

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LOCAL #245, UNITED FOOD & COMMERCIAL  
WORKERS INTERNATIONAL UNION, AFL-CIO & CLC**

and

**DEAN PICKLE AND SPECIALTY PRODUCTS COMPANY**

Case 2  
No. 57611  
A-5770

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Appearances:

**Mr. Eugene L. Krull**, International Representative, United Food & Commercial Workers International Union, AFL-CIO & CLC, P.O. Box 1174, Appleton, WI 54912-1174, appearing on behalf of the Union.

Schiff Hardin & Waite, by **Attorney Henry W. Sledz, Jr.**, 6600 Sears Tower, Chicago, IL 60606-5500, appearing on behalf of the Company.

**ARBITRATION AWARD**

The Union and the Company named above are parties to a collective bargaining agreement effective from October 1, 1997, through September 30, 2002. The collective bargaining agreement provides for final and binding arbitration of grievances that the parties are unable to settle. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to hear the grievance of Jim Hurd. The undersigned was appointed and held a hearing on August 13, 1999, in Green Bay, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by September 23, 1999.

**ISSUE**

The issue to be decided is:

Was the Grievant, Jim Hurd, discharged for just cause? If not, what should the remedy be?

## CONTRACT LANGUAGE

### **ARTICLE 23. – DISCHARGE**

The Company agrees not to discharge an employee on account of union activity or other causes forbidden by law, but nothing contained in this Agreement shall be construed to limit or restrict the Company's right to discharge for just cause.

## BACKGROUND

The Company operates a food processing plant in Green Bay, among other places. The Green Bay facility employs about 450 employees and about 170 of them are represented by Local 245, Food & Commercial Workers International Union.

The Grievant is Jim Hurd, an employee at the Company's Green Bay plant for about five years. He was an order filler for the warehouse for the last 13 months before he was discharged on April 1, 1999. This grievance is over the discharge.

The Company has work rules and "good manufacturing practices" (called GMP's) to insure proper sanitation and meet state and federal regulations regarding the processing of food. The purpose of GMP's is to provide a good product to customers. State and federal regulatory agencies can shut down the plant if sanitary conditions are not maintained. The GMP's that are relevant in this case are the following:

9. No food or drink is permitted in the manufacturing, processing, warehouse or tankyard areas. This includes all visitors. Food and drink is limited to the lunch room.

10. No gum chewing, candy, etc. is permitted in the plant. Employees should not hold toothpicks, bag closure ties or similar objects in the mouth while in production.

11. Dean Pickle and Specialty Products is a smoke free environment. This means no smoking or chewing of tobacco products is allowed inside the plant, offices, maintenance shop, tankyard, or company vehicles. There is no indoor-designated smoking area. This policy applies to all employees and visitors

Dennis Bentley has been with the Company for 24 years and been the Plant Manager in Green Bay for more than 10 years. Bentley testified that the GMP's are given to new employees at their orientations and are posted on bulletin boards. Updates are put into payroll stuffers. When GMP's are violated, employees are disciplined according to the severity of the violation. Bentley noted that the lab area has a designated eating and drinking area and another where food and drinks are not allowed. The lab is not part of the production or warehouse area.

The Company's general work rules and procedures are handled like the GMP's, with new employees getting copies at orientation, updates put in payroll stuffers, and copies posted on bulletin boards. The general work rules used to be part of the collective bargaining agreement but were negotiated out of the current contract. The relevant work rule states:

16. Neglect of duty, insubordination or incompetence in its various forms (Includes failure to follow supervisor's instructions given in line of duty and for the purpose of producing the Company's product or for orderly discipline).

The relevant work history regarding the Grievant is for the month of March, 1999. On March 26<sup>th</sup>, the Plant Environmental Safety Coordinator, Jess Reif, observed the Grievant having a cigarette on a propane forklift, which violated the GMP's. Reif gave the Grievant a written warning for violating the smoking policy.

Christine Helminger is the Quality Control Supervisor at the plant and works in the lab. She is often out in the production and warehouse area. On March 23<sup>rd</sup>, she saw a soda can on the Grievant's forklift. She walked up to him and told him that the soda was in violation of the GMP's and asked him to remove it. The Grievant complied. Helminger testified that there were four times in the past that she asked the Grievant to comply with the GMP's, and he complied three times – up until March 30<sup>th</sup>, when the incident that led to the Grievant's termination took place.

On March 30<sup>th</sup>, the Grievant was training Bob Bristol. Both were on separate forklifts. Helminger saw a soda can on the Grievant's forklift. According to Helminger, she told the Grievant that soda was not allowed in the warehouse, and that she had just told him last week that having a soda in the warehouse was against the GMP's. Helminger said that the Grievant said that they always have food in the lab and he didn't understand why he couldn't have it out in the warehouse. Helminger said that the Grievant said he was going to see Bentley to tell him that the lab people have food. Helminger said she did not want to discuss that with him. The Grievant told her to "get the hell away" from him and waved his hands in the air. According to Helminger, she then took the soda off the forklift at that point and walked away and called Bentley. Helminger testified that she asked the Grievant to remove the soda but he made no effort to do so. He stayed on the forklift at all times.

