BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 150

and

AMERICAN BUILDING MAINTENANCE JANITORIAL SERVICES, INC.

Case 12
No. 56977
A-5728

(Peggy Thomas Discharge)

Appearances:

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., by **Attorney John Brennan,** P.O. Box 12993, Milwaukee, WI 53212, appearing on behalf of Service Employees International Union, Local 150.

Mr. Hilton Ritter, Branch Manager, 633 West Wisconsin Avenue, Suite 810, Milwaukee, WI 53203, at the hearing, and McGuire, Woods, Battle & Booth, LLP, by **Attorney Holly Ann Georgell**, 77 West Wacker Drive, Suite 4500, Chicago, IL 60601-1635 on the brief, appearing on behalf of American Building Maintenance Janitorial Services, Inc.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Service Employees International Union, Local 150 (hereinafter referred to as the Union) and American Building Maintenance Janitorial Services, Inc. (hereinafter referred to as the Company) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute over the discharge of Peggy Thomas. The undersigned was so designated. A hearing was held on February 12, 1999, in Milwaukee, Wisconsin at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and argument as were relevant to the dispute. The parties submitted post-hearing briefs, which were exchanged through the arbitrator on April 14, 1999, whereupon the record was closed. Subsequent to the closing of the record, the undersigned was advised that the Regional Director of Region 30 of the National Labor Relations Board had administratively deferred a pending unfair labor practice charge over the termination to arbitration, and was requesting a copy of the Award when it was issued.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

Now, having considered the testimony, exhibits, and other evidence, the arguments of the parties, and the record as a whole, and being fully advised in the premises, the undersigned makes the following Award.

I. ISSUE

The issue before the arbitrator is whether the Employer had just cause to terminate the grievant and, if not, what is the appropriate remedy?

II. RELEVANT CONTRACT LANGUAGE

Agreement Between Local 150, SEIU and
Milwaukee Downtown Janitorial Contractors
August 1, 1997 through July 31, 2000

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ARTICLE 2 - NONDISCRIMINATION

SECTION 2.1 - NONDISCRIMINATION: No employee or applicant for employment covered by this agreement shall be discriminated against because of membership or activities in the Union. Neither the Employer nor the Union shall discriminate for or against any employee or applicant for employment covered by its Agreement on account of race, color, religious creed, national origin, age (except as allowed by law), sex, marital status, physical handicap or veteran status or any other protected class as defined by State or Federal law. It is the policy of the Employer and the Union that the provisions of this Agreement shall be applied to all employees without regard to race, color, religious creed, national origin, age (except as allowed by law), sex, marital status, physical handicap or veteran status or any other protected class as defined by State or Federal law.

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ARTICLE 6 – SENIORITY

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SECTION 6.3: TERMINATION OF SENIORITY:
Seniority shall cease if an employee:
1) Voluntarily quits;
2) Is discharged for just cause;
3) Is laid off for a period of time that exceeds the length of his service with the company, or;
4) Any employee absent from work without notice for any three (3) days in any six (6) month period will have their seniority terminated, unless the employee can prove that communication was beyond there (sic) control.

. . .

ARTICLE 8 - GRIEVANCE PROCEDURE

SECTION 8.1 - GRIEVANCE PROCEDURE: In the event that an employee feels that his or her rights under this Agreement have been violated, a grievance may be filed and adjusted in the following manner:

1) Before filing a written grievance, the employee must present his/her complaint directly to his/her immediate supervisor within five (5) work days of the alleged contractual violation. The immediate supervisor shall have five (5) work days within which to respond in writing.

2) In the event the grievance is not resolved, a written grievance shall be prepared and presented to the account representative within five (5) work days after the immediate supervisor has responded to the grievance. The written grievance shall be adjusted and resolved in writing by the Account Representative or other representative designated by the Branch Manager of employer within five (5) work days of receipt by him/her of the written grievance.

3) If the matter is not satisfactorily resolved at that level, the grievance may be presented to the Milwaukee Branch Manager who shall give his/her written response within five (5) work days of receipt by him/her of the grievance.

4) During the steps of the grievance procedure, the aggrieved employee may have the assistance of a Local 150 Union Representative of their choice.

5) In the event that a grievance is not satisfactorily resolved as set forth herein, the charging party has the right to have the matter arbitrated. If the parties cannot agree upon an impartial arbitrator, the parties shall request the Wisconsin Employment Relations Commission appoint an arbitrator from its staff.

