BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL 577-M

and

S & M ROTOGRAVURE SERVICE, INC.

Case 3
No. 56875
A-5720

(Steve Brycki Grievances)

Appearances:

Murphy, Gillick, Wicht & Prachthauser, Attorneys at Law by **Mr. George Graf**, 300 North Corporate Drive, Suite 260, Brookfield, Wisconsin 53045, appearing on behalf of Graphic Communications International Union, Local 577-M.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by **Mr. Jack Walker**, Suite 900, Ten East Doty Street, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of S & M Rotogravure Service, Inc.

ARBITRATION AWARD

Graphic Communications International Union, Local 577-M (hereinafter referred to as the Union) and S & M Rotogravure Service, Inc. (hereinafter referred to as the Company) requested that the Wisconsin Employment Relations Commission assign Raleigh Jones, an arbitrator on its staff, to hear and decide a dispute concerning the suspension and discharge of Steve Brycki. Hearing was held on January 19 and 25, 1999, in Brookfield, Wisconsin, at which time the parties presented such testimony, exhibits and other evidence as was relevant to the grievance. The hearing was transcribed. After the hearing, the parties filed briefs and reply briefs, whereupon the record was closed on April 7, 1999. Having considered the evidence, the arguments of the parties, the applicable provisions of the contract, and the record as a whole, the arbitrator makes the following Award.

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.

ISSUES

The parties stipulated to the following issues:

1. Was the three-day disciplinary layoff of Steve Brycki on October 17, 1997 for just cause? If not, what is the appropriate remedy?

2. Was the discharge of Steve Brycki on June 26, 1998 for just cause? If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISION

The parties' 1995-99 collective bargaining agreement contains the following pertinent provision:

SECTION 11 – LAYOFF AND DISCHARGE

11.1 An employee may be laid off, for an extended period of time, subject to recall as stated below. No employee may be disciplined or discharged except for just cause. Before the discharge of a shop delegate, officer, or member of the Executive Board of the Local, the Employer must notify the Union of its intention and shall give the Union a reasonable opportunity to confer with the Employer and to call in the International for this purpose. It shall be the responsibility of the Union to notify the Employer employing such official as described above. In the event of a discharge of an employee, the Employer shall, no later than the second working day, furnish reason for such discharge in writing to the Union.

FACTS

The Company supplies electronically engraved cylinders to the packaging industry. The Union is the exclusive bargaining representative for some of the Company's employes. The position of floor helper is excluded from the bargaining unit. Grievant Steve Brycki, a 22-year employe of the Company, was in the bargaining unit. This grievance concerns Brycki's suspension and subsequent discharge.

Brycki often talked about his personal life at work. Specifically, he boasted to his co-workers about his drinking exploits, domestic disputes, bar fights and jail time. George Strobl was one employe who heard many of Brycki's war stories.

Both the suspension and the subsequent discharge emanate from an incident which occurred October 15, 1997.

Brycki worked the first shift that day. After the shift ended, he and another first shift employe, floor helper Wayne Weber, went to Brycki's house. At 4:45 p.m., the two men went to a bar, where they stayed for about the next five hours. During that period, each man consumed between four and six beers.

Around 9:30 p.m., the two men decided to return to the Company to get Brycki's truck from the Company's parking lot. There is no work rule which prohibits employes from returning to the Company's premises after their shift ends. Other employes have done so.

When Brycki and Weber returned to the Company's facility at 9:45 p.m., both went inside to use the restroom. While they were inside the plant, Brycki saw second shift superintendent George Strobl and had an extended verbal exchange with him. Before the content of their verbal exchange is reviewed, the following background is pertinent for context.

Although Strobl is a foreman, he is in the bargaining unit. He is not empowered to hire, fire or discipline employes. Strobl and Brycki have known each other for many years. Their relationship is not easy to categorize. At times, the two men have been friends, with Strobl doing favors for Brycki and getting/selling him various items. At other times, there have been hard feelings between the two men. When the latter occurred, their language toward each other was earthy and profane. The following incident illustrates both of the foregoing.

In early October, 1997, Brycki asked Strobl to get him some leather pieces for a longbow he (Brycki) was working on. Strobl indicated he would do this favor for Brycki. The leather pieces in question turned out to be difficult to find, but Strobl eventually found them and purchased them. After doing so, he brought the leather pieces into work, along with the receipt, and gave them to Brycki expecting to be reimbursed for same. Brycki however refused to accept the leather pieces or pay Strobl for them because Brycki thought the pieces cost too much. This upset Strobl who thought Brycki should reimburse him for the leather pieces. Thereafter, Strobl would not let the matter fade away, but raised it repeatedly with Brycki. When he did, Brycki would say "fuck you", to which Strobl would respond in kind. Their mutual swearing at each other was heard by several employes.

The focus now shifts back to the verbal exchange which occurred on October 15, 1997. When Strobl saw Brycki and Weber in the building about 9:50 p.m., he asked them what they were doing there, to which one of them replied "we came to check on you." Brycki and Weber then went into a work area in the plating department where they sat on cylinders and engaged in boisterous banter. After watching and listening to them for awhile, Strobl concluded that the two men were intoxicated. He based this conclusion on their slurred speech, their glazed eyes and their general appearance. Additionally, Strobl had seen Brycki intoxicated once before. Strobl then told the two men that he thought "it would be a good idea if they left", to which Brycki responded "fuck you; I don't have to leave; you can't make me leave." Strobl then said "I think you should leave" whereupon Brycki repeated the same comments he had previously made. Strobl then told the two men "you drunks should get the fuck out of here." Strobl's comments did not cause Brycki and Weber to move; they stayed where they were in the plating department. Strobl then told the two men that if they did not leave (the premises), he (Strobl) would call his supervisor and report it. Brycki responded to this by again repeating the same comments he had previously made to Strobl (i.e. "fuck you. . . "). Strobl then went into his office which was nearby and called Tony Alioto at home. Alioto is the engraving superintendent and is Strobl's immediate supervisor. Alioto is in the bargaining unit. When Alioto got on the phone, Strobl told him that Brycki was in the building; that he (Strobl) thought Brycki was intoxicated; that he had told Brycki to leave; and that Brycki refused to leave the building. Brycki then went into Strobl's office and talked to Alioto on the phone, while Strobl left his office. Alioto told Brycki to quit arguing with Strobl and leave the building, to which Brycki responded with unspecified loud profane replies. Both Strobl and Alioto then heard a loud clunk which turned out to be the phone receiver being slammed by Brycki on the desk. Brycki then walked out of Strobl's office and said something to him. What Brycki said is disputed.

Strobl testified Brycki said: "Fuck you; I don't have to leave; Come on, I'll take you outside and beat the shit out of you." Alioto, who was still on the phone line, testified he heard Brycki make this statement/threat to Strobl. Alan Carlsen, who was standing nearby, also testified he heard Brycki make this statement/threat to Strobl. Wayne Weber and Jim Kotlewski testified that Brycki did not threaten Strobl.

Strobl then walked into his office, picked up the phone, and talked with Alioto some more. Alioto told Strobl that if Brycki did not leave the premises, he should call the police. This ended the phone call. After Strobl hung up the phone, he yelled at Brycki "get out of here you drunk and take that little fag out of here." Strobl meant the phrase "little fag" to refer to Weber, who was still with Brycki. Weber had previously had some unspecified run-ins with Strobl, after which Weber had "mooned" Strobl. Brycki and Weber then left the building.

After Brycki and Weber left the building, they went out to the parking lot and smoked cigarettes. While they were in the parking lot smoking, they were joined by two other employes: Carlsen and Kotlewski. Both are floor persons. Either Brycki or Weber told Carlsen they had been out drinking that evening. Carlsen testified that while he was there, Brycki urinated in a cigarette ashtray which is near a building entrance, and on the building wall. Weber and Kotlewski testified at the hearing they were with Brycki the entire time he (Brycki) was outside, and he (Brycki) did not urinate outside.

Brycki and Weber then went back inside the building. Once inside, Brycki searched for and located Strobl. After finding him, Brycki immediately resumed taunting Strobl. Strobl responded to Brycki's taunting by saying "leave the building or I'll call the police." Strobl repeated this phrase to Brycki five to ten times (five times according to Weber and eight to ten times according to Strobl).