Helminger admitted that the Grievant never said directly that he was not removing the soda, just that he said, "get the hell away from me." Helminger testified that she did not grab the soda can before the Grievant said, "get the hell away from me." Helminger considered his action in not getting off the forklift and demanding her to get away from him to be a refusal to remove the soda.

The Grievant testified that he was working with Bristol when he heard someone yelling. He was not on his forklift at that time. He turned and saw Helminger with a can of soda in her hand. He knew what it was about, that he was in the wrong to have a soda on the forklift.

According to the Grievant, Helminger said – haven't I told you once or twice before about this, and he said "whatever" to her. He thought she was walking away, but she was yelling at him. He then said, "get the hell out of my face" and turned back to work with Bristol. His forklift was not running but he had earplugs on. The Grievant testified that he did not refuse to remove the soda since Helminger had the soda in her hand the whole time, and he had dumped them out every other time she asked him to do so. He testified that he never received an order from Helminger on March 30<sup>th</sup>.

Bristol could not hear what was said between the Grievant and Helminger because he was wearing earplugs. He turned around from a task and saw Helminger at the front of the Grievant's forklift with a soda can in her hand and could tell that they were having an exchange for about a minute. He was about 10 to 12 feet away from them.

Helminger paged Bentley, who met with her in his office, along with Matt De Wan, the Quality Assurance Manager and Helminger's supervisor. Helminger told Bentley that she saw the Grievant in the warehouse with a soda can, that she went up to him and tried to remove it. Helminger told Bentley that she had asked the Grievant to remove the can of soda and he did not remove it. Bentley told Helminger to tell the Grievant that he was suspended until further notice. When she did, the Grievant told her that it was unfair because the lab people could have food and drinks in their area and he accused Helminger of picking on him.

Helminger's report written up that day states the following:

I observed an open soda on Jim Hurd's forklift in the warehouse so I approached him and told him soda was not allowed in the warehouse. I reminded him I had told him on March 23, 1999 that soda was not allowed in the warehouse and he was in violation of the GMP Rules. Jim Hurd argued with me and told me to "get the hell away from him." I removed the soda and contacted Dennis Bentley. Jim Hurd was called to Tom Hendricks office with Tom Hendricks, Stella Sudduth, Matt De Wan and I present. He admitted to drinking soda on his forklift and that he had said to "Get the hell away from Him" to me. He also accused me of "picking" on him. He was told to punch out and that he was suspended until further notice.

The next day, Bentley met with the Grievant. Tom Parma was present as a Union representative. Marlene Smith, the Human Resources Manager, was also at this meeting. Bentley recalled asking the Grievant why he continued to break the GMP's, and the Grievant said he didn't know why he continued to break them. The Grievant admitted that he had been smoking but not caught before. The Grievant complained about the lab having pizza and cake in the office but he could not have soda in the warehouse. He admitted that he lost his temper and had told Helminger to get out of his face or out of his way. The Grievant did not say specifically that Helminger had never given him an order because she already had the soda in her hand during the confrontation. At the end of the meeting, Bentley told the Grievant that he was being suspended for two reasons -- insubordination and violation of GMP's. Marlene Smith prepared notes from the meeting, which state:

Dennis asked Jim why he continues to disobey company work rules. Jim responded: "I don't know why." He had no answer.

Dennis told Jim that Chris Helminger had just talked to him a week before the March 30<sup>th</sup> incident regarding the fact that soda was not allowed in the warehouse. This was a GMP violation.

Jim responded: What do you want me to say?

Dennis proceeded to tell him where the company stands on employee compliance with company work rules. Jim said: Rules only apply to certain people. For instance, it's okay for the workers in the Lab to have cake and pizza down there and the warehouse personnel cannot do that. The warehouse does not have open product exposed, so why isn't it okay to eat/drink in that area?

Dennis referred to Jim's warning letter dated March 26, 1999, for smoking in a non-authorized area. Dennis even stressed to him about smoking on his lift truck with a propane tank right there. This is a very serious violation. Jim really had no answer. He stated that his heart sometimes pounds, so he has an immediate need for nicotine and that's why he smokes. He admitted to smoking whenever he has this need, even if it is not an authorized break. He just has not been caught. He also told us that he has been smoking since he was 12 years old. He has tried the patch, but with no success. Also, he went through his doctor to get a prescription for Zyban. That did not work either.

When asked why he swore at Chris Helminger on March 30<sup>th</sup>, he didn't know why. He admitted to telling her to "get out of my face." He didn't remember if he said "Get the hell away from me." Jim also felt that he was being picked on. Jim said that Chris did not see him drinking the soda, but he did have it on his fork lift truck. Jim also asked why it was OK for company management to swear at workers. He said Brad Froberg has done that to him.

Jim did tell us that he was training another co-worker (Bob Bristol) at the time that the incident on the 30<sup>th</sup> occurred. When Chris approached him and grabbed the soda, he said he just lost his temper.

Jim asked why he was suspended.

