the grievant stated to him:

> You can not (sic) tell me you wouldn't like it with a man.
>
> You can put your nuts on this beard and your pecker in here (meaning his mouth).

Paul also stated that the grievant pulled down his pants but not his underwear and said, "You can't tell me you wouldn't like this." Paul just looked away and presently the Maintenance Supervisor, Joe Losinski, came up and told Paul that if he was being harassed he should write it down. Paul then returned to his truck and went back to Advance Electric in LaCrosse. The next day on January 26, 1996, Paul talked to his employer about what had occurred and Paul told him what happened. Paul's employer gave him a typed sheet with a series of questions such as what, where, when, who, etc., essentially dealing with sexual harassment. Paul took the form home and typed it up. On Monday, January 29, 1996, the Company received a fax from Advanced Electric which was Paul's statement and a handwritten note to the effect that Advanced Electric would not send any of its employes to the Company unless steps were taken to insure a safe working environment for the deliverymen. The Company's Vice President and General Manager, Aaron Gesicki, received the fax and spoke to the Maintenance Supervisor and several maintenance employes, including the grievant. The grievant admitted he knew Paul but denied that he talked with him, interacted with him, did anything or observed anything on January 25, 1996. Gesicki suspended the grievant pending further investigation. The next day Gesicki interviewed Paul and another employe at Advanced Electric. Gesicki questioned Paul about the January 25, 1996 incident as well as a different incident on January 19, 1996, as well as on other days. An employe, identified as "Tiny," was present at the January 19, 1996 incident and Gesicki, from the description, determined that "Tiny" was Sid Helgesen, who in his interview with Gesicki had not seen, heard or said anything and could not confirm or deny that anything happened. On February 14, 1996, the grievant was discharged for sexual misconduct. The matter was grieved and appealed to the instant arbitration.

ISSUE:

The parties stipulated to the following:

> Was the grievant discharged for just cause?
>
> If not, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE V

SENIORITY

. . .

Section 5.

An employee shall lose his seniority for the following reasons:

(a). If he resigns.

(b). If he is discharged for proper cause.

(C). If he fails to notify the Company after being absent three (3) consecutive days.

(d). If he has performed no work for a period exceeding one-half of his seniority, or for a period of twenty four (24) months, whichever in (sic) less.

. . .

ARTICLE IX

GENERAL PROVISIONS

Section 1. Management

Subject to the provisions of this Agreement, the management of the plant, property and business of the Company, the direction of the working force, including the right to determine who shall be hired, promoted, demoted, transferred and/or assigned to jobs, to suspend, discipline and discharge employees for cause, to increase or decrease the working force, and to determine the products to be handled, produced or manufactured and the methods, processes and means of production or handling shall be vested exclusively in the Company. Suspensions, discipline and discharge shall be subject to the grievance and arbitration procedures provided in Article III

hereof. Any employee who is promoted, demoted or

transferred by the Company contrary to his own desires shall not suffer any loss of seniority as a result of such promotion demotion or transfer.

. . .

Section 11. Disciplinary Procedure

(a). In the event of the issuance of any form of disciplinary action against any member of the bargaining unit for a violation of a posted work rule or excessive absenteeism, the following progressive disciplinary procedure shall be followed:

1st Step - verbal warnings with written confirmation to the shift steward
2nd step - written warning
3rd step - 3 day layoff
4th step - subject to discharge

COMPANY'S POSITION:

The Company's arguments can be summarized as follows:

1. The evidence establishes the grievant made the offensive, obscene, sexual comments to Paul on January 19 and 25, 1996. It argues that Paul had no reason to fabricate his statement and was a credible witness, whereas the grievant denied everything and admitted nothing. It asserts that the grievant's denials are beyond belief.

2. The grievant's gross misconduct warranted termination. It observes that his comments to Paul were extremely vulgar and abusive and were directed to a vendor/supplier which resulted in the Company having to deliver and pick up motors and equipment, a service previously provided by the vendor/supplier. The Company takes the position that the grievant's conduct was so serious that progressive discipline was not required and was similar to prior discharges for theft and willful destruction of property. It insists that blatant sexual misconduct directed at a customer or vendor/supplier or member of the public warrants discharge.