6) All determination and awards of an arbitrator hereunder shall be final, conclusive, and binding upon all the parties, executors, administrators, or successors.

7) For the purposes of this Article "work days" shall not include Saturday, Sunday, holidays, or any other non-work day, unless otherwise agreed by both parties.

. . .

ARTICLE 12 - MANAGEMENT RIGHTS

SECTION 12.1 - MANAGEMENT RIGHTS: The management, direction and control of operations are and shall remain within the sole discretion of the Employer. This shall include, but not be limited to, the assignment of work, determination of the products to be used, the promulgation of reasonable work standards, work rules and other facilities, the hiring, promotion, and the termination of employees for just cause, the curtailment of all or part of the Employers (sic) operation and all other functions formally and the proper function of the Employer, except as limited by the specific clauses of this written Agreement.

The Employer will discuss with the Union the effects of any changes in the hours of work and/or changes in work schedules. The Employer will not subcontract in any case where such action would result in job loss to current unit members.

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III. BACKGROUND

The Company provides janitorial services to buildings in and around Milwaukee, Wisconsin. The employes of its downtown Milwaukee operations are represented by the Union. The grievant, Peggy Thomas, had been employed by the Company for over ten years as a custodial employe at the Firstar Center. Her immediate supervisor was Charles Willis. For six years, until the time of her discharge in October of 1998, she was the steward for the 5:00 p.m. - 1:00 a.m. shift.

On October 13, 1998, the grievant arrived at the Firstar Center shortly before her shift started. She encountered fellow steward Margaret Tippet. Tippet and another steward, Bernice Wrancher, had been scheduled to have a grievance meeting with Willis about a claim by an employe named Candler that Willis had unfairly singled her out for criticism in front of other workers. The grievant asked Tippet how the meeting had gone, and Tippet replied "You know how it is -- he turns everything to his advantage." The grievant saw Wrancher in the lobby, but did not speak with her at that point. She went downstairs to the Company's office, punched in and asked supervisor Aida Ramirez if she could go back upstairs to speak with Wrancher and Tippet. Ramirez gave her permission.

The grievant spoke with the two stewards about the grievance meeting, and they said nothing had been resolved. Wrancher told her that Willis had refused to let the employe sit in on the meeting, even though it was about her grievance. The grievant asked them if the written grievance had been submitted to management, and Wrancher said she was so upset that she had forgotten to hand it in. The grievant took the written grievance with her, and gave it to Ramirez, asking that she in turn give it to Willis. The statement of the Candler grievance, which Tippet wrote on October 8th, said:

> Charles was discriminating when he was yelling at a female employer (sic) when there was 2 males (sic) employers (sic) in the room at fault also. There was no reason to disrespect or intimidate in the manner he did, causing her to get upset and go to the clinic under stress. That is harassment. Charles called the Union stewart (sic) names and said he is tired of all his employees.
>
> . . .
>
> REMEDY REQUESTED: If Charles is tired it's time to move on before somebody gets hurt.

After handing the grievance to Ramirez, the grievant went to get her equipment for the shift. Ramirez approached her and told her that Willis wished to speak with her. She replied that she didn't wish to argue with Willis, but Ramirez repeated that he wanted to see her. The grievant went to the conference room. Willis and administrative assistant Muriel Wilson were seated at the table, Ramirez stood in the doorway, and Miranda Milton-Pass was in a nearby room handing out supplies. There is some dispute about what was said, but in essence Willis asked why the Candler grievance was being filed in written form, and he and the grievant had words. In the course of their exchange, she told him he was "full of shit" and he told her to punch out. When she asked why, he told her she was suspended pending termination for cursing at him. She indicated that she had no intention of leaving, and Willis had building security called to escort her out. The grievant dropped off her keys and left before anyone from security responded to the call.

On October 27th, the Company's Personnel Manager Veronica Vinson sent the grievant a letter advising her that her employment had been terminated for violating work rule #6:

> The use of profanity, abusive language, swearing, threatening gestures or fighting with another ABM employee, supervisor, customer or tenant will cause immediate suspension pending review of your employment with ABM. Any of these will not be tolerated at any time for any reason.