Brycki and Weber left the building a second time about 10:10 p.m.

The second shift ended at 10:15 p.m. When it ended, Strobl and two other employes left the building together to walk to their cars because they did not know if Brycki was still in the parking lot. He was not.

The next day, October 16, 1997, Company Vice-President Peter Gross learned about the previous night's incident from Carmen Alioto, the brother of Tony, who is also a supervisor at the Company. Carmen Alioto is Brycki's supervisor.

Gross then interviewed Strobl and Alioto about the previous night's incident. Both told Gross that Brycki had refused to leave the plant after Strobl told him to do so, and that Brycki had threatened to beat Strobl. Gross told both men to prepare a written statement about it, which both did that same day. Strobl's statement says in pertinent part that after he told Brycki to leave, Brycki threatened him saying "come outside and he would take care of me, etc." Alioto's statement says in pertinent part that Brycki threatened Strobl, but did not identify what the threat was. Several weeks later, Alioto wrote up another written statement which says in pertinent part that Brycki's threat to Strobl was as follows: "Why don't you punch out (time clock) and go outside so I can beat the crap out of you?"

That same day (October 16), Company President Paul Peterson interviewed Rollie Noltise, an employe who was referenced in Strobl's written statement. Noltise told Peterson that it looked to him like Weber and Brycki had been drinking, but he knew nothing else about the incident. Peterson also talked to employe Bob Lewinski, who told Peterson he heard loud voices the night of October 15, but nothing specific. Peterson also interviewed employe Alan Carlsen. Carlsen told Peterson that Weber and Brycki were drunk; that Strobl had asked them to leave the premises; that they had refused to do so; and that Strobl and Brycki had argued loudly.

The next day, October 17, 1997, Gross and Peterson held a meeting with Weber about the events which occurred the evening of October 15. When Weber was asked what happened, he replied that he and Brycki came into the building that night and that Strobl told them to leave. Peterson asked Weber if he and Brycki had been drinking, and Weber admitted that they had. Weber was then shown a copy of Strobl's written statement. After he reviewed it, Weber told Gross and Peterson that Strobl's statement was accurate. Peterson then asked Weber if he would sign it, and he responded in the affirmative. Weber then wrote: "I read the above statement and is all correct in what happened" and signed his name. At the end of this five-minute meeting, Peterson suspended Weber for one day for his involvement in the October 15 incident.

After talking to Weber and giving him a one-day suspension, Gross and Peterson called Brycki into the Company's offices that same afternoon. At the start of the meeting, Brycki asked for Donn Koglin to be present during the interview. Koglin was the union steward at the time and Brycki was a former steward. Peterson denied the request. In doing so, he told Brycki that Koglin was not in the plant because he had gone home for the rest of the day. When Peterson denied Brycki's request for Koglin to be present, he (Peterson) was unaware of Brycki's right to union representation under the WEINGARTEN decision. After Peterson refused Brycki's request to have Koglin present, Peterson asked Brycki for his account of what happened the evening of October 15. Brycki responded by going into detail about the leather incident which had occurred with Strobl earlier in the month. Peterson viewed the leather matter as unrelated to the events of October 15, and kept trying to get Brycki to focus on just the events of October 15. Brycki would not do so. During the meeting, Peterson asked Brycki if he was drunk that night, to which Brycki responded that he had had a few beers, but was not drunk. Peterson also asked Brycki if he had stayed in the plant after being asked by Strobl to leave, but Brycki would not reply. This meeting lasted about 10 to 15 minutes. Peterson did not get any new information from Brycki during this interview. At the end of the meeting, Peterson suspended Brycki for three days for his involvement in the October 15 incident. The suspension letter read as follows:

October 17, 1997

TO: Steve Brycki

FROM: Paul Peterson

RE: Disciplinary Action

An incident that occurred Wednesday night October 15, 1997 has been brought to my attention by our second shift superintendent George Strobl and our engraving superintendent Tony Alioto.

The specifics of the incident are detailed in the attached written statements from the two superintendents involved.

One of the basic responsibilities of any company is to provide and maintain a safe working environment for all of it's employees. The threatening nature of your misconduct, your apparent intoxicated state and total disregard of company authority while on company premises has prompted me to take disciplinary action.

The severity of this situation, coupled with previous warnings for behavioral related problems, (reference attached copies of written reprimands of 1-13-94 and 9-25-96) has caused the company to take the following action:

1. Effective 10-17-97, you are suspended from work without pay, until Thursday, 10-23-97 when you are to report for work at 7:30 a.m. Thursday, first shift.

2. Effective 10-17-97, you will not be allowed on the company's premises on your non working hours (except for arrival and departure of your shift of work) without written permission from company management.

Any future misconduct, including being found on company premises on non working hours, will be considered just cause for immediate dismissal.

cc: Local 577-M
Mr. Chris Yatchek

Four documents were attached to this letter: 1) Strobl's written account of the incident; 2) Alioto's written account of the incident; 3) a written reprimand dated September 25, 1996 dealing with attendance; and 4) a written reprimand dated January 13, 1994 dealing with horseplay.

Brycki subsequently grieved his suspension. After the grievance was filed, union steward Koglin advised Brycki to obtain written statements from co-workers concerning the events of October 15. Brycki did so. Over the course of the next week, he obtained written

statements from four co-workers. The employes' statements, and how they were obtained, will now be reviewed.

On October 16, Brycki called Al Carlsen and asked him if he would write up a statement about the October 15 incident. Carlsen said he would. The two men then agreed to meet at a certain bar where Carlsen was to write up his statement. There was a miscommunication between them concerning when this was to happen: Carlsen showed up at the bar that night (October 16), while Brycki showed up at the bar the next night (October 17). Since they went to the bar on different nights, they missed each other. On October 18, Pam Brycki, Steve's wife, looked up Carlsen's phone number in the phone book and called the number. Carlsen was not at home, but his brother was, and he gave her directions to their house. Both Steve and Pam Brycki then drove over to Carlsen's house about 3:30 p.m. They arrived at Carlsen's house at the same time Carlsen did. Steve Brycki then asked Carlsen if he could go write up his statement, to which Carlsen replied in the affirmative. Carlsen then got into the truck being driven by Pam Brycki and the three of them rode together to a nearby bar.

At the bar, they talked and drank beer. The Bryckis had two beers each and Carlsen had three. The Bryckis paid for the beer.

Carlson and Pam Brycki were the only witnesses who testified about what happened at the bar, and their recollections about what Steve Brycki said differ.

Carlsen testified that Steve Brycki told him that writing a statement on his behalf would be a good way to get into the union and show the union members. Carlsen was interested in getting a union (bargaining unit) position and he took this statement as a promise to get him a union (bargaining unit) position. Carlsen initially testified that Brycki then promised to pay or "take care of" the Union's $100 initiation fee, but later he recanted that and said Brycki never promised to pay it (i.e. the $100 initiation fee).

Pam Brycki testified that her husband made no threats or inducements to get Carlsen to write his statement. She specifically disputed Carlsen's testimony that her husband promised to get him into the Union and pay the Union's $100 initiation fee. She testified that she was the one who raised the matter of Carlsen's being included in the bargaining unit, and if the Union's $100 initiation fee was mentioned at all, it would have been by her.

After the discussion just referenced was finished, Carlson began to write up his statement. As he did so, Steve Brycki sat next to him and looked over his shoulder as he wrote. As Carlsen wrote his statement, Brycki suggested several changes. One change, which both Carlsen and Pam Brycki agree on, was to start the statement by recounting the leather incident; namely, that Strobl was upset with Brycki for that and that Strobl verbally harassed

Brycki for failing to pay for the leather. Another change, which both Carlsen and Pam Brycki agree on, was to identify Weber as the recipient of Strobl's "fag" remark. Carlsen testified that another change was to add the comment that Strobl "has a bug up his ass." Carlsen incorporated all three suggestions into his draft. The rough draft was then shown to Pam Brycki who reviewed it. Carlsen then rewrote his statement on a separate piece of paper. His original draft statement was destroyed. Carlsen testified that when they left the bar, Steve Brycki told him not to tell anybody about it.

