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 38 No. 53828 A-5451

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 April 11, 1996. The hearing was transcribed and the parties filed post-hearing briefs which were exchanged on June 5, 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 27, 1987, as a general laborer. He later went to cupola repair and three to four years before the hearing he became a maintenance man where he did greasing, changing bearings, motors, cleaning the bag houses, fabricating, welding, cutting and he did some electrical work. On January 26, 1996, the maintenance supervisor, Joe Losinski, came in at about 5:00 a.m. Losinski noted that the maintenance area was a mess and told the grievant, Bill Bloom and Henry Vian, all maintenance men to remove some metal grating from the area. Bloom said that they hadn't brought it there and

shouldn't have to take it out. Losinski told them that the department had to work as a team. Bloom and Vian then picked up the grate and took it outside. The grievant then engaged in a conversation with Losinski and told him that he should quit harassing everybody or the same thing that happened at Northern Engraving could happen here. Some years earlier an employe at Northern Engraving shot another employe. What was stated is in dispute but after this conversation the grievant went into the shop office. Losinski also went into the shop office via a different door and turned on a tape recorder that was in his pocket. Losinski then asked the grievant about Northern Engraving. The tape reveals the following:

Supervisor: What was that -- what happened at Northern Engraving?

Grievant: Some guy got harassed and some guy just brought in a shot gun and shot him -- just like that!

Supervisor: Your (sic) kidding?

Grievant: No I ain't kidding, go down to the library and check out the newspapers and you can read all about it.

Supervisor: Humm -- You think that will happen here?

Grievant: Oh you bet, there ain't nothing but a bunch of panty waists over their and there's crazy motherfuckers here.

Supervisor: You think so?

Grievant: Ya it will happen here.

Supervisor: You think so?

Grievant: Ya.

Supervisor: Who do you think will get shot?

Grievant: Probably you!

Supervisor: Me?

Grievant: I ain't saying you but probably you.

Supervisor: Ya?

Grievant:	Your (sic) the one that's going around pullin everybody's fucking chain!
Supervisor:	You think so?
Grievant:	Ya!
Supervisor:	Oh. O.K. Well -- when that time comes I'll deal with it -- how's that?
Grievant:	Sounds good to me!
Supervisor:	All right.
Grievant:	You're the one that will have to deal with it.
Supervisor:	I've been shot at before.
Grievant:	So have I.
Supervisor:	Have ya?
Grievant:	Ya -- more than once.
Supervisor:	O.K. -- Well, I can't wait.
Grievant:	I can't either -- don't bother me.
Supervisor:	Don't bother you? Will (sic) it must bother you. Your (sic) telling me about it.
Grievant:	Well I'm just looking out for other people's welfare too.
Supervisor:	Like whose?
Grievant:	Everybody here.
Supervisor:	Oh ya.
Grievant:	Turn the tape recorder off.

Supervisor: Why is that?

Grievant: What is that! Your (sic) trying to fucking entrap me -- you stupid son of a bastard.

Supervisor: Hey. Hey.

The grievant then left the office and the supervisor reported this incident to Aaron Gesicki, the Company's General Manager. Gesicki listened to the tape and on January 28, 1996, suspended the grievant pending investigation. On February 5, 1996, the grievant was discharged. 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

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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.

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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 (sic) demotion or transfer.

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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

(b). After a period of six, (6) months from the last step of discipline as outlined above, and if the employee has no further

> discipline issued, he shall revert to the prior step of discipline. However, if no further discipline is issued to an employee for a period of one (1) year from the last step, his record shall be clean.
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> (c). Any employee determined to be using, possessing, or under the influence of alcohol or illegal drugs on Company property will be terminated from employment immediately, and not subject to any progressive disciplinary procedure.

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COMPANY'S POSITION:

The Company's arguments can be summarized as follows:

1. The evidence supports a finding that the grievant threatened the life of the supervisor in the work area and repeated it in the shop office. It argues that the grievant told the supervisor that someone might act out by shooting someone like at Northern Engraving and he repeated these comments in the shop office. It characterizes these as blatant, arrogant and without remorse as the grievant assumed the conversation was being tape recorded. It states that the grievant was angry and loud and meant to intimidate the supervisor even though the grievant did not state he would do the shooting.

