BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL 43

and

MODERN BUILDING MATERIALS, INC.

Case 26
No. 55289
A-5592

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Mr. Frederick C. Miner**, on behalf of the Union.

Michael, Best & Friedrich, LLP, by **Mr. Mark E. Toth**, on behalf of the Company

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "Company", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Kenosha, Wisconsin, on September 23, 1997. The hearing was transcribed and the parties thereafter filed briefs that were received by December 17, 1997. Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

Did the Company have just cause to suspend grievant Daniel T. Dorr and, if not, what is the appropriate remedy?

BACKGROUND

The Company makes precast concrete underground structures at its Kenosha, Wisconsin, facility.

Human Resource Director Ted L. Mastos - who formerly served as a Business Agent for Local 43 and who in that capacity negotiated Local 43's last contract with the Company - met with Acting Union Shop Steward Dorr during the week of May 20, 1997, 1/ to discuss Dorr's actions in supposedly telling fellow employe Steve Pritchard to punch in contrary to the Company's directive, a charge Dorr denied.

Mastos on May 27 issued a written warning to Dorr which was not grieved and which stated in pertinent part:

. . .

> **Nature of Incident:** You directed Steve Pritchard to punch in before his start time today. Steve did follow your instruction contradicting Management direction. You then confronted and interfered with Wet Pour Lead, Tim Fugate, direction of his area of responsibility about Steve's start time. You also confronted Department 130 Manager, Tom Hammiler, about this issue.
>
> **Comment:** It is not your prerogative or responsibility to direct the work force, establish employee start times, and/or interfere with the designated area Lead and/or Manager. It is not your prerogative or responsibility to direct employees outside of your Lead responsibilities.

. . .

Mastos met with Dorr on May 27 at about 2:30 p.m. for the purpose of conducting a disciplinary meeting and to give him said warning.

Mastos testified that Dorr went "ballistic" by calling him "fucker"; by claiming that he had sold out to the Company and by calling him a "turncoat bastard"; by threatening to have Mastos fired by the end of the week; by "standing up and shaking his finger at me"; and by "trying to intimidate me out of the disciplinary action. . ." Mastos also said that Dorr walked out of their disciplinary meeting before he was done and contrary to Mastos' direct order that he remain. Mastos added that he thereafter added 15 minutes to Dorr's time card - which showed that he had checked out at 2:30 p.m. - to cover the time of said meeting.

On cross-examination, Mastos stated that he did not talk to Dorr before he issued his May 27 written warning letter and that said letter was prepared before their meeting; that he and Dorr on May 27 never discussed the earlier Pritchard incident because Dorr "exploded at that point"; that Dorr told him on May 27 that he had nothing to apologize for; that Dorr never

threatened to hit him on May 27; and that he was unaware at that time that Door was checked out and that he no longer was on the clock.

Dorr, who served as the Union's chief negotiator in the last contract negotiations, testified that he punched out at 2:30 p.m. on May 27 before he met with Mastos; that Mastos then handed him the May 27 warning letter referenced above; that he told Mastos, "This is fucking bullshit"; that he and Mastos both raised their voices; that he told Mastos he was on his own time; and that Mastos replied he was on Company time. Dorr also told Mastos that "his very presence here. . .was a direct conflict of interest" because Mastos had formerly served as a Local 43 Business Representative and because Mastos had negotiated the Union's last contract with the Company. Dorr added that he told Mastos the meeting was over "Because it became so heated that I had lost control" and because "whenever the situation arises, it's always best to leave the room." He also said that he later refused to apologize to Mastos because "there was nothing to apologize for."

Union Steward Norman Mieloszyk accompanied Dorr to his May 27 meeting with Mastos and attended said meeting. He testified "they started shouting back and forth. . ."; that Dorr then told Mastos he was on his own time; that Mastos asserted otherwise; and that Mastos told him after the meeting that he would have pulled the warning letter off the table if they could have "talked up the issue".

Sales Engineer Jeff Forgette and Mechanical Engineer Steve Hartnig overheard some of Mastos'-Dorr's May 27 conversation in their downstairs office. Forgette testified that he heard someone - later identified by Mastos to be Dorr - say in a loud voice, "fuck, fuck you"; that it sounded threatening and intimidating; and that he never heard Mastos' voice during this exchange. Hartnig testified that he "heard a lot of boisterous yelling"; that the word "fuck" was heard "a few times"; that the yelling sounded threatening and intimidating; and that he never overheard Mastos' voice. Hartnig admitted on cross-examination that he would not recognize Dorr's voice without seeing him.