The instant grievance was thereafter filed. It was not resolved in the lower steps of the grievance procedure and was referred to arbitration. A hearing was held on February 12, 1999, at which time, in addition to the facts recited above, the following testimony was taken:

Miranda Milton-Pass: Miranda Milton-Pass testified that she is a supervisor for ABM and was in an adjoining area with a view of the October 13th meeting between Willis and the grievant. She said that when Willis got the grievance form, he told Ramirez to get the grievant, because the grievance had already been resolved. According to her written statement of the incident, which was prepared in Willis's presence on October 15th, when the grievant entered the room and sat at the conference table, Willis, referring to the grievance, said "What is this? You didn't bother to come to the meeting, and this has been resolved and I'm not going to go over it again! You should have been at the meeting, you're supposed to have a meeting first before a grievance is filed, and you chose not to attend!" Referring again to the written grievance form, Willis said "In the grievance you made a statement stating that to resolve the grievance it will be to have me removed from the building. I'm not going anywhere, I'm through talking to you and you can go back to work!" According to Milton-Pass, the grievant replied "Charles, you are full of shit and your ass will be out of here, I bet you that!" Willis told her to punch out and go home and she asked why. He told her it was because she swore at him, and she said she wasn't going to leave. He ordered her to punch out and leave the building and she told him if he wanted her to leave, he could punch her out. Willis then directed Wilson to call security, and the grievant left. Milton-Pass said she never heard any profanity from Willis during this exchange. While Willis is her supervisor and was present when she wrote her statement, she denied being coerced to make a statement.

Muriel Wilson: Muriel Wilson testified that she is the Company's administrative assistant at the Firstar building, and was present for the October 13th meeting. When the grievant came in, Willis asked her what this was, referring to the grievance, and the grievant told him it was a grievance. He told her that she had not bothered to attend the grievance meeting and he was not going to discuss it with her. He noted that the grievance requested that he be removed and said he wasn't going anywhere. At that point, the grievant stood up and said "you're full of shit" and he ordered her to punch out. She asked why and he said it was for cursing at him and she should leave. She refused and Willis told Wilson to call security. The grievant left. Wilson said that she did not see the grievant punch out, even though she had

been told to. Her observation was that neither Willis not the grievant were upset during this meeting, and that they were simply having words with one another. On cross-examination, Wilson said that employes frequently use profanity but not towards supervisors. She recalled one incident when an employe told her in profane terms what he was not going to do, and she believed he was written up for it.

Hilton Ritter: Neither Aida Ramirez nor Charles Willis attended the arbitration hearing. However, Branch Manager Hilton Ritter presented a handwritten statement prepared by Ramirez on October 15th and an October 14th memorandum from Willis to Veronica Vinson setting forth his version of events. Ritter was advised that hearsay documents are entitled to less weight on disputed points than live testimony would receive.

Ramirez's statement said that Willis told the grievant the meeting to discuss Candler's grievance was at 3:00 p.m. and she did not bother to attend. The grievance had been resolved in that meeting and he was not going to go over it again. He told her that before a written grievance was presented a meeting had to be held, and she did not attend the meeting. He noted that the proposed resolution of the grievance was for him to be removed from the building and that he wasn't going anywhere. He told her he was through with her and she should go back to work. The grievant told Willis that "his ass would be out" before hers and that he was full of shit. Willis told her to punch out and go home, because she was suspended pending review for cursing at him. The grievant said she wasn't going anywhere and Willis told Wilson to call security. The grievant left before security arrived.

Willis's memorandum to Vinson recounted the events as:

. . .

> Around 5:30 p.m. Peggy Thomas came to the office as I had requested. Peggy sat down and I asked her to explain why the Union was filing this grievance since I had met with Bernice Wrancher and Margaret Tippet at 3:00 p.m. earlier in the day and felt that we had resolved all of the issues. Peggy had not attended this meeting, even though it was her who requested it. The grievance was dated 10/8/98 which was several days before our meeting and violated the correct union grievance procedure according to the SEIU Local 150 Union Agreement.
>
> I also stated to Peggy that the remedy requested in the grievance was to have me removed from the account. I told her I was not going anywhere and that our meeting was over and she could leave the meeting and go back to work. Peggy said to me that "my ass would be out before her, and that I was full of shit." At

> that point I told Peggy to punch out and go home and that she was being suspended pending termination review for cursing at me. Peggy said "I'm not going anywhere". I then instructed Muriel Wilson to call building security and have them come to the office to escort Peggy from the building.
>
> Peggy then left the office but returned and threw her keys on the table and left. Security came to the office and said they had seen Peggy on the way to the security desk to exit the property. Peggy Thomas did not punch out as requested prior to leaving.