Carlsen's one-page statement says in pertinent part: 1) that Strobl was upset with Brycki over the leather incident; 2) that on October 15, Strobl told Brycki "you drunks get the fuck out of here". . .[and] "take that fag with you"; 3) that Brycki left the plant after talking on the phone with Tony Alioto; 4) that there were "no threats made. . . to George [Strobl] from Steve [Brycki]"; and 5) that Strobl "has a bug up his ass."

Sometime in the week after October 17 (the date is not specified in the record), Brycki called Weber and asked him if he would write up a statement about the October 15 incident. Weber said that he would. Weber and Brycki then met at a nearby bowling alley and Weber wrote a one-page handwritten statement. They each had one beer while Weber was writing the statement. This statement says in pertinent part: 1) that he and Brycki had five beers that night before going back to the plant but "were not drunk"; 2) that Strobl told them: "get out you drunks and take that little fucking fag too"; and 3) that Brycki never threatened Strobl.

On October 19, Brycki called Jim Kotlewski and asked him if he would write up a "vague" statement about the October 15 incident. Kotlewski said that he would. The record does not indicate where this statement was written and whether Brycki was with Kotlewski when he (Kotlewski) wrote his statement. Kotlewski's one-page handwritten statement says in pertinent part: 1) that neither Brycki nor Weber was intoxicated; 2) that he did not witness Brycki make any threats towards Strobl; and 3) that Strobl told Brycki "get the fuck out of here and take that fag with you."

On October 19, Brycki wrote up his own statement about the October 15 incident. The three-page handwritten statement begins by recounting the leather incident with Strobl and that Strobl was angry with him (Brycki) afterwards and verbally harassed him for failing to pay for the leather. With regard to the October 15 incident, the statement says in pertinent part: 1) that before he returned to the plant, he and Weber had four to five beers over a five and one-half hour period; 2) that when he walked into the plant he said "hi" to Strobl who responded by saying "get the fuck out of here you fucking drunks, and take that fucking fag with you"; 3) that he left the plant after Tony Alioto told him to leave in a phone call; and 4) that he denies threatening Strobl.

On November 18, Steve Uhrman prepared a written statement at Brycki's request. The record does not indicate where this statement was written or whether Brycki was with Uhrman when he (Uhrman) wrote his statement. Uhrman's two-page handwritten statement does not deal with the October 15 incident at all. Instead, it deals exclusively with the leather incident which occurred in early October, 1997. The statement says in pertinent part that Strobl was upset over Brycki's failure to pay him for the leather pieces he bought for Brycki.

After Brycki's suspension grievance was filed, union representatives attempted without success for months to set up a meeting with Peterson to discuss same. Peterson acknowledged at the hearing that union representatives "tried like the dickens" to set up a meeting with him, but he was unavailable for months because he was immersed in pressing business matters. After numerous attempts by the Union to schedule such a meeting, one was eventually scheduled in March, 1998 – five months after the grievance was filed.

The grievance meeting was held March 24, 1998. At this meeting, Union officials gave Company officials the written statements Brycki had obtained from Carlsen, Weber, Kotlewski and Uhrman, plus Brycki's own written statement concerning the events of October 15, 1997.

During the meeting, several employes were called in and questioned. Weber was one of them. He was asked whether the written statement he had given to Brycki was true, and he replied that it was. An unidentified Company official told Weber that his written statement was inconsistent with what he had previously told Company officials, and asked why. Weber did not respond.

Carlsen was then called into the meeting. He was asked whether the written statement he had given to Brycki was true, and he replied that it was. Carlsen was also asked whether he was intimidated or threatened by Brycki. Several witnesses (Alioto, Kotlewski and Koglin) testified that Carlsen answered this question by stating that he was not threatened by Brycki, by that he did feel threatened by Strobl. Other witnesses and Carlsen himself did not remember him (i.e. Carlsen) making this statement about feeling threatened by Strobl. Carlsen was also asked whether he heard Brycki threaten Strobl on October 15, to which he (Carlsen) replied in the negative. Carlsen then left the meeting.

Tony Alioto left the grievance meeting while it was still in progress. As he was walking out of the building to go to an appointment, he saw Carlsen and briefly spoke with him. Alioto told Carlsen that he was flabbergasted that Carlsen didn't hear Brycki make any threats to Strobl that night. He then asked Carlsen if he (Carlsen) was telling the truth. Carlsen replied that he couldn't tell the truth at the meeting because Brycki was in the room,

and he was intimidated by Brycki. Alioto responded by telling Carlsen that he should go back to the (ongoing grievance) meeting and tell them that. Carlsen did not return to the grievance meeting.

An hour after the grievance meeting ended, Strobl called Carlsen into his office. Strobl began by telling Carlsen that was said would "stay in the room". Strobl then told Carlsen that he couldn't believe that Carlsen felt threatened by him. Strobl then told Carlsen that it struck him as unusual that his and Brycki's statements both contain the following identical phrase: "take that fag with you, which was Wayne Weber." Carlsen responded to this by telling Strobl that Brycki had taken him to a bar and made him write up a false statement. The meeting ended with Strobl telling Carlsen to tell his story to Peter Gross.

Either Alioto or Strobl or both told Gross what Carlsen had told him/them following the grievance meeting. The next day, March 25, Gross approached Carlsen at work and asked him about the October 15 incident and the written statement he had supplied concerning same. With regard to the October 15 incident, Carlsen told Gross that that night, Brycki urinated in the parking lot. With regard to his written statement, Carlsen told Gross that Brycki had made him write up a false statement. Gross responded by telling Carlsen to write up a second statement. Carlsen subsequently did. That written statement will be reviewed later.

Shortly thereafter, Gross approached Weber at work and asked him if Brycki had urinated in the parking lot on the evening of October 15. Weber replied in the affirmative.

On April 3, 1998, Union Representative Gene Holt wrote Petersen and inquired whether he (Petersen) had changed his position concerning Brycki's suspension. On April 7, Petersen responded in writing that "we have reviewed the material presented at our last meeting, and stand by our decision regarding the disciplinary action taken as a result of the October 15, 1997 incident."

On either April 16 or 17, 1998, Carlsen drafted a second written statement. He put both dates on this statement. He wrote this statement at his home. No one was with him when he wrote it. The first page of this handwritten statement addressed what happened the night of October 15, 1997. It says in pertinent part: 1) that when Brycki and Weber came into the plant that night, Strobl asked him [Brycki] to leave; 2) that Brycki refused to do so and started to argue with Strobl; 3) that Strobl then called Tony Alioto; 4) that Brycki then told Strobl "to punch out so he can beat the shit out of him"; 5) that Carlsen then went outside with them [Brycki and Weber] for a cigarette; 6) that while outside, Brycki told him that they had been drinking before they came back to the plant; 7) that Carlsen saw Brycki "piss on the building and on Bob's car"; 8) that Brycki then came back inside the building and argued more with Strobl; and 9) that Brycki then went outside again and left the premises. The second page

of this statement addressed what happened after Brycki asked him to write up a statement. It says in pertinent part: 1) that Brycki called him and asked him to write up a statement for him; 2) that Brycki later came to his house without permission and took him to a bar; 3) that at the bar they had a few drinks; 4) that Brycki told him "if I write a statement I could get in the Union"; 5) that Brycki told him that after he [Carlsen] wrote up his statement, "he [Brycki] would send me some forms to fill out and it would cost me $100.00 to get in"; 6) that after he wrote the statement, he never got any of the forms about joining the union; 7) that at the [March 24, 1998] grievance meeting, he said that his [October 18, 1997] written statement was the truth; 8) that when he said that, "he felt a little nervous with Steve in there so I didn't want to say much"; 9) that later "I had a nice talk with George and I told him that the statement I wrote for Steve was not the truth"; and 10) that "this statement I wrote is what really happened". Carlsen testified that no one in management threatened him to make this statement, or told him what to say in it.

After Carlsen wrote this statement, nothing pertinent to this case happened for two months.

Around June 15, 1998, Petersen told Union President Chris Yatchak that he had gotten some additional facts about the October 15, 1997 incident and subsequent events and that he wanted to interview Brycki about them. A meeting was subsequently arranged for that purpose.