3. The supervisor did not engage in any sexual harassment or misconduct which would negate or mitigate the grievant's termination. The Company contends that the allegations against the supervisor were created for the hearing as a mitigation defense to the grievant's discharge. It points out that while a number of grievances were filed by the Union against the supervisor, none were filed on the happy face on the mirror incident or the shower incident.

4. The grievant's discharge was not based on any anti-union motivation. The Company points out that the Union's focus of attack was Supervisor Losinski, a former Union steward at his prior employment. It submits that Losinski's actions were proper and discipline had been expunged from the grievant's file in August, 1995, so the grievant had a clear record. Additionally, the Company observes that it was Gesicki who investigated and made the decision to terminate the grievant and Losinski was not involved in the decision. The Company maintains that the Union was grasping at straws when it brought up an incident that occurred three years earlier involving discharges by Gesicki which were resolved and the employes reinstated. It insists that this is nothing but a fabricated charade to minimize the grievant's misconduct. It requests that the grievance be denied and dismissed.

UNION'S POSITION:

The Union's position can be summarized as follows:

1. The Company's burden of proof in this case is greater than a preponderance of the evidence and should be proof beyond a reasonable doubt or clear and convincing evidence. It contends that under either of these standards the Company's uncorroborated allegations concerning one incident cannot support the discharge.

2. No just cause for the discharge. The Union argues that the evidence failed to establish that any sexual harassment occurred. It attacks Paul's testimony as uncorroborated and not credible. It notes there was no physical contact and the allegations were denied by the grievant and another witness. The Union also points out that the Company has no sexual harassment policy and never warned the grievant that sexual harassment could lead to discharge. It claims that the Company conducted a faulty investigation, simply accepting Paul's statements as true and giving no credence to the grievant or an eyewitness. It alleges that Gesicki's failure to consider the grievant's work record to determine the proper level of discipline and his failure to engage in an impartial investigation mandates that the discharge be overturned. The Union states that whether or not the incident occurred, the Company was required to follow the progressive discipline scheme set forth in the contract and it failed to consider the grievant's unblemished 23 year record. The Union maintains that the Company's claim of inconvenience in now dealing with the vendor is irrelevant and of little consequence and should be given no weight.

3. The grievant was subjected to disparate treatment. It asserts that Supervisor Losinski engaged in a number of incidents of harassment including sexual harassment and nothing was done despite Losinski's short term employment. It argues that the grievant was not treated similarly and should be reinstated.

4. The grievant was terminated based on anti-union motivation. It takes the position that Losinski repeatedly engaged in anti-union and anti-grievant conduct based on the grievant

being the shop steward. It claims that Losinski wanted to get rid of the Union and the grievant. It also claims Gesicki demonstrated anti-union animus and this is an impermissible motive for the discharge. It concludes that the record as a whole leads to only one conclusion, the grievance must be sustained.

DISCUSSION:

The Union has raised an issue with respect to the burden of proof asserting that in cases where allegations of moral turpitude are involved, a higher standard is required and because of the stigma attached to sexual harassment, the burden should be "beyond a reasonable doubt," or alternatively, clear and convincing evidence. The standard "beyond a reasonable doubt" is a criminal standard and the stigma associated with dismissal is obviously less severe than a criminal conviction with loss of liberty and other consequences. Therefore, proof beyond a reasonable doubt is not the appropriate burden of proof. Both state and federal laws obligate employers to prevent sexual harassment in the work place and employers can be subject to substantial penalties for violation of said laws. It is the public policy for employers to provide a work place free of sexual harassment and an impediment to this policy would be to require a higher standard of proof beyond a preponderance of the evidence to discipline or discharge a transgressor whose conduct could subject an employer to penalties based on such conduct. Thus, the undersigned finds that the appropriate burden of proof is the preponderance of the evidence.