Ritter also presented a copy of an April 24, 1998 termination letter to an employe named Duncan for threatening a supervisor. He was advised that, without some information about the employe and the circumstances of the termination, it would be difficult to say what weight could be accorded the document. Ritter presented copies of previous discipline from the grievant's personnel file, including a March 8, 1996 written warning for failing to punch out when instructed, and an April 8, 1997 verbal warning for failing to punch out.

Ritter made a narrative statement, indicating that he believed the dispute on the 13th was the Union's fault for not following the proper procedures for grievance processing. In particular, he noted that the contract calls for a first step meeting, and does not specify who has to be present. Thus the exclusion of Candler was not improper. The contract also gives the supervisor five days to give a response, so the Union was wrong to present a written grievance immediately, particularly one that was dated five days before the meeting with Willis.

Darryl Evans: Darryl Evans testified that he is the business representative for Local 150 and services the ABM contract. He said that he receives many employe complaints from the Firstar building and that most of them concern Willis swearing at employes. Evans said that he handled the grievance of the employe who swore at Muriel Wilson. The employe had responded to a work order from Wilson by saying "I already did that -- fuck you, I'm not going to do that anymore." He met with Willis on the grievance and Willis suggested that Evans counsel the employe not to use such language. On cross-examination, Evans said that he could not recall the employe's name though he did recall the meeting. He acknowledged that he received complaints from workers on accounts other than ABM, and that he had not personally heard Willis use profanity.

Peggy Thomas: Peggy Thomas testified that she was not able to be at the meeting over the Candler grievance because she was caring for a sick child. Her understanding of that grievance was that it concerned Willis meeting with three employees, two males and one female, and pounding on the table, telling the female that he was tired of her "sneaking shit." When she reported to the conference room as ordered, Willis held up the Candler grievance, pointed to the remedy section, and said "This right here is not gonna happen." Willis was

angry and shouted at her about not following the proper grievance procedures, to which she responded "You didn't follow procedures either." He told her to get her butt out of the office, and she tried to object, but he cut her off and said "Get your ass out of here and go to work." He repeated it again, then said "You're susp… no, you're fired. No, you're susp… no, you're fired. You'll never see the inside of this building again." She replied that she had been in the building longer than he had, that she saw no reason that she should leave. He told her to punch out and go home, and she protested that she hadn't done anything. He told her she was fired, and she told him he was full of shit. She waved her hand at him, threw her keys on the table and walked out. He followed her out and repeated "you're fired" several times. When she asked why, he said it was because she cursed at him. As she rode up the escalator he called her a bitch.

According to Thomas, Willis was in the habit of referring to employes in degrading ways. He called the three stewards "Snoop Doggy Dog," "Hunchback" and "Smurf," and referred to female black employes as Aunt Jemima. While there is a great deal of profanity used at work, including between Willis and the employes, Willis would not react to a man swearing at him. However, if a woman talked back to him, he would react very strongly. Thomas recalled an incident involving an employe named Eric whose vacation request had been denied. Willis called her into his office and said she should talk to Eric because he had been calling Willis a "bastard" and a "mother-fucker," among other things. She did talk to Eric, but no discipline was ever imposed in that case. She also recalled a grievance meeting involving the three stewards and another employe named Daniel, who had been disciplined. Daniel was getting upset, so Willis terminated the meeting. After Daniel left, Willis revealed that Daniel had told him to "suck his dick." Thomas said she did not believe Willis was telling the truth, but she knew there was no discipline for the alleged comment. Looking at the prior discipline presented by Ritter, Thomas said she had no recollection of ever receiving any reprimands for failing to punch out, and had never before seen the corrective actions forms that Ritter claimed to have found in her file.

On cross-examination, Thomas said she was familiar with the grievance procedure and thought there was nothing inappropriate about immediately moving to a written grievance when Willis refused to even allow Candler to sit in on the meeting over her own grievance. She said that she had never denied swearing at Willis. When shown the former personnel director's summary of a grievance meeting, which said "Ms. Thomas denied she had ever used profanity," Thomas said she hadn't even spoken in that meeting, that Vinson spoke for the Company and Evans spoke for her. She said that the Candler grievance omitted any mention of Willis saying Candler was "sneaking shit" because Tippet forgot to include it. She denied that Willis ordered her to punch out, and said she didn't punch out because she had done nothing wrong.