Mastos met with Dorr on June 3 and then issued him a five-day suspension via the following Employee Disciplinary Report which stated in pertinent part:

> **Violation:** Using abusive, threatening and profane language toward a manager in conjunction with Work rule 3 and established arbitration decisions.
>
> **Nature of Incident:** As soon as you became aware that the topic of our May 27, 1997, discipline meeting concerned the incident in which you directed Steve Pritchard to punch in before his start time and confronted and interfered with Wet Pour Lead, Tim Fugate and Department 120 Manager, Tom Hammiler, you began

swearing, accusing Labor Relations Coordinator, Ted L. Mastos, of

various actions without basis, threaten his employment status with the company, and made other abusive statements.

You screamed that, ". . .this is my time, I'm punched out." To which I stated, "This is my time. . ." If I was not cut off, I'd have finished by stating that you will be paid for the meeting time (an additional fifteen (15) minutes was added to your time card for the meeting).

Because of your emotional outburst, I was unable to discuss the specifics of the discipline. Even though I repeatedly stated the issue was your behavior and actions, you stormed out without allowing an opportunity to discuss the issues at hand. This, despite my effort to state the meeting had not ended and you retorting that it had.

Comment: The numerous confrontations, interference, threats, and physical contact you have been involved in during your tenure at MBM is well known. Unfortunately, most are undocumented. Conduct of this nature will not be tolerated by any employee of MBM, bargaining unit or salaried. Management will not relinquish rights not negotiated to any other party. Work Rules attached to the contract specify one (1) week suspension for first offense. In an effort to identify and correct the behavior, the initial discipline was issued as a warning. It is our desire to work with employees if at all possible. Unfortunately, your actions do not allow reasoned discussion.

• • •

Mastos at that time offered to rescind the suspension if Dorr apologized and if Dorr understood that he was wrong, but Dorr refused to do so. Dorr therefore served the five-day suspension provided for in Mastos' June 3 letter and he on June 9 filed the instant grievance, hence leading to the instant proceeding. 2/

A dispute also arose between the parties at the hearing over an April 3 letter purportedly written by Mastos which discussed breaking the Union and which stated, *inter alia*: "I will continue to try to find a way to decertify the Union through over previously discussed methods." Mastos flatly denied ever writing the letter. Company president and co-owner Michael O'Connor, one of the supposed addressees of said letter, also stated that it was a total forgery and that he never had the discussion with Mastos alluded to therein.

POSITIONS OF THE PARTIES

In support of the grievance, the Union argues that the Company improperly suspended Dorr because work rule 3 - the rule he was charged with violating on May 27 - "does not apply here" because Dorr had checked out and was off-duty. The Union also asserts that Mastos provoked Dorr; that Dorr's foul language does not warrant a suspension because "the customary penalty for vulgarity is a reprimand"; that Dorr cannot be disciplined over his "advocacy of the Pritchard grievance"; and that Mastos' actions "undermined Dorr's authority as a Union steward." As a remedy, the Union requests that Dorr's suspension be overturned and that he be made whole.

The Company, in turn, contends that it properly suspended Dorr because he on May 27 "acted in an angry, abusive, threatening and profane manner. . ."; because he violated the Company's work rules which prohibit abusive and threatening behavior and insubordination; and because Dorr's second such offense warranted imposition of a one-week suspension.

DISCUSSION

In resolving the issue presented, it is first necessary to point out what this case does not involve.

It does not have anything to do with the April 3 letter which discusses how to break the Union. Both Mastos and Company president O'Connor testified that the letter is a forgery and that it was never written by Mastos. I credit their testimony, as there is not one iota of evidence in this record showing that Mastos wrote the letter.

This case also does not have anything to do with Dorr's concerted, protected activities. True, he was acting shop steward when he earlier advocated on Pritchard's behalf and it is similarly true that the May 27 written reprimand involved Dorr's actions in the Pritchard matter. However, Dorr did not grieve said written warning. Hence, it is unnecessary to determine whether Dorr acted properly in that earlier situation, as it is well recognized that an ungrieved prior disciplinary action stands. See How Arbitration Works, Elkouri and Elkouri, p. 926-927 (5th Edition, BNA, 1997).

Moreover, there is no merit to the Union's assertion that "Mastos' issuance of the written warning undermined Dorr's authority as a Union steward." Dorr's status as a union official has little to do with this case. He was called in for a disciplinary meeting on May 27, at which time he was expected to act in an appropriate manner like any other employe called in for such a meeting. Thus, even if we assume *arguendo* that he was entitled to vent some steam and exhibit some unhappiness over his written warning, that did not give Dorr the license to direct the 2-3 minute tirade of personal abuse against Mastos charged here.

The Union cites BUCYRUS - ERIE CO., 44 LA 858 (McGurry, 1965) and SINCLAIR REFINING CO., 42 LA 131 (Elson, 1964), in support of its claim that Dorr's comments and actions were protected because of his union status.