This meeting was held June 24, 1998. Those present at that meeting were Peterson, Gross, Brycki, Yatchak and Koglin. In this meeting, Brycki was asked about two dozen questions. These were yes/no questions. The pertinent questions and answers are as follows. Brycki was asked if he still stood by his written statement concerning the events of October 15, 1997. He responded in the affirmative. Brycki was also asked whether he had urinated on the building, on a car, or on Bob's car. He responded in the negative. Brycki was also asked whether he had threatened Carlsen, Kotlewski or Weber. He responded in the negative. Brycki was also asked whether he had promised Carlsen, Kotlewski or Weber anything for their statements. He responded in the negative. Brycki was also asked if he offered to get Carlsen a union job. He responded in the negative. There was little discussion of any of Brycki's answers. For the most part, various accusations were made against him, and he denied them. After Brycki had responded to the Company's questions, Company officials provided Union officials with a copy of Carlsen's second statement (i.e. the one dated April 16 and 17, 1998). This was the first time Union officials had seen this statement. An unnamed union official asked if Carlsen had been coerced by anyone from the Company into giving the second statement, and Peterson answered in the negative. The Company then produced a document entitled "Last Chance Agreement". This document provided that Brycki would continue to have employment with the Company but only under certain conditions. Brycki was given the choice of signing this document or being terminated. Brycki refused to sign the

document. Company officials then indicated that they felt Brycki had lied when he responded to the questions which had just been asked of him, and that, coupled with the reasons listed in the Last Chance Agreement (i.e. the urination and the threat to another employe), were dischargeable offenses. The meeting ended with Brycki being suspended and being told that unless he agreed to the Last Chance Agreement, he would be terminated. When Brycki and the Union rejected the terms of the Last Chance Agreement, the discharge took effect.

> On June 26, 1998, Gross wrote Yatchak a letter which provides in pertinent part: At our last meeting on Wednesday, June 24, 1998 and for reasons as outlined in the "Last Chance Agreement" (copy enclosed) and alternately for not telling the truth, Steven Brycki is to be considered suspended until 3:00 PM July 1, 1998 as agreed to or unless he or the Union responds to the offer of a "Last Chance Agreement". If there is no response from Mr. Brycki or the Union within this time frame, S&M will consider Mr. Brycki's employment terminated for each of the above reasons.

Paragraph 2 of the Last Chance Agreement referenced above states as follows:

> Further investigation has revealed that Brycki committed another offense on October 15, 1997 for which he has not yet been disciplined, and has further revealed that Brycki improperly induced an employee to give a false statement to S&M in connection with the events of October 15, 1997.
>
> . . .
>
> Brycki's suspension and discharge were ultimately appealed to arbitration.
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> Brycki did not testify at the hearing.

POSITIONS OF THE PARTIES

Union

The Union's position is that the Company did not have just cause to suspend and later discharge the grievant. In its view, the record evidence does not support the charges made against Brycki. It also asserts that the Company failed to provide Brycki with basic due process.

The Union makes the following arguments with regard to the suspension. First, with regard to the merits, it notes at the outset that Brycki's conduct was not, in its words, "laudatory". Specifically, it acknowledges that he came back to the shop that night after he had been drinking beer; that he then had an argument with Strobl wherein he used obscenities; and that he originally refused to leave the premises after Strobl had told him to leave.

That said, the Union avers that Brycki did not threaten Strobl that night as he is charged with doing. To support this premise, it cites the following: first, the testimony of Weber and Kotlewski that Brycki did not threaten Strobl and second, Brycki's denial in his written statement that he threatened Strobl. In the Union's view, the foregoing should be sufficient to refute this charge against Brycki.

The Union essentially argues in the alternative that even if Brycki threatened Strobl that night, Brycki nevertheless has some valid defenses which should excuse his actions. The Union's first defense is that Brycki did not violate any Company work rule by returning to the plant that night. The Union's second defense is that the incident was "to a large extent" Strobl's fault because Strobl "precipitated the encounter by his belligerent attitude and crude remarks." The Union's third defense is that the Company bears the responsibility for the October 15, 1997 incident because of its lax practices (specifically that the Company tolerated other employes having arguments and using obscenities at the plant). As the Union sees it, Brycki should not be made the scapegoat for an incident which would not have occurred but for Strobl's ineptness and hostility.

Next, the Union raises several due process arguments which it believes should result in the suspension being overturned.

The first is that the Company violated Brycki's WEINGARTEN rights when they interviewed him on October 17, 1997 without a union representative being present. The Union notes that at that meeting, Brycki specifically asked for union steward Koglin to be present, and that request was flat out denied. The Union avers that the suspension should be set aside on that basis alone.

The Union's second due process argument is that the Company failed to fulfill its obligation to conduct an adequate investigation before it assessed punishment. According to the Union, the Company's investigation of the October 15 incident was a sham and unfair from its outset because the Company made little effort to check with employe witnesses and simply took the word of Company supervisors Strobl and Alioto.

Attention is now turned to the grievant's discharge. The Union avers that all three charges against the grievant are rubbish which are not supported by credible record evidence.

First, with regard to the charge that Brycki improperly induced Carlson's written statement, the Union notes that this charge is based on the testimony of just one witness – Carlsen. According to the Union, Carlsen demonstrated at the hearing that he has no regard for the truth, and is incapable of telling same. It asserts there are numerous inconsistencies in Carlsen's testimony on this point and that he changed his story several times. Aside from that, the Union contends that Carlsen's testimony was rebutted by Pam Brycki who testified that Steve Brycki did not threaten Carlsen, did not induce Carlsen to give a false statement, and did not promise to get Carlsen into the union or pay his union initiation fee. The Union characterizes Pam Brycki as a reliable and credible witness.

Second, with regard to the urinating charge, the Union notes that the only evidence supplied at the hearing to support this charge again came from Carlsen. The Union calls his credibility "nonexistent" and "worthless" and characterizes the charge itself as "purely a figment of Carlsen's imagination." Aside from that, the Union contends that Carlsen's allegation was rebutted by two witnesses, Kotlewski and Weber, whom it characterizes as reliable, credible and disinterested witnesses. It also notes that Brycki denied the (urinating) charge when he was interrogated by Peterson on June 24, 1998.

Third, the Union contends that the Company has failed to sustain its burden of proving that Brycki lied about charges one and two. In its view, this charge stems solely from the fact that Brycki denied charges one and two at the June 24, 1998 disciplinary interview. The Union argues that denying an accusation, as Brycki did, does not constitute "lying" so as to subject him to discharge.

Next, the Union raises several due process arguments which it believes should result in the discharge being overturned.

The first is that the Company failed to conduct an adequate investigation before it fired Brycki. According to the Union, the Company simply took Carlsen's statements (arguably coerced by Strobl) at face value, did not attempt to interview other eyewitnesses, and rejected Brycki's denial out of hand.

The Union's second due process argument concerns the timing of the grievant's discharge. The Union notes in this regard that Brycki continued to work at his job for eight months after his suspension without any problems (namely, from October, 1997 through June, 1998), at which point he had one meeting with management and was fired. The Union asks rhetorically that if Brycki's October, 1997 actions were so serious, why wouldn't the Company have put him on notice as soon as it learned of the new allegations on March 24, 1998? In the Union's view, it makes no sense that the Company would wait another three months to act (while doing no investigation) and then on June 24, 1998 demand that Brycki either had to sign the Last Chance Agreement or be summarily dismissed. The Union believes these facts demonstrate a lack of basic fairness toward Brycki.

The Union's third due process argument is that the concept of double jeopardy applies here and precludes the Company from using the (alleged) urination incident as a basis for discharging the grievant. The Union asserts that if the grievant in fact urinated in the Company parking lot on October 15, 1997, a diligent investigation would have uncovered it. The Union maintains that the Company supposedly made a thorough investigation of the October 15, 1997 incident and decided a three-day disciplinary layoff was proper punishment. The Union contends that the Company should not now be able to rely on the urination which allegedly took place on October 15, 1997 as a basis to discharge the grievant.

Finally, the Union comments on the fact that the grievant did not testify at the hearing. As the Union sees it, Brycki's decision to not testify in this case should not be held against him and no adverse inference should be drawn from it. To support this premise, the Union cites several arbitrators who did not apply an adverse inference when the grievant failed to testify.