The main issue in this case is whether the grievant engaged in the conduct alleged by Paul. Paul's testimony was straight forward and consistent. The grievant denied that anything occurred on January 25 and/or 19, 1996. The issue of credibility is squarely presented to the undersigned. In assessing credibility, the undersigned has considered what Paul's reason would be to fabricate a story about the grievant. Paul testified credibly that he was concerned about his job and didn't know how his boss might react to his reporting the grievant's conduct. Why would someone concerned about losing his job make up a story about someone where there has been no credible evidence of animosity between them. Furthermore, if Paul was concocting a story, he would have hardly reported that the grievant pulled down his pants but not his underwear. This has the ring of truth. If Paul was fabricating, his report would most likely have stated that the grievant exposed himself. It does not but states that the grievant did not pull down his underwear. The undersigned concludes that Paul's testimony is very credible. On the other hand, the grievant has an interest in denying the allegations as his job is in jeopardy. The undersigned finds that the grievant is not credible based on his possible job loss as well as his demeanor. His testimony with respect to a prior incident where he refused to help Paul take a part to the truck is simply not believable. Thus, the undersigned concludes that the evidence establishes that the grievant engaged in the conduct to which Paul testified. Additionally, the comments by the grievant to Paul as well as the grievant's conduct are offensive to any reasonable person.

The Union has asserted that the Company has not promulgated a sex harassment policy.

The evidence does not indicate that the Company has a sex harassment policy; however, the undersigned does not find that this is a defense to the grievant's misconduct. A policy is designed to provide a work place free from sexual harassment and free from a hostile or offensive work environment. The instant case does not come within a classic sexual harassment case; rather, this case falls into the category of offensive comments to an outsider, in this case an employe of a vendor/supplier similar to a customer or a member of the public. The present case is not one employe harassing another; rather, it is offensive conduct directed toward a non-employe. As to the Union's claim that the grievant was not warned about such conduct, no warning is necessary because any employe would or should know that such conduct is unacceptable. The grievant's denial is tacit acknowledgment that such conduct is improper. Therefore, these defenses are without merit.

The Union's claim that the Company conducted a faulty investigation because Gesicki believed Paul and not the grievant and Helgesen is without merit. Gesicki's credibility determinations do not establish that he was not impartial such that the investigation was improper. Additionally, the failure to take into account the grievant's work record does not go to the investigation results but rather is a factor in the amount of discipline for the wrongdoing uncovered in the investigation. Therefore, the Union's claim of a faulty investigation is not proved.

The Union argues that the Company was required to follow the progressive discipline scheme pursuant to the contractual provisions. It asserts that progressive discipline must be followed and discharge is only appropriate if the accused is shown to be beyond the possibility of rehabilitation. The evidence showed that on at least two occasions, theft and deliberate destruction of Company property, progressive discipline prior to discharge was not given. The undersigned finds that the seriousness of the offense determines whether progressive discipline is required. Serious offenses such as theft, assault, sabotage, fighting, etc., can result in immediate discharge. Also, a single serious incident of sexual harassment can result in immediate discharge. 1/ Thus, the failure to follow progressive discipline as set forth in the contract is not a prerequisite to a termination for sexual harassment.

The Union maintains that the Company failed to take into account the grievant's unblemished work record in determining the penalty and with 23 years of service, the Company owes the grievant a second chance. This factor will be discussed later in this decision in determining whether discharge was the proper penalty.

The Union claims that there was disparate treatment of the grievant because he was discharged and Losinski engaged in serious misconduct and was not given any discipline except "counseling" for referring to the grievant as "boy." First, it must be noted that no one including Losinski is alleged to have made insulting, vulgar and demeaning remarks to a non-employe such

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1/ Porter Equipment Co., 86 LA 1253 (Liberman, 1986).

as the grievant has been found to have done. Secondly, the allegations against Losinski have not been proved or pursued except for the "boy" comment for which Losinski was counseled. Under all the circumstances, there is no disparate treatment because there is not sufficient evidence that like conduct was not treated similarly.