Bernice Wrancher: Bernice Wrancher testified that she was present for the Candler grievance meeting and that when she asked where the other people including Candler were,

Willis said he wouldn't allow them to attend. She told him it could not be resolved without all of them being present. Later she briefly explained to the grievant [Thomas] what had happened and gave her the written grievance because she had forgotten to file it.

Wrancher said that profanity was very common in the building, and that Willis cursed at her frequently. She had seen Willis curse in front of members of the public, including one occasion when he called her a "stupid bitch" in front of a bunch of people in the Galleria area. Her recollection of the grievance meeting with the employe named Daniel is that Willis claimed Daniel told him "You treat people so cruel and so dirty, you must be sucking Hilton's dick." Nothing happened to Daniel after this meeting.

On cross-examination, Wrancher said that she did not include the reference to "sneaking shit" in the Candler grievance because she did not consider the use of that term to be cursing. She recalled that she cried when he called her a stupid bitch, because her feelings were hurt, and because Willis is an ordained minister and should not speak to her like that.

Additional facts, as necessary, will be set forth below.

IV. ARGUMENTS OF THE PARTIES

A. The Arguments of the Company

The Company takes the position that the grievant was discharged for just cause. She admits to having directed profanity at her supervisor and did not return to her work when ordered to do so. She also failed to punch out when she did leave, despite a direct order from Willis to punch out. Moreover, she threatened Willis's physical safety by presenting a grievance in which the demand for relief said "Charles is tired. It's time for him to leave before someone gets hurt."

The grievant is a Union steward, but her conduct in this matter is not protected in any way. It is well established that stewards do not have the right to engage in flagrant insubordination, including the use of profanity directed personally at a supervisor. In this case, the grievant was not even acting as a steward, since it was clear that the meeting was over when she engaged in her misconduct. Moreover, a review of her conduct shows that it would not have been protected even if the meeting was on-going. In his award in TRANS-CITY TERMINAL WAREHOUSE, 94 LA 1075 (1990), Arbitrator Marlin Volz established four criteria for judging whether behavior is protected:

> (1) the place of the discussion, i.e. in an office or conference room or on the production floor; (2) the subject matter of the discussion, i.e., whether it pertained to grievances, negotiations, or administration of the contract or to

> some unrelated subject matter; (3) the nature of the employee's outburst, i.e. relevant to the argumentation of the subject matter or extraneous name calling, screaming, obscene gestures; (4) whether the outburst was, in any way, provoked by the employer . . .

Here the conduct occurred in front of three co-workers, not in a private meeting. The profanity uttered by the grievant, the written threat to his safety, and the insubordinate refusal to follow orders had nothing to do with the substance of the Candler grievance. Clearly the grievant's conduct was intended to provoke Willis. Finally, there was no provocation. The grievant's conduct fails every one of the tests set forth by arbitrator Volz.

Stripped of any special protection as a steward, it is plain that the grievant's conduct merits discharge. The arbitrator must keep in mind that she admits the misconduct, and that it is not his role to second guess management in the selection of a penalty once the underlying offense is proved. The work rules here expressly authorize management to skip steps in the progressive discipline structure when the offenses are serious enough. There are few offenses more serious than threatening a supervisor and insubordination. The grievant's record already includes a verbal warning and a written warning for insubordination, and the Company cannot be expected to tolerate this behavior anymore.

The Union's claim that management somehow condoned profanity must be rejected. Darryl Evans could not even remember the name of the employe who allegedly received only a counseling for swearing at Wilson. Wrancher's claim that Willis swore regularly is at odds with her admission that she would be shocked to hear an ordained minister swear. The supposed evidence of past incidents of profanity without disciplinary consequences are self-serving and implausible. The only solid evidence in the record is the recent discharge of an employe for directing abusive language at a supervisor.

As a steward, the grievant has a duty to follow the contract to the letter. Her conduct on October 13th falls short of any reasonable standard. On the record, she richly deserved to be terminated. Accordingly, the grievance should be denied.

B. The Arguments of the Union

The Union takes the position that the grievant did nothing wrong, and that she should be reinstated and made whole. The grievant is a steward and was presenting a grievance. Stewards acting in their official capacity owe a duty only to their members and stand as equals to Company officials. Unlike when they act in their capacity as employes, they are not under the control or direction of the Company. Thus they are entitled to a greater degree of latitude in their language and approach when they present grievances. There is a long line of cases in which arbitrators have accepted the use of even harsh and profoundly offensive language when

it is used to express a steward's views. Here, the grievant used the words "shit" and "ass" in a grievance meeting. These words are nothing remarkable in the workplace at large, and they certainly cannot form the basis for a discharge when used in grievance processing. A contrary result would chill aggressive representation and impair the protected rights of all employes.