2. The grievant's behavior warranted termination. The Company cites numerous arbitration decisions where discharge was upheld for employes who threatened to inflict bodily harm on a supervisor. The Company submits that progressive discipline was not required and that it had discharged an employe for theft and another for deliberate destruction of property without following progressive discipline and the grievant's abusive conduct was a major violation of the work rules for which discharge could result for the first offense.

3. There were no extenuating circumstances to mitigate the penalty of discharge. The Company claims that there was no extreme provocation to excuse the grievant's threats directed at his supervisor. It asks that the grievance be denied.

UNION'S POSITION:

The Union's position can be summarized as follows:

1. The burden of proof for a discharge is by clear and convincing evidence.

2. There was no evidence that the grievant intended to threaten his supervisor. The Union argues that in a case of an alleged threat to a supervisor, the employer must establish that the employe intended to do harm to the supervisor. It submits that the grievant never made in any way any physical assault on the supervisor. It notes that there was no evidence that the grievant lost his cool during the January 26, 1996 incident. It points out that the grievant never stated he would take action against his supervisor, only that someone might if certain conduct does not change and the grievant specifically stated he wanted to prevent harm to all persons. It claims that the grievant felt harassed by his supervisor. It concludes that, based on the above, the record does not support a claim that the grievant intended any threat.

3. The grievant was entrapped. The Union claims that the supervisor followed the grievant into the shop office, did not inform him that he was tape recording the conversation and then asked questions seeking to entrap the grievant into statements that he had no intent to make. It insists that such underhanded activity should not be condoned.

4. Progressive discipline was not followed. The Union refers to the contractual provision calling for progressive discipline and argues that a nine year employe with a clear record requires reduced discipline.

5. There was no evidence that the supervisor felt threatened by the grievant. The Union insists that the conversation on January 26, 1996, was harmless contrasted with an alleged direct threat to kill on June 14, 1995, when absolutely no action was taken against the grievant. The Union notes that the supervisor continued to work with the grievant for seven months after the June threat. It observes that after the alleged threat on January 26, 1996, the supervisor did not immediately report it but got a tape recorder and followed the grievant into the shop. It submits that the supervisor's actions belie an assertion that he feared the grievant. It asks that the discharge be overturned.

DISCUSSION:

With respect to the burden of proof in the instant case, arbitration is a civil matter and not a criminal case where the grievant's liberty is at stake and the burden of proof is the standard for civil matters which is a preponderance of the evidence. 1/

The grievant has asserted the defense of entrapment. Entrapment is a defense available to a defendant in a criminal matter where he/she has been induced by law enforcement to commit an offense which the defendant was not otherwise disposed to commit. In this case, there is no law enforcement involved and there is no showing that the grievant would not have committed a crime

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1/ Continental Fibre Drum, Inc., 83 LA 1197 (Yaney, 1984).

unless induced by law enforcement. In short, this defense is not available to the grievant in the instant case. Provocation by a supervisor may be used as a defense but entrapment only applies to the actions of law enforcement and not a civilian supervisor.

Both parties have cited a number of cases supporting their respective positions and the undersigned has reviewed a number of additional decisions. A review of the decisions by many arbitrators on conduct of the sort here reveals that the outcome varies considerably based on various circumstances. In the instant case, the Union has argued the Company had the burden of showing that the grievant intended to harm the supervisor. The undersigned does not agree. Rather than the grievant's intent, it is the impact on the person who hears the statement that is important. If a remark can reasonably be taken seriously by the recipient, it is not relevant that the maker of the remark claims he/she was joking.