Finally, the Union has asserted that the real reason the grievant was terminated was because of his Union activity. The focus of the Union argument was Supervisor Losinski but Losinski did not investigate the allegations against the grievant and made no recommendation or decision with respect to the grievant's discharge. The Union failed to show any nexus between Losinski and the grievant's discharge. Thus, any anti-union or anti-grievant motivation by Losinski, if any, was not shown to relate to the grievant's discharge and this allegation is found to lack any proof. The Union's only other assertion is a three year old incident involving Gesicki which appears to be a momentary loss of tempers and when cooler heads prevailed, the parties were back to the status quo. That this incident was later referenced by Gesicki is not sufficient to show anti-union bias was the reason for the Company's decision to discharge the grievant. Rather, it was the grievant's comments to Paul that was the basis for the Company's decision to discharge him and his past Union activity was irrelevant.

The only issue remaining in this case is the penalty for the grievant's misconduct. Even though the undersigned is not bound by any other arbitrator's decision, a review of other decisions cited by the parties is enlightening. A number of cases deal with sexual harassment in the work place but these are not really applicable here as the instant case involves comments to an outside party. The Company cites a number of these cases but usually they involve a customer or the public where the reputation of the employer is damaged. In Lohr Distributing Co., 101 LA 1217 (Fowler, 1993), comments were made by a beer delivery person in uniform to a bartender in front of customers. The arbitrator found that the conduct harmed the employer's reputation and he upheld the discharge of the delivery person who had received a final warning notice three years prior to his discharge. In Grey Eagle Distributors, 93 LA 24 (Canestraight, 1989), a beer truck driver in uniform who used abusive language to members of the public was terminated in part due to the harm to the employer's image. It should be noted that this employe was a Union steward who was disciplined 24 times in the prior four years, including five suspensions. He asserted all these incidents were untrue and were because of his supervisor's racism. In Genuine Parts Co., 79 LA 220 (Reed, 1982), a delivery driver got into a physical confrontation with another driver after pursuing that driver instead of avoiding the confrontation and was discharged based in part on the delivery driver's very little seniority. In General Telephone Co. of Calif., 86 LA 654 (Adelson, 1986) a telephone company employe who was rude to customers was discharged despite having commendations in his record. In Southern Bell Telephone & Telegraph Co., 75 LA 409 (Seibel, 1980), an outside repair technician was discharged for making repeated obscene and harassing calls to a customer. The employe was caught and arrested by the police and placed in deferred prosecution and discharge was held proper partly because the telephone company is a monopoly providing services to the public and it would not be responsible to the public if it allowed the employe to provide services to a customer. This is sort of a persona non grata case. Similarly, in Corley Distributing Co., Inc., 68 LA 513 (Ipavec, 1977), a driver who was abusive

to a brewer's employes and was banned by the brewer was properly terminated again as persona non grata as there was no other work for him.

None of these cases are sufficiently comparable to the instant case. Here, the grievant directed his comments and actions to a vendor so the damage to the public image of the Company seems remote and minor at least. There is some inconvenience to the Company as it does not have pickup and delivery services as it did before. In a number of the cited cases, the employe had a poor work record or very little seniority. In this case the grievant has over 22 years of seniority and only a verbal warning in his record. The grievant's comments and actions on January 19 and 25, 1996, were clearly offensive and made to degrade and harass Paul. Such conduct deserves severe punishment but given the grievant's long service and record, the undersigned finds that the discharge was too severe a penalty under the totality of circumstances. The appropriate penalty for the grievant's conduct is that he be reinstated with no loss of seniority but without any back pay or benefits. This penalty should be sufficient to prevent any repetition of such conduct on the part of the grievant.

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

AWARD

The Company did not have just cause to discharge the grievant, and it shall immediately reinstate him with no loss of seniority, but without any back pay or benefits.

Dated at Madison, Wisconsin, this 29th day of July, 1996.

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