The relatively few cases in which a steward is successfully disciplined for bad language generally involve flagrant insubordination in front of other workers. This incident took place in a Company conference room, away from the other workers. Moreover, Willis rather clearly provoked the grievant to anger, dressing her down, raising his voice, telling her he wouldn't accept the grievance, brusquely dismissing her without letting her speak, and directing profanity at her himself.

The record is clear that vulgar language is used regularly in the workplace without any disciplinary consequence, and that Willis himself is one of the chief offenders. Given this, and given that the grievant acted within the scope of the protection customarily afforded a steward, it is not possible to find just cause for discipline. Accordingly, the arbitrator must sustain the grievance and order her reinstated and made whole.

V. DISCUSSION

A. The Grounds for Discipline

The grievant was discharged for using a profanity towards her supervisor. While the Company's brief attempts to make the case that she was also disciplined for refusing a direct order to punch out and that she threatened her supervisor with physical harm, these allegations do considerable violence to the factual record of the case. Refusal to punch out is not mentioned as a grounds for termination in any of the grievance documents. Former Personnel Manager Veronica Vinson's write-up of the October 20th grievance meeting states that the suspension pending investigation was for using profanity, and that the only issue discussed in the meeting was whether that allegation was true. The letter of termination states that she was discharged for violating work rule #6, which bars the use of obscene language and gestures. While a refusal to punch out might possibly have been subjectively considered by management as part of the overall sequence of events leading to discipline, I cannot find that it was a significant factor in the termination.

As for the allegation that Thomas threatened Willis by giving him the Candler grievance, there is absolutely no basis for this conclusion. Contrary to the Company's theory, the record is clear that Thomas did not write the grievance. Tippet wrote the grievance. Moreover, counsel misreads the document. Granting that there are some strike-outs in the wording of the "Remedy Requested" portion, the arbitrator's copy says "if Charles is tired, it's time to move on before somebody gets hurt." This clearly refers back to the statement attributed to Willis in the main portion of the grievance form: "Charles called the Union

stewart (sic) names and said he is tired of all his employees." Willis himself, in berating Thomas for submitting the grievance, referred to this section and said the Union was asking that he be removed from the building, and that he was not going anywhere. He gave no indication that he regarded this as a threat of violence. As with the refusal to punch out, nothing in the grievance documents suggests that a threat of violence played a role in the discharge decision, and this interpretation was never applied to the grievance form until the arbitration briefs were filed after the hearing. Inasmuch as the form, read in context, does not constitute a threat, and since it was not taken as a threat, and since in any event the grievant did not author the form, the allegation that she made a threat to her supervisor cannot be given any weight.

B. The Grievant's Status as a Steward - Protected Versus Unprotected Activity

According to the Union, the grievant was disciplined for actions she took in her capacity as Union steward. Stewards are not immune from discipline for their conduct, but where insubordination charges are leveled as a consequence of actions taken to advocate for employes, there is a stronger degree of protection afforded a steward than to other employes. 1/ This protection does not extend to conduct which is particularly egregious or flagrant, 2/ but, in order to get beyond that threshold, if the grievant's acts were taken in her official capacity, they must by definition go at least somewhat beyond those which would ordinarily be considered "just cause" for discipline. The first issue, then, is whether the grievant was, in fact insubordinate. If so, the question is whether her conduct was protected concerted activity. If so, the next question is whether her behavior was so egregious as to strip her of the Act's protection. If the grievant was removed from the Act's protection, the final question is whether the penalty imposed is consistent with a just cause standard.

1/ See SOUTHERN INDIANA GAS & ELECTRIC, 85 LA 716 (NATHAN, 1985); MAXWELL AIR FORCE BASE, 97 LA 1129 (HOWELL, 1991); BORNSTEIN, ET AL., LABOR AND EMPLOYMENT ARBITRATION, 2ND ED. (Matthew Bender, 1997), AT §12.03(3) and cases cited therein.