In sum, the Union submits that the Company did not prove the grievant committed the offenses he was charged with committing. The Union therefore requests that both the suspension and the discharge be overturned, the grievant reinstated, and a make whole remedy issued.

Company

The Company's position is that it had just cause to suspend the grievant in October, 1997 and to discharge him in June, 1998. In its view, it has provided sufficient evidence to satisfy its burden of proving that the discipline imposed was warranted. It also asserts that any procedural defects are not sufficient grounds for overturning the suspension and discharge.

The Company makes the following arguments with regard to the suspension. First, it starts by reviewing these facts: that night, Brycki came into the shop "stoked up" after a night of drinking, walked into a work area, started an argument with working foreman Strobl, refused to leave, threw the telephone down after foreman Alioto told him to leave, threatened to beat Strobl up, left the building, and then re-entered the building and argued with Strobl some more.

As the Company sees it, the Union concedes that Brycki did all these things with the exception of threatening to beat Strobl up. The Company contends that Brycki, in fact, did so. To support this premise, it cites Strobl's testimony to that effect and Alioto's testimony that he overheard Brycki threaten Strobl. The Company submits that the testimony of Weber and Kotlewski that Brycki did not threaten to beat Strobl up should not be credited.

Next, the Company argues that none of the Union's defenses for Brycki's conduct have merit. First, with regard to the Union's contention that Brycki did not violate a Company rule by returning to work, the Company avers that it does not matter if a Company rule was in place regarding returning to work upon completion of an employe's shift because Brycki was not suspended merely because he returned to the plant. Rather, he was suspended because, upon his return, he refused to leave the plant, caused unsafe work conditions, and threatened a supervisor. Second, with regard to the Union's contention that this incident was "precipitated" by Strobl, the Company asserts that there is nobody to blame for this matter but Brycki. The Company opines that it was Brycki's comments and his refusal to leave the plant that turned what may have been a non-event into something much bigger. Third, with regard to the Union's contention that nobody in management took the incident seriously, the Company contends this contention is not only ridiculous, but also contrary to the testimony of all Company officials. Fourth, with regard to the Union's contention that the Company bears the responsibility for the incident because of alleged lax practices in the plant, the Company maintains that still does not excuse Brycki's conduct on October 15, 1997.

Next, the Company responds to the Union's due process arguments on the suspension.

First, with regard to the Union's claim that the Company violated Brycki's WEINGARTEN rights, the Company believes that even if there was a WEINGARTEN problem with the October 17, 1997, meeting, that should not affect the Company's subsequent disciplinary action. This argument is based on the premise that Brycki was not prejudiced by the Company's action. The Company notes in this regard that Brycki did not answer the questions posed to him by Peterson and thus revealed no new information regarding what had occurred that night. The Company also alleges that any WEINGARTEN problem was rectified later when the parties held their June, 1998 meeting, which the Company characterizes as a due process meeting. The Company argues in the alternative that if the arbitrator finds the Company's denial of the grievant's WEINGARTEN rights did result in prejudice to the grievant, the appropriate remedy is an order requiring the Company to cease and desist, or at most, backpay for the wages he missed during his three-day suspension.

Second, with regard to the sufficiency of the Company's investigation, the Company asserts it conducted a thorough investigation prior to assessing punishment. To support this premise, it notes that it interviewed six people and gave Brycki the opportunity to provide his version of the events of the evening of October 15, 1997. In the Company's view, this is all that was required.

The Company makes the following arguments with regard to the discharge. It starts by reviewing these facts. Following the grievance meeting on Brycki's suspension, Carlsen told Gross that the statement he had supplied was false and had been induced by Brycki. Carlsen also told Gross that on October 15, 1997, Brycki had urinated in the parking lot. Weber later corroborated Carlsen's statement about the urination. The Company believed both of

Carlsen's allegations over Brycki's denial and concluded these events constituted new (and dischargeable) offenses.

The Company contends it proved that Brycki improperly induced other witnesses to provide false statements so he could avoid discipline. The support this premise, it notes that Brycki obtained statements at bars from Weber and Carlsen, and avers that he told them what to put in their statements.

The Company notes that just two people testified about what happened when Brycki obtained the statement from Carlsen: Carlsen and Pam Brycki. The Company argues that Carlsen's testimony should be given more weight than Pam Brycki's testimony because she has a direct interest in seeing her husband prevail, while Carlsen is a disinterested witness who has no outcome in this case. While the Company characterizes Carlsen as an "easily led witness", it nonetheless asserts he was still credible.

The Company also contends it proved that Brycki urinated in the Company parking lot on October 15, 1997. To support this premise, it cites Carlsen's testimony to that effect. The Company notes that while Weber and Kotlewski testified to the contrary (namely, that Brycki did not urinate outside), the Company calls the arbitrator's attention to the fact that they were not with Brycki during every moment he was outside.

Finally, the Company argues it proved that Brycki lied about both of the above because he denied committing these acts at the June, 1998 disciplinary interview. The Company maintains that lying constitutes just cause for discharge.

Next, the Company responds to the Union's due process arguments on the discharge.

First, it contends that the Company's investigation was adequate and the Union's contention to the contrary has no basis. It avers that it conducted a fair and thorough investigation prior to assessing punishment. To support this premise, it notes that it interviewed both Carlsen and Brycki about the charges and, after doing so, believed Carlsen.

Second, with regard to the timing of the discharge, the Company asserts it needed time to figure out how to deal with the new allegations. Even if this delay is considered a procedural defect, the Company believes it is not grounds for reversing a discharge.

Third, the Company contends the Union's double jeopardy argument should also fail. The Company points out that double jeopardy occurs when a person is given multiple punishments for the same offense. The Company asserts that here, though, Brycki is not being

punished for the same offenses, but rather for a separate incident (namely, urinating in the parking lot) which also occurred on October 15, 1997, and for later events (namely, inducing false statements from coworkers and lying about it).

Finally, the Company calls attention to the fact that Brycki did not testify at the hearing. The Company submits that Brycki's failure to take the stand in his own defense strongly suggests that if he had done so and told the truth, he would have admitted he induced Carlsen to make a false statement, urinated in the parking lot, and lied about the foregoing. The Company believes that Brycki's failure to testify not only weakens his case, but also should give rise to a negative inference, namely, that Brycki had something to lose by testifying.

In sum, the Company claims it has given Brycki many opportunities to deal with his "alcohol problem", but it had no choice but to discharge him for his "final offenses". The Company therefore contends that both grievances should be denied and the discipline upheld.

DISCUSSION

Section 11.1 of the parties' labor agreement contains what is commonly known as a "just cause" provision. It provides that the Company will not discipline or discharge an employe without just cause. What happened here is that the grievant was suspended and subsequently discharged by the Company. Given this disciplinary action, the obvious question to be answered here is whether the Company had just cause for doing so.

As is normally the case, the term "just cause" is not defined in the parties' labor agreement. While the term is undefined, a widely understood and applied analytical framework has been developed over the years through the common law of labor arbitration. That analytical framework consists of two basic elements: the first is whether the employer proved the employe's misconduct, and the second, assuming this showing of wrongdoing is made, is whether the employer established that the discipline which it imposed was justified under all the relevant facts and circumstances. The relevant facts and circumstances which are usually considered are the notions of progressive discipline, due process protections, and disparate treatment.

In the discussion which follows, I will address the suspension first and then the discharge.

The Suspension

As just noted, the first part of a just cause analysis requires that the Company prove the grievant's misconduct. In the context of this case, there are two separate sub-parts to making

this call: 1) did Brycki do what he is charged with doing on October 15, 1997 (namely, refusing to leave the plant after being told to do so and threatening Strobl); and 2) assuming he did, does the grievant have any valid defenses for his conduct. In the discussion which follows, those points will be addressed in the order just listed.

The first point obviously turns on the facts involved. I begin by reviewing the following undisputed facts. After a night of drinking beer, Brycki and Weber returned to the plant to pick up Brycki's vehicle and go to the bathroom. While they were there, they went into a work area. Strobl, believing that the two men were intoxicated, first asked them to leave and later told them to leave. Brycki refused to do so. An argument then ensued between the two men wherein both used obscenities to the other. Since Brycki would not leave the plant, Strobl called Tony Alioto and told him what was happening. Alioto then talked to Brycki on the phone and told him to quit arguing with Strobl and to leave the building. Brycki then slammed the phone down and walked away. As he was doing so, he (Brycki) said something to Strobl. What he said is disputed.