The Union contends that the words spoken were ambiguous and not a direct threat of physical assault. Threats come in different forms. An employe can raise his fists and approach a supervisor and threaten to beat him and actually strike the supervisor. On the other hand, an implied assault may be highly threatening, too. For example, a statement such as "I know where you live" can be very threatening depending on the circumstances. Also, "your day is coming, buddy, and it's just around the corner" can be abusive. 2/ In the instant case, the undersigned finds that in the maintenance work area the grievant told his supervisor that he should quit harassing everyone or the same thing that happened at Northern Engraving could happen at the Company. One employe shot another employe at Northern Engraving. The grievant did not say he would shoot the supervisor but did state that there was a probability that the grievant would be shot. There was an instant replay of this conversation in the shop office. It seems quite clear that there is an implied threat that the supervisor had to change his conduct or someone was probably going to shoot him. No ambiguity is present here. The utterance has only one purpose and that is to intimidate the supervisor. The grievant's claim that he was just looking out for the supervisor's welfare just doesn't wash. Likewise, the claim that the supervisor was harassing employes is simply not supported. The evidence establishes that the supervisor asked or directed employes to clean up the maintenance area. The right of management to run and operate its business is a well accepted concept in labor relations. In this regard, supervisors can given an order and expect that it will be obeyed. There are exceptions such as undue safety risks and illegal conduct but here it is evident that the supervisor was giving a legitimate order. The grievant didn't question it, rather Bloom did, yet Vian and Bloom did the work and the evidence failed to demonstrate that they felt harassed, put upon or angry. Certainly directing someone to do what is part of his/her job can hardly be considered harassment which would provoke or justify the grievant's comments.

There was no evidence that the grievant was angry or "lost his cool" as argued by the Union, so why would he even make the statement that the supervisor should stop harassing everyone or a similar incident would occur as at Northern Engraving. There appears no rational explanation for the grievant to make the statements he made nor to repeat them unless he did it with premeditation to intimidate his supervisor. Thus, the credible evidence establishes that the grievant threatened and intimidated his supervisor.

2/ Id.

The Union has asserted that the supervisor was not threatened or fearful of the grievant. The supervisor testified he took the grievant seriously and reported the incident to the police. 3/ Additionally, the supervisor taped the conversation because of his concerns. 4/ He also reported it to his supervisor. The evidence sufficiently establishes that the supervisor was concerned and threatened and took the grievant very seriously. It is concluded that the evidence establishes that the grievant made implied threats of violence against his supervisor and the only issue to be determined is the appropriate penalty for the grievant's misconduct.

The Union has argued that progressive discipline has not been followed. Threats against a supervisor are generally considered grounds for discharge without following progressive discipline. 5/ Intimidation of a supervisor is clearly disruptive of the day-to-day functioning of the plant and is destructive of the labor relationship. The evidence also established that no progressive discipline was given before discharges for theft and deliberate destruction of Company property. Threats and intimidation of a supervisor is considered as serious an offense as theft or deliberate destruction of Company property and thus the Company was not required to follow progressive discipline as urged by the Union.

A review of arbitration cases demonstrates a wide variety of results. In Chromalloy Division - Oklahoma, 67 LA 1310 (Moore, 1977), discharge was upheld for an employe who told his supervisor to "get off his back." In National Metal & Steel Corp., 68 LA 669 (Ellsworth, 1977), an employe who told his supervisor to "shut up" was discharged. In Rockwell International, 88 LA 418 (Scholtz, 1986), an employe who told his supervisor to "go fuck himself" twice and later told his manager he could "go fuck off" was discharged. In Everfresh, Inc., 99 LA 1038 (Allen, 1992) an employe who yelled at his supervisor, "I'll take care of you and make you pay" had his discharge reduced to a ten day suspension. In Alumax Aluminum Corp., 92 LA 28 (Allen, 1988), an employe who told his supervisor, "Don't fuck with me" also had his discharge reduced to a ten day suspension. The Company and the Union have cited cases with various discipline depending on the circumstances. Each case must be decided on its own

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3/ Tr. 16-17.

4/ Tr. 14, 20, 52.

5/ United Parcel Service, Inc., 76 LA 1087 (Rubenstein, 1981); General Electric Co., 75 LA 468 (Dempsey, 1980); Hill Refrigeration, 69 LA 839 (Weitzman, 1977).

facts and circumstances. In the instant case, the evidence established that there was no provocation for the grievant's statement on January 26, 1996. There was simply no justification for the utterance other than to intimidate the supervisor. Based on the grievant's testimony, it appears that he does not have a clue that he did anything wrong. It seems clear that the grievant's conduct has so poisoned his relationship with the supervisor and the Company that his employment cannot be continued. The grievant has not indicated that his conduct would be modified or corrected upon reinstatement and the undersigned concludes that he should not substitute his judgment for the Company's under the facts and circumstances of this case and the discharge will not be set aside.

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 discharged the grievant for just cause, and therefore, the grievance is denied and dismissed in all respects.

Dated at Madison, Wisconsin, this 27th day of August, 1996.

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