2/ See TRANS-CITY TERMINAL WAREHOUSE, 94 LA 1075 (VOLZ, 1990) holding that obscenity and personal insults directed towards a supervisor while protesting managerial decisions may remove a Union president from the protection of the NLRA; See also HAMBURG INDUSTRIES, 271 NLRB NO. 108 (1984); CATERPILLAR TRACTOR CO., 242 NLRB 523 (1979); TRAVERSE CITY OSTEOPATHIC HOSPITAL, 260 NLRB 1061 (1982); UNION CARBIDE CORP., 171 NLRB 1651 (1968).

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1. Insubordination / Work Rule Violation

The grievant does not deny telling Willis that he was "full of shit" nor saying to him

words to the effect of "your ass" would be out of the Firstar Building before hers would be.

Whether these relatively mild vulgarities rise to the level of insubordination depends upon the context -- the nature of the workplace, the audience, the manner in which they were said and, most importantly, the purpose for which they were said. The central question is whether they were said for the purpose of conveying disrespect for Willis's authority or position. I believe that it is a reasonable reading of the record to say that they were. Moreover, they violate the clear terms of Work Rule #6, which bars ". . . use of profanity, abusive language, swearing, threatening gestures or fighting with another ABM employee, supervisor . . ." On the face of it, the grievant's language is contrary to an established work rule. Thus, without deciding any penalty issues such as disparate treatment, proportionality or mitigating circumstances, I conclude that the Company had just cause to at least consider discipline for the language used in the October 13th meeting.

2. Protected Activity

The Company initially asserts that this could not have been protected activity, since Willis had announced that the meeting was over before the grievant ever uttered any profanity. It is true that Willis had finished his statement at that point and had told the grievant to get back to work. However, even by his telling, the grievant had been given no opportunity to speak. It may be that Willis believes a grievance meeting can consist of summoning the steward, berating her for filing a grievance and then announcing that the meeting is over without hearing any response, but that view would come as a surprise to most persons familiar with grievance processing and the concept of concerted activity. Whether the grievant is acting as a steward does not depend on whether Willis wants her to act as a steward. I am not suggesting that the grievant could, on her own initiative, simply linger in his office and claim she was still in a protected grievance meeting. That is not what happened here. She was summoned to a meeting with a supervisor. The subject of the meeting was a grievance she had filed. The supervisor stated his position. She responded. No reasonable reading of this record could yield the conclusion that the grievant was not acting as a steward in a grievance meeting when she addressed Willis.

The Company cites Arbitrator Volz's Award in TRANS-CITY TERMINAL WAREHOUSE as offering an analytical structure for steward misconduct cases. In that case, Arbitrator Volz adopted the NLRB's ATLANTIC STEEL COMPANY 3/ test for determining whether alleged verbal insubordination is protected activity:

> (1) the place of the discussion, i.e. in an office or conference room or on the production floor; (2) the subject matter of the discussion, i.e., whether it pertained to grievances, negotiations, or administration of the contract or to some unrelated subject matter; (3) the nature of the employee's outburst, i.e.

> relevant to the argumentation of the subject matter or extraneous name calling, screaming, obscene gestures; (4) whether the outburst was, in any way, provoked by the employer . . .

3/ ATLANTIC STEEL COMPANY, 245 NLRB NO. 107, 102 LRRM 1247 (1979).

As to the first factor, the meeting was held in a conference room in the ABM office in the basement of the building. While the Company claims that the remarks were made in a work area and in front of co-workers, this is not what the facts show. Workers go to the area to get supplies, but it is not in any way analogous to a shop floor. The persons present in the room, other than the grievant, were all supervisors or management employes. Miranda Milton-Pass was in an adjoining area handing out supplies, and was within earshot of the exchange. Milton-Pass was a supervisor when she testified at the arbitration hearing, but it is not clear whether she was in the bargaining unit in October of 1998. Whether she was or not, it cannot be said that by making her comments in this location, the grievant was making an effort to show up Willis in front of the work force. Consideration of this factor would tend to show that the grievant's conduct was protected.

The subject matter of the discussion was Willis's view of how the grievant had handled the Candler grievance and what he thought of the remedy requested. This is textbook protected activity. As for the nature of her outburst, according to management witnesses, she said he was full of shit and that his ass would be out of the building in response to his statement that the remedy requested in the grievance -- his removal -- was never going to happen. This relates to the protected topic and, while it may be crude, it is not an extraneous outburst or an ad hominen attack. Consideration of the second and third factors would support the conclusion that the vulgarities were uttered in a protected context.