Strobl testified Brycki said: "Fuck you; I don't have to leave; Come on, I'll take you outside and beat the shit out of you." Alioto, who was still on the phone line, testified he overheard Brycki make this statement/threat to Strobl. Brycki did not testify, but in his written statement he denied threatening Strobl. Weber and Kotlewski testified that Brycki did not threaten Strobl.

Obviously, this testimony conflicts and cannot be reconciled. After weighing this conflicting testimony, I credit Strobl's account for the following reasons. First and foremost, Strobl's account was corroborated by Alioto who was still on the phone and overheard what Brycki said to Strobl. Alioto's testimony was consistent with Strobl's that Brycki threatened to "beat the shit" out of Strobl. Even if Strobl is considered an interested witness because of his conflict with Brycki over the leather matter, that is not the case with Alioto. He (Alioto) is a disinterested witness. Insofar as the record shows, there is no basis for Alioto to fabricate his account of what Brycki said to Strobl on October 15, 1997. Second, a close reading of the record reveals that Weber and Kotlewski may not have heard what Brycki said to Strobl after he (Brycki) slammed the phone down and walked away. The following shows this. Weber testified that after Brycki threw the phone down, he (Weber) walked out of the building. If Weber was in the process of walking out of the building or was out of the building when Brycki made his statement to Strobl, it stands to reason that he would not have heard what Brycki said to Strobl. Kotlewski testified that he was about 20 feet away from Brycki when Brycki talked on the phone with Alioto and could not hear what Brycki said to Alioto in the phone call. If Kotlewski could not hear what Brycki said to Alioto in the phone call, it logically follows that he probably could not hear what Brycki said to Strobl afterwards either.

Given the foregoing, it is concluded that notwithstanding Brycki's assertion in his written statement to the contrary, Brycki did indeed threaten to beat Strobl on October 15, 1997. 1/

1/ In reaching this conclusion, the undersigned did not rely on the testimony of Alan Carlsen.

It follows from this finding that Brycki did what he is charged with doing (namely, refusing to leave the plant after Strobl told him to do so and threatening to beat Strobl). Refusing to do what a supervisor directs and threatening to beat a supervisor both constitute inappropriate workplace conduct which no employer can be expected to tolerate.

Having so found, the focus now turns to the second point referenced above (namely, does the grievant have any valid defenses for his conduct). The Union asserts that he does and that they (i.e. the defenses) should excuse or justify his actions.

The Union's first defense is that Brycki did not violate any rule by returning to the plant that night. While that is true, this argument misses the mark because Brycki was not suspended for returning to the plant; he was suspended for other reasons.

The Union's second defense is that the incident was "to a large extent" Strobl's fault because Strobl "precipitated the encounter by his belligerent attitude and crude remarks." The problem with this contention is that the record evidence shows otherwise. It was Brycki, not Strobl, who started the angry verbal exchange. It was also Brycki who first used obscenities. It was also Brycki who was told to leave and who refused to do so. Finally, it was Brycki who threatened Strobl, not vice-versa. In my view, the foregoing facts establish that Brycki bears responsibility for the incident. The fact that Strobl was angry with Brycki before the incident occurred because of the leather incident does not change this result or somehow turn Brycki into an innocent victim.

The Union's third defense is that the Company bears the responsibility for the incident which occurred on October 15, 1997. I disagree. As has just been noted, Brycki bears the responsibility for the incident. The fact that other employes have had arguments and used obscenities at the plant proves nothing because Brycki was not disciplined for arguing with Strobl or using obscenities.

Having found that none of the Union's defenses excuse the grievant's actions on October 15, 1997, it is held that the grievant committed misconduct on that date by refusing to leave the plant after being told to do so and threatening to beat Strobl. This conduct clearly crossed the line of appropriate workplace conduct. As a result, it warranted discipline.

The second part of a just cause analysis requires that the Employer establish that the penalty imposed was appropriate under the relevant facts and circumstances. In reviewing the appropriateness of discipline under a just cause standard, arbitrators generally consider the notions of due process, progressive discipline and disparate treatment. The undersigned will do likewise in reviewing the appropriateness of the grievant's suspension. These matters will be addressed in the order just listed.

Due Process Considerations

The Union raises several due process arguments which it believes should result in the suspension being overturned.

First, it contends that the Company violated Brycki's WEINGARTEN rights when they interviewed him on October 17, 1997. It is undisputed that at the start of that investigatory interview, Brycki asked for (Union Steward) Koglin to be present. The Company acknowledges that in doing so, Brycki was attempting to invoke his WEINGARTEN rights. Under WEINGARTEN, a represented employe is entitled, on request, to have a union representative present at meetings or interviews with the employer whenever the meeting or interview is one that the employe reasonably believes may lead to discipline or discharge. That did not happen here because Peterson denied Brycki's request for Koglin to be present. Since an employer's refusal to honor a proper request for union representation would be an unfair labor practice under Section 8(a)(1) of the NLRA, many arbitrators, relying on WEINGARTEN, find such a refusal to be a procedural due process violation even if the right is not specified in the collective bargaining agreement. The undersigned finds likewise.

Having so found, the next question is what remedy, if any, should be imposed herein for the Company's failure to allow a union steward/representative to be present at Brycki's disciplinary interview. Arbitrators have taken a number of different approaches when faced with this situation. Some arbitrators have penalized the employer for failing to comply with WEINGARTEN by nullifying the disciplinary action outright, or reducing it, regardless of whether the employe was prejudiced by the employer's failure to comply with WEINGARTEN. Other arbitrators have not nullified or reduced the disciplinary action because it was not established that the employe was irreversibly prejudiced by the employer's failure to comply with WEINGARTEN. In this case, I have decided to apply the latter approach because Brycki did not make any incriminating statements in the investigatory interview. Said another way, he did not give the Company any ammunition to use against him in this interview. The

following shows this. In the interview, Brycki kept wanting to tell Peterson about the leather incident, while Peterson wanted to hear about the facts involved in the October 15 incident. For the most part, Brycki side-stepped Peterson's questions and did not answer them. Whether it was by design or not, Brycki revealed little information to Peterson about what happened that night. As a result, Peterson did not gain any new information from Brycki during this interview that he did not already know from other interviewees. That being the case, Brycki clearly was not prejudiced by the Company's failure to grant Brycki's request to have a union representative attend that disciplinary interview. As a result, the Company's failure to comply with WEINGARTEN at that disciplinary interview does not warrant nullifying or reducing Brycki's suspension.

The Union's second due process argument is that the Company's investigation of the October 15 incident was a sham and unfair because the Company made little effort to check with employe witnesses and simply took the word of Company supervisors. I conclude the record evidence shows otherwise. My discussion on this point begins with a review of the following pertinent facts. Peterson and Gross started their investigation the next day (October 16, 1997). That day, they interviewed supervisors Strobl and Alioto and requested written statements from both of them, which were supplied that same day. In those interviews, Peterson and Gross learned that Strobl was an witness to the entire incident and that Alioto heard part of it while he was on the phone. The same day, Peterson interviewed three employes who were possible witnesses: Rollie Notheis, Bob Lewinski and Al Carlsen. In these interviews, it was learned that Carlsen saw more than Notheis or Lewinski did. After interviewing these employes, Peterson and Gross next interviewed Weber. In his interview, Weber told management officials that Strobl's account of the incident was correct, and he signed a statement to that effect. Peterson and Gross then interviewed Brycki. At the interview, Brycki was given an opportunity to tell his side of the story. He essentially declined to do so. At that point, Peterson concluded that he had the essential facts of the incident from witnesses Strobl, Alioto and Carlsen, and he suspended Brycki. When Peterson made this decision, none of the seven people who had been interviewed, including Weber and Brycki, disputed Strobl's account of the incident. This meant that on the date Brycki was suspended (October 17, 1997), Strobl's account of the incident, particularly that Brycki threatened him, was undisputed. 2/ In my view, nothing in the foregoing facts establishes

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2/ This subsequently changed when several employes, including Brycki, Weber and Carlsen signed statements indicating that Brycki did not threaten Strobl on October 15, 1997. However, the Company did not learn that Strobl's account of the incident (particularly that Brycki threatened to beat him) was disputed until the March 24, 1998 grievance meeting. Since this was five months after Brycki's suspension, this portion

of the discussion is limited to what the Company knew from its investigation as of the date it suspended Brycki (October 17, 1997). What happened thereafter will be addressed in the Discharge section of this Award.