In BUCYRUS - ERIE, the grievant was not on company time; the grievant never used terms such as "fucker" and "turncoat bastard"; and Arbitrator McGurry refused to sustain the three-day suspension in part because the grievant did not work under the foreman engaged in their verbal confrontation. However, arbitrator McGurry pointed out: "There is no doubt that if the grievant's remarks were made in "Z"'s department, while the grievant was working for "Z". . .disciplinary action would be upheld." 44 LA at p. 861. Here, of course, Dorr was working under Mastos' supervision.

In SINCLAIR, Arbitrator Elson upheld a two-week suspension imposed on a union committeeman who refused to continue working and who argued with a supervisor. The Union correctly points out that Arbitrator Elson there stated: "A committeeman must be free to express himself vigorously and indeed militantly if the employes are to have an adequate advocate." 42 LA at p. 134. However, Arbitrator Elson added:

> "But it does not follow that there are no limits. Important as is the committeeman's function, he is a creature of the collective bargaining agreement and has overriding responsibility to maintain the agreement. Discipline may be in order if this responsibility is disregarded." Id. at 134.

Going on, Arbitrator Elson stated:

> "no committeeman is an island unto himself. He is part of a group of people assigned by the Union to assist employes in bringing about a fair and proper administration of the collective bargaining agreement. This involves not only responsibilities to the men and the Union but also to the Company." Id. at 136.

Here, too, Dorr is not "an island unto himself" who is free to berate and curse management at will. Rather, as a Union official, he is covered by the same work rules as all other employes, including those who prohibit employes from threatening, intimidating, or coercing other employes.

In addition, Dorr cannot excuse his outburst on the ground that Mastos had acted unethically by first serving as Local 43's business agent and then working for the Company. What Mastos did is perfectly legal. While Dorr (and others) might not like what Mastos did, Dorr has no license to berate Mastos and to treat him like dirt merely because he changed sides. Instead, Mastos is entitled to receive as much respect as any other supervisor and he has the right to have all of his orders

followed. It appears that much of the dispute here has arisen because Dorr has refused to recognize this fundamental principle.

Furthermore, while the Union tries to picture Mastos as being on some sort of vindictive campaign to punish Dorr because of his concerted, protected activities, the record shows that Mastos was prepared to drop the May 27 written warning and even the subsequent 5-day suspension if Dorr only had behaved appropriately and had apologized for his May 27 outburst. Given that, it is clear that Mastos was willing to give Dorr every possible break and that there is no merit to the Union's contrary claim. Thus, Dorr was issued the five-day suspension only because of his own actions during his May 27 disciplinary meeting with Mastos, rather than any improper effort to do him in.

The Union also argues that mere vulgarity is insufficient to warrant such a suspension and it cites several arbitration cases where arbitrators have reversed disciplinary actions imposed in the face of an employes' foul language: INTERSTATE BRANDS, 83 LA 497 (Richmond, 1984); KAISER STEEL CORP., 49 LA 507 (Jones, 1967); VETERANS ADMINISTRATION MEDICAL CENTER, 76 LA 412 (Pastore, 1981); CHALLENGE MACHINERY CO., 81 LA 865 (Roumell, 1983); SANYO MANUFACTURING CORP., 85 LA 207 (Kelliher, 1985); SOCIAL SECURITY ADMINISTRATION, 81 LA 1051 (Muessig, 1983); WHITE ENGINES, 80 LA 1038 (Curry, 1983); CITY OF LOS ANGELES, 64 LA 751 (Tamoush, 1975).

There is no need to now go into great detail regarding the facts in each and every one of these cited cases. It instead suffices to say here that all are factually distinguishable.

INTERSTATE BRANDS involved an employe who told another employe "to just push the fucking rock out" and that she was "fucking crazy" - conduct which earned him a 20-day suspension from Arbitrator Lionel Richman based upon his finding: "it is the sting intended which may convert unacceptable shop-talk into unacceptable provocation." 83 LA at p. 501. In KAISER STEEL, Arbitrator Edgar A. Jones overturned the discharge of an employe who twice told his supervisor "Fuck you" after being told by his supervisor to be more careful following an accident. Arbitrator Jones ruled: "To say 'Fuck you' to a supervisor, thus may be a friendly gesture or a gross insult, depending on the setting of the encounter. The assault on authority must be shown by further evidence." 79 LA at p. 508. In VETERANS ADMINISTRATION, Arbitrator Joseph M. Pastore, Jr. sustained a written warning to an employe who told several patients who had turned on a television set contrary to the grievant's order: "I'll fix your ass." In CHALLENGE MACHINERY, Arbitrator George T. Roumell, Jr., sustained the oral warning given to a grievant who - after being told to redo some work - told his supervisor: "You got me today, but I'll get you tomorrow." In SANYO MANUFACTURING CORP., Arbitrator Peter M. Kelliher overturned the ten-day suspension of a grievant who told a fellow employe: "You don't have to do anything [a supervisor] says, you can stay or leave, whatever you want to do." Arbitrator Kelliher found that the employer "has not shown that [the grievant] used abusive language." 85 LA at p. 211.