Finally, there is the question of provocation. Again using the management witnesses' accounts, Willis called the grievant into a meeting, delivered a monologue on her deficiencies as a steward and the implausibility of the relief requested in the grievance, informed her that the grievance was resolved when she had just been told by her fellow steward that nothing had been accomplished in the meeting, and then, giving her no opportunity to respond, summarily dismissed her, announcing that the meeting was over and she should get back to work. While his position as a supervisor entitles Willis to a certain amount of respect, the grievant's status as an equal at the shop floor level of labor relations would seem to require a corresponding measure of respect. Any reasonable person would find his approach in this grievance meeting to have been provocative.

Having considered each of the four factors identified by the Board and Arbitrator Volz as bearing on the question of protected activity, I conclude that the grievant was engaged in protected activity in her meeting with Willis on October 13th.

3. Egregious Behavior

Even protected concerted activity may be stripped of the Act's protection if the steward's behavior was "so flagrant, egregious or opprobrious so that [she] lost the protection of Section 8(a) of the NLRA." TRANS-CITY TERMINAL WAREHOUSE, at 1079. Again, this is a matter of context and the totality of the circumstances. Looking at the sequence of the meeting itself, and again using the version related by management's witnesses, Willis delivered his monologue to the grievant, who responded by saying he was full of shit, whereupon he immediately suspended her pending discharge for using profanity. This is not an employe who was out of control and screaming, or ignoring management's repeated efforts to have her end the meeting. Nor are the vulgarities used so uncommon and extreme as to be, by themselves, egregious. Indeed, the great weight of the evidence is that profanity is not uncommon in this workplace. Darryl Evans testified that he represented an employe who, in response to a direct order from Muriel Wilson, said "I already did that -- fuck you, I'm not going to do that anymore." Evans testified without contradiction that Willis's reaction to this was to ask Evans to counsel the employe not to use that kind of language. 4/ Wrancher and Thomas both testified without contradiction to an incident in which Willis told them another employe had either told him to suck his dick or accused him of sucking Ritter's dick. In either event, there was no resulting discipline. Wrancher testified without contradiction that Willis himself regularly directed profanity at employes, including calling her a "stupid bitch" in the Galleria area of the building when the public was present. Given all of this, it is impossible to conclude that either the grievant's behavior or words during the grievance meeting on October 13, 1998, were so egregious as to remove her from the protections of the Act. 5/

4/ The Company expresses skepticism about this testimony, noting that Evans could not remember the employe's name. Muriel Wilson, appearing as a management witness, was the first to testify to this incident. She did not know what discipline had been issued and she, too, was not able to remember the employe's name. The record supports the conclusion that it occurred, and Evans' testimony on the disposition of the case is both credible and unrebutted.

5/ Even in the instance cited by the Company to support its choice of penalty, the April 24, 1998 discharge of employe Duncan, while the termination letter cites the rule against profanity, the underlying discipline notice cites refusal to perform work when ordered to, directing abuse and profanity at the supervisor, refusal to follow work orders in general, a history of poor work performance, and walking off the job. On its face, that case is not comparable to the grievant's situation.

C. Just Cause for Discharge

I have concluded that the grievant's conduct on October 13, 1998, was protected by Section 8(a) of the National Labor Relations Act. Terminating an employe for statutorily protected conduct is inconsistent with a just cause standard. I would note, however, that even if the grievant was not subject to the Act's protections in this instance, discharge would not be an appropriate penalty. The grievant has over ten years of service with the Company. Her disciplinary record consists of a written warning from March of 1996 for failing to punch out when directed to do so, and a verbal warning from April of 1997 for what appears to have been an inadvertent failure to punch her time card at the end of the shift. The parties agree that the Company uses a system of progressive discipline, and it would be hard to conclude that discharge was the next appropriate penalty under a progressive system for an employe with her record. In light of the apparent lax enforcement of the rules against profanity, and the very minor or non-existent penalties imposed for far more serious cases (see discussion in Section B(3), above), such a conclusion would be impossible.

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

AWARD

The Company did not have just cause to terminate the grievant. The appropriate remedy is to immediately reinstate her to her former position, without loss of seniority or benefits, and to make her whole for her losses.

The arbitrator will retain jurisdiction over this matter, for the sole purpose of clarifying the remedy, for a period of sixty (60) days from the date of issuance.

Dated at Racine, Wisconsin, this 25th day of May, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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