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that the Company's investigation up to October 17, 1997 was botched, flawed or a sham. It therefore was sufficient to pass muster.

Progressive Discipline and Disparate Treatment

The record indicates that the grievant has previously received several written warnings for other misconduct. These prior warnings specifically put him on notice that further misconduct would lead to further disciplinary action including suspension. The next step in the normal progressive disciplinary sequence is for warnings to be followed by a suspension. Since that is exactly what happened here, the Company followed progressive discipline.

Finally, it does not appear that Brycki was subjected to disparate treatment by being suspended. There is nothing in the record indicating that other employes engaged in behavior similar to Brycki's behavior and were not disciplined for it. While Weber was disciplined less severely than Brycki (i.e. Weber was suspended for one day and Brycki for three), there is a reasonable basis for this, namely that Weber's misconduct was less serious than Brycki's. It was Brycki who specifically refused to leave the building after being told to do so and who threatened to beat Strobl. Weber did neither. Under these circumstances, it was reasonable for the Company to assess different discipline on them.

Given the foregoing, it is held that Brycki's suspension was neither disproportionate to his offense nor an abuse of management discretion, but was reasonably related to the seriousness of his proven misconduct. The Company therefore had just cause to suspend him for three days.

The Discharge

Attention is now turned to the grievant's discharge. The Company discharged the grievant for 1) improperly inducing an employe to give a false statement about the events of October 15, 1997; 2) urinating in the Company parking lot; and 3) lying about both of the foregoing. The second charge deals with conduct which allegedly occurred on October 15, 1997, while the other two charges involve conduct which occurred subsequent to that date. These charges will be addressed in the order just listed.

As previously noted, the first element of a just cause determination turns on whether the grievant committed these offenses as charged. Obviously, this depends on the facts. The Company contends that Brycki did, in fact, commit these offenses. Brycki disputes this. Though

he did not testify at the hearing, he denied committing these offenses at the June 24, 1998, investigatory interview.

Attention is focused first on the charge that Brycki improperly induced an employe to give a false (written) statement about the events of October 15, 1997. My discussion begins with the following prefatory comments. Following his suspension, Brycki asked several of his co-workers for written statements about the October 15 incident, which they subsequently supplied. There is nothing improper about obtaining such statements. They have become common in labor relations. In this case, not only did various Union witnesses supply written statements, but so did Company witnesses Strobl and Alioto.

There is nothing problematic about Strobl's and Alioto's statements. The following shows this. They were asked to write up a statement and, insofar as the record shows, they did so without anyone from management looking over their shoulder and guiding them, or telling them what to include in their statement. Also, they did not write up their statement while drinking beer in a bar. Simply put, there is no reason whatsoever to suspect the validity of their statements or how they were obtained.

That is not the case though with the statements which Brycki obtained from Carlsen, Weber and Kotlewski. Their statements are troublesome and problematic for the following reasons. First, with regard to Carlsen's statement, Brycki was with Carlsen when he (Carlsen) wrote it. This took place in a bar and Carlsen had three beers (which the Bryckis paid for) while he wrote his statement. As he did so, Brycki made several suggestions about content which Carlsen incorporated into his statement. 3/ Second, with regard to Weber's statement, Brycki

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3/ The substance of what was just characterized as Brycki's "suggestions about content" will be addressed later in the <u>Discussion</u>.

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was also with him when he (Weber) wrote up his statement. They were also drinking beer at the time. Third, with regard to Kotlewski's statement, Brycki told him (Kotlewski) to write up a "vague" statement. In my view, the foregoing facts raise legitimate concerns about the validity of these three statements and how they were obtained. Certainly it would have been better, in hindsight, if Brycki had not been with Carlsen and Weber when they wrote up their statements, if they had not written them up while drinking beer in bar, and if Brycki had not said anything whatsoever to any of them about what they should or should not include in their statement.

When the Company fired Brycki, it could have contended that he improperly induced several employes to make false statements about the October 15, 1997 incident. However, as will be shown, it did not do that. Instead, the Company decided to limit the charge of improperly inducing a false statement to just one employe (as opposed to several employes). The following sentence from the discharge letter/second paragraph of the Last Chance Agreement shows this: ". . .Brycki improperly induced *an employe* to give a false statement to S & M in connection with the events of October 15, 1997." (Emphasis added). Although the discharge letter/Last Chance Agreement does not identify who that employe is, it is clear from the record that the Company was referring to Carlsen. In their brief, the Company contends that Brycki also improperly induced Weber and (maybe) Kotlewski into making false statements about the October 15, 1997 incident. When the Company wrote the grievant's discharge letter, it could have contended that Brycki improperly induced all three employes (i.e. Carlsen, Weber and Kotlewski) into making false statements because it obviously was aware of their written statements and it considered all three to be false. It did not do so. Such was its right. Having done so though, it cannot expand the reason for the grievant's discharge to now also include inducing false statements from Weber and Kotlewski. Accordingly then, Weber's and Kotlewski's statements will not be used as a basis for reviewing the grievant's discharge. This rationale also applies to Brycki's own statement. Accordingly, Brycki's statement will not be reviewed either.

Having so found, the focus turns to Carlsen's statement. My discussion begins with a preliminary comment concerning how it was obtained. The record indicates that Pam and Steve Brycki showed up at Carlsen's house unannounced and asked him if he would go to a bar with them to write up his statement. Carlsen, who had gone to the bar two days earlier looking for Brycki to do just that, agreed to go with them. In my view, nothing about the foregoing establishes that Carlsen was forced, coerced, or threatened to go to the bar with the Bryckis. Rather, he went of his own free will. Furthermore, he knew why he was going – namely, to write up his statement about the October 15 incident and presumably have a beer while doing so.

When the three of them got to the bar, they had a beer or two and talked. I have decided to characterize what they talked about first as "the union discussion".

The Company contends that what happened during "the union discussion" was that Brycki promised to get Carlsen a union job and pay the Union's $100 initiation fee, and that these (two) promises induced Carlsen to write up his (subsequent) statement. I certainly agree that if Brycki did promise to get Carlsen a union (bargaining unit) position, and pay the Union's $100 initiation fee, then those promises would constitute an improper inducement to get Carlsen to write his statement.

After reviewing the record testimony however, I am not persuaded that Brycki made those promises. My analysis begins with some comments concerning what happened prior to "the union discussion" at the bar. As previously noted, when Carlsen got in the Bryckis' truck on October 18, he knew exactly why he was going to the bar with them – namely, to write up a statement on Brycki's behalf about the October 15 incident. That was the same reason he went to the bar by himself on October 16 and waited for Brycki. Insofar as the record shows, Carlsen did not extract any kind of promise from Brycki before he went to the bar with him on October 18. That being so, I am convinced that Carlsen had decided to write up a statement for Brycki, and a favorable statement to boot, even before "the union discussion" occurred in the bar. That said, this still leaves the question of whether Brycki promised to get Carlsen a union job and pay the Union's $100 initiation fee. With regard to Brycki's alleged promise to get Carlsen a union job, there is absolutely no evidence that Brycki said to Carlsen "I promise to get you into the Union or a bargaining unit position in exchange for your (favorable) statement." Thus, Brycki never explicitly tied one to the other. While Brycki did tell Carlsen that writing a statement on his behalf would be a good way to get into the union and show the Union members, I do not interpret that statement as a promise that Brycki would somehow get Carlsen into the Union or get him a union (bargaining unit) position. In my view, that statement was little more than puffing. With regard to Brycki's alleged promise to pay the Union's $100 initiation fee, Carlsen's own testimony on this point was internally inconsistent. He initially testified that Brycki promised to pay or "take care of" the $100 initiation fee, but later he recanted that and said Brycki never promised to pay it (i.e. the $100 initiation fee). This inconsistency from the very person making the charge precludes a finding that Brycki promised to pay Carlsen the $100 initiation fee in exchange for his statement. Based on the foregoing, it is concluded that Brycki did not promise to get Carlsen a union (bargaining unit) job and pay the Union's $100 initiation fee in exchange for a favorable (written) statement.