In SOCIAL SECURITY ADMINISTRATION, Arbitrator Eckehard Muessig reduced the grievants' three-day suspension to a letter of reprimand after telling a supervisor: "Shit, wait a minute. Did that motherfucker send you down here? I am not taking any leave, you got that? You tell motherfucker Briscoe that if he got something to tell me, then let him." His decision, though, was predicated on his finding that management did not conduct a fair investigation and that the grievant's "due process rights. . . were strained in a significant degree." 81 LA at p. 1054. In WHITE ENGINES, Arbitrator Earl M. Curry, Jr., reduced the grievant's three-day suspension to a two-day suspension after finding that the grievant told a supervisor: "I know where you're coming from, you motherfucker. You're a p --- k, and you'll always be a p --- k." Arbitrator Curry imposed a two-day suspension because the grievant's comments "went beyond mere 'shop talk'" and because another employe who used worse language was not disciplined. 80 LA at p. 1040. In CITY OF LOS ANGELES, Arbitrator Philip Tamoush converted a two-day suspension into a verbal reprimand for a librarian who called her supervisor an "asskisser", "asskissing" or "kickass" because it constituted a "first offense". 64 LA at p. 755.

This case is different from all the aforementioned cases because this was <u>not</u> Dorr's first disciplinary offense; because there is no history of disparate treatment here; because Dorr's due process rights were not violated; because Dorr did use abusive language repeatedly; and because - short of striking him - Dorr exhibited the greatest possible assault against Mastos' authority.

For here, the record shows via the combined testimony of Forgette and Hartnig - who overheard some of Dorr's tirade and whose testimony I credit - that Dorr tried to intimidate and threaten Mastos on May 27. Dorr's actions in doing so thereby crossed the line from mere vulgarity to something else.

In addition, I credit Mastos' testimony that Dorr walked out of their meeting prematurely and that Dorr refused to return to finish the May 27 disciplinary interview even after Mastos ordered him to do so. However, the Union correctly points out that Dorr was not charged with insubordination in Mastos' June 3 letter of suspension. As a result, the Company cannot now discipline Dorr over this issue since it is axiomatic that an employer's disciplinary action stands or falls on whatever disciplinary infraction is cited at the time discipline is imposed.

Since work rule 3 was the only work rule alleged to have been violated in Mastos' June 3 letter, this case is limited to whether Dorr violated said work rule.

Work rule 3 states: "Proven threatening, intimidating or coercing fellow employes on

Company property while on duty" and it provides that the first violation of this rule leads to one week off and that the second violation leads to discharge.

The Union asserts that Dorr cannot be punished under this rule because he had punched out and hence was not on duty when he met with Mastos. The problem with this claim is that Dorr was told much earlier in the day that Mastos wanted to see him and that Dorr therefore knew that his meeting with Mastos involved his employment with the Company. Thus, it was Dorr himself who chose not to show up at Mastos' office until 2:30 p.m. In addition, Dorr had the absolute right under the contract to be paid for whatever time he spent with Mastos even though he had already punched out since their meeting was work-related and since Mastos ordered him to report to his office. Dorr therefore was "on the clock" and on duty since Mastos changed Dorr's time card by adding 15 minutes to it.

The Union cites KALAMAZOO COUNTY ROAD COMMISSION, 88 LA 1049 (Lewis, 1987), in support of its contrary claim. There, Arbitrator Dawson J. Lewis found that the employer improperly discharged two employes who had alcoholic drinks during their unpaid lunch hour away from the employer's property. That is hardly the case here since Dorr's encounter with Mastos occurred on Company property and "on the clock" for the reason just stated above.

I therefore find that Dorr on May 27 violated work rule 3 by screaming obscenities at Mastos and by engaging in intimidating and coercive conduct, thereby subjecting himself to the five-day suspension provided for violating this work rule.

In light of the above, it is my

AWARD

That the Company had just cause to suspend grievant Daniel T. Dorr; the grievance is therefore denied.

Dated at Madison, Wisconsin, this 19th day of February, 1998.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

ENDNOTES

1/ Unless otherwise stated, all dates hereinafter refer to 1997.

2/ Dorr also filed an unfair labor practice charge with the National Labor Relations Board which, in turn, deferred said charge to arbitration.

AAG/gjc
5629.WP1