Having so found, the focus turns to whether Brycki, in the words of the Last Chance Agreement, "induced [Carlsen] to give a false statement to S & M in connection with the events of October 15, 1997." After "the union discussion" was finished, Carlsen wrote up his statement. As he did, Brycki looked over Carlsen's shoulder and made several suggestions about the content of what he (Carlsen) was writing and how it was worded. It has previously been noted that Brycki should not have done so and the fact that he did is troublesome and problematic. What makes it particularly troublesome and problematic is that Carlsen incorporated all of Brycki's suggestions into the statement. Obviously, Carlsen should have written up his statement on his own and used his own words without Brycki looking over his shoulder and making suggestions about content. That said, the question to be decided herein is whether Brycki had Carlsen write anything that was false. If he did, then Brycki induced a false statement. Attention is now turned to making that call.

The record indicates that Brycki induced Carlsen to make three changes to his statement. However, as the following analysis shows, none of the three were "false statements". The first change which Brycki suggested to Carlsen was that he start the statement by recounting the leather incident in detail, specifically that Strobl was upset with Brycki for that and that Strobl verbally harassed Brycki for failing to pay for the leather. That is not a false statement; it is an accurate statement. The second change which Brycki suggested to Carlsen was to identify Weber as the recipient of Strobl's "fag" remark. That too is not a false statement; it is an accurate statement. The third change which Brycki suggested to Carlsen was to add the comment that Strobl "has a bug up his ass". Since that statement is nothing more than a subjective opinion, the undersigned declines to characterize it as either accurate or false.

When Carlsen's statement was finished, it provided in pertinent part: 1) that Strobl was upset with Brycki over the leather incident; 2) that on October 15, Strobl told Brycki "you drunks get the fuck out of here" . . .[and] "take that fag with you"; 3) that Brycki left the plant after talking on the phone with Tony Alioto; 4) that there were "no threats made. . .to George [Strobl] from Steve [Brycki]"; and 5) that Strobl "has a bug up his ass."

In the context of this case, the most important part of this statement is what I have characterized as point #4 (i.e. that there were "no threats made. . .to George from Steve"). This sentence is hereinafter identified as point #4. The reason point #4 is so important is because this was the part which Carlsen changed in his second statement. Specifically, he went from saying (in his first statement) that Brycki did not threaten Strobl to saying (in his second statement) that Brycki did threaten Strobl. Since Brycki did indeed threaten to beat Strobl on October 15, 1997, this means that point #4 in Carlsen's (first) statement was a "false statement."

That being so, the question is who was the author/source of point #4. If it was Brycki, then he induced Carlsen to make a false statement.

The record will not support a finding that Brycki was the author/source of this critical sentence. The following shows why. As has already been noted, Carlsen testified that Brycki was the source of three points which he ultimately included in his statement (i.e. 1) that Strobl was upset with Brycki over the leather incident; 2) that Weber was the recipient of Strobl's "fag" remark; and 3) that Strobl "has a bug up his ass.") Notable by its absence was testimony from Carlsen that Brycki was the author/source of point #4 dealing with threats. If Brycki was the author/source of point #4, Carlsen would have said so when he was directly asked about it at the hearing. He did not. 4/ Since Carlsen did not identify Brycki as the author/source of point

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4/ Transcript, p. 168.

#4, it is held that the wording in point #4 came from Carlsen and was his creation – not Brycki's. Thus, while point #4 is indeed a false statement, Brycki was not the author/source of it – Carlsen was.

Given the foregoing, it is concluded that Brycki did not induce Carlsen to give a "false statement" in connection with the events of October 15, 1997. As a result, that charge against Brycki has not been sustained.

Attention is now turned to the charge that Brycki urinated in the Company parking lot on October 15, 1997. My discussion begins with a review of the following background facts. The day after the March 24, 1998 grievance meeting was held on Brycki's suspension, Gross talked to Carlsen about the statement Carlsen had supplied in that meeting. In the course of that discussion, Carlsen told Gross that Brycki had urinated in the Company parking lot on the evening of October 15, 1997. Shortly thereafter, Gross asked Weber if Brycki had urinated in the parking lot on October 15, 1997 and Weber replied in the affirmative. From the Company's perspective, this was a matter which it was unaware of when it suspended Brycki for his October 15, 1997 misconduct.

When Brycki had his disciplinary interview on June 24, 1998, he denied urinating in the Company parking lot on October 15, 1997.

At the hearing, just one witness testified that Brycki urinated in the parking lot on October 15, 1997. That witness was Carlsen. Carlsen's account was disputed by two witnesses: Weber and Kotlewski. Both testified they were with Brycki when he was in the parking lot that night and that he did not urinate in the parking lot.

Obviously, Carlsen's testimony on this point conflicts with Weber's and Kotlewski's testimony and cannot be reconciled. After weighing this conflicting testimony, I find that Carlsen's testimony does not carry more weight than that of the other two employes. My rationale follows. First, all three are disinterested witnesses in that none have anything to gain by their testimony herein. Second, all three are floor helpers who are excluded from the bargaining unit and therefore have no direct stake in the outcome of a unit member's discipline. Third, the veracity of all three witnesses has been called into question herein. Having found that Carlsen's testimony does not carry more weight than the others, I conclude that the Company has not met its burden of proving that Brycki urinated in the Company parking lot on the evening of October 15, 1997. As a result, that charge against Brycki has not been sustained either.

The third and final charge against Brycki is that he lied about charges one and two (i.e. inducing Carlsen to give a false statement in connection with the events of October 15, 1997 and urinating in the Company parking lot on October 15, 1997). Having previously held that charges

one and two were not sustained, it logically follows that the third charge cannot be sustained

either because it is essentially a derivative of charges one and two. 5/

5/ In so finding, I am well aware that I found earlier in the <u>Suspension</u> section that Brycki lied in his written statement when he said he did not threaten Strobl. Specifically, I found that he did threaten to beat Strobl. However, just because Brycki lied about that (i.e. threatening to beat Strobl) does not mean he also lied when he denied inducing Carlsen to give a false statement and urinating in the parking lot. Thus, the fact that Brycki lied about threatening Strobl cannot be bootstrapped to prove the third charge.

Since none of the three charges against Brycki have been sustained, the Company failed to prove that Brycki committed the misconduct he was charged with.

Inasmuch as the Company has not proven the first element of just cause, it is unnecessary to address the parties' arguments with respect to the second element of just cause (particularly due process considerations, the Company's investigation prior to discharge, the timing of the grievant's discharge, the notion of double jeopardy, and the grievant's failure to testify).

Accordingly, the grievant's discharge is overturned. The grievant is to be reinstated with no loss of seniority and with full backpay and benefits less any interim earnings.

In closing, it is noted that I am mindful of the Company's difficulties in this troubling case: faced with claims from Carlsen that Brycki had induced a false statement from him and urinated in the parking lot, the Company decided it believed Carlsen's allegations over Brycki's blanket denial. Had the Company proved that Brycki engaged in the alleged misconduct, the Company's termination of Brycki would have been sustained. That has not happened because the Company did not prove Brycki's alleged misconduct. Thus, the discharge portion of this case turns on the Company's burden of proof, and only stands for the proposition that there was insufficient evidence in this case to warrant finding that the grievant committed the misconduct he was charged with.

In light of the above, it is my

<u>AWARD</u>

1. That the three-day disciplinary layoff of Steven Brycki on October 17, 1997 was for just cause. Therefore, that grievance is denied.

2. That the discharge of Steven Brycki on June 26, 1998 was not for just cause. The Company therefore violated Section 11.1 of the collective bargaining agreement when it

discharged him. In order to remedy this contractual violation, the Company is directed to reinstate Brycki to his former or substantially equivalent position with no loss of seniority and to make him whole for lost wages and benefits less any interim earnings. The undersigned will retain jurisdiction for at least thirty (30) days from the date of this Award solely for the purpose of resolving any dispute with respect to the remedy herein.

Dated at Madison, Wisconsin, this 16th day of June, 1999.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

REJ/gjc
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