Dennis responded that there were two reasons:

1. Insubordination to a supervisor.
2. Not obeying GMP's.

Jim felt that the company was trying to screw him or maybe even fire him. He asked what was going to happen next. He was told that Dennis would contact him by phone on Thursday, April 1<sup>st</sup>, as to the company decision in this matter.

Marlene also brought up an incident that happened last year where she talked to him because he reported to work at 11:00 AM, and never called. He remarked that he was coming in that late because he was being charged for a ½ day absence, so he might as well take the ½ day off and then come in.

Dennis then asked Jim if every employee should do what he did when coming in late, since that absence went towards the attendance policy. He said: "Definitely, those employees should do the same thing. They're stupid not to."

Jim's attitude provokes people into becoming upset. This includes his co-workers who have to fill in for him when he doesn't show up as well as management personnel. We informed Jim of this at that meeting last year. He didn't care what point the company was trying to get across to him, because his closing remark at that meeting was something like: "I'll wait until I get fired."

Marlene Smith never heard the Grievant say when Helminger had taken the soda, just that she had grabbed the soda. Bentley and Katey Smith, the Human Resources Director, went over the notes from the meeting the following day. Bentley gave the Grievant a notice of termination on April 1, 1999, stating that the Company concluded that he was in direct violation of insubordination to a supervisor.

Allen Fye is the President of the Union. He had a meeting with Bentley and Katey Smith, and they all talked to Bristol about the March 30<sup>th</sup> incident sometime in mid April, probably April 19<sup>th</sup>. Fye did not believe that the Grievant had been insubordinate, and he pointed out that the minutes from the meeting as recorded by Smith show that Helminger had grabbed the soda. Fye thought the Company should have been aware that Helminger had taken the soda because of the meetings that he had with management regarding the grievance.

The Company responded to the grievance on April 7<sup>th</sup> with a memorandum from Katey Smith to Al Fye that stated the following:

I am receipt of the grievance dated 4/7/99 regarding Jim Hurd's termination.

The basis for Jim's termination was insubordination. As discussed previously, the insubordinate act was Jim's refusal to remove an open can of soda from a restricted area as directed by a supervisor. Further comments made by Jim were not the grounds for termination. Therefore, I deny the rationale behind point number one.

Secondly, a GMP violation was the circumstance which initiated the supervisor directive, but was again not the grounds for termination. It was Jim's refusal to remove the open soda can from the restricted area.

Therefore, Jim Hurd's termination due to his insubordinate act of refusing an order from a supervisor stands. His award request is denied.

The Grievant felt that Helminger's conduct on March 30<sup>th</sup> was in retaliation for his complaint to her about food in the lab. He had taken a delivery to the lab and noticed a half-eaten cake in the middle of the lab. He talked to an employee in the lab who said it was someone's birthday. He saw Helminger the next day and asked her why they could have food in the lab but they could not have soda in the warehouse. The Grievant thought that the lab was a restricted area.

### **THE PARTIES' POSITIONS**

#### **The Company**

The Company states that a fairly universal definition of insubordination set forth by Arbitrator DiLauro is a "willful disregard of express or implied directions of an employer and refusal to obey a reasonable order." A broader definition includes failure to effectuate a supervisor's direct order, combative or abusive behavior towards a supervisor, among other things. An employee does not have to directly refuse a supervisor's order to be insubordinate – not complying promptly with a direct order is sufficient. An employee should immediately comply with a supervisor's directive, even if she or he disagrees with the reasonableness of the order. That is the basis of the "obey now, grieve later" concept.

The Company asserts that there can be little doubt that the Grievant was insubordinate. Helminger previously warned him on March 23<sup>rd</sup> that food and drinks were prohibited in the warehouse and that any future violations could lead to discipline. While he promptly obeyed the supervisor on that occasion, he changed his approach one-week later. On March 30<sup>th</sup>, the Grievant did not comply promptly with the supervisor's directive to dispose of the soda. Instead, he proceeded to argue with her, claiming that other areas of the plant received preferential treatment because food and drinks were permitted. Helminger again requested the Grievant to get rid of the soda, but he became agitated, threw up his arms and yelled at her to "get the hell out of the way." In order to avoid further escalation with an angry employee, she removed the can of soda herself.

The Company contends that the Grievant's actions were insubordinate in two ways. First, he treated his supervisor in an abusive and hostile manner. Secondly, he did not promptly comply with the supervisor's direction or make any effort to indicate that he would comply. He only argued with Helminger and took no action to indicate that he would remove the can of soda.

The Company anticipates that the Union will argue that the Grievant was not given the opportunity to comply with Helminger's order since she removed the can of soda herself. That argument should not be accepted, the Company urges, because the Grievant had shown one week earlier that he knew how to comply with this same order. On March 30<sup>th</sup>, he chose not to comply and chose instead to argue with Helminger and yell at her.

The Company argues that credibility issues should be resolved in favor of the Company. The Union may argue that Helminger never gave the Grievant a chance to remove the soda and removed it herself before ever talking to the Grievant. That was the Grievant's version, and he tried to buttress his story with Bristol's testimony. However, Bristol admitted that he was wearing hearing protection and did not hear the beginning of the conversation between Helminger and the Grievant. Bristol did not see Helminger approach, did not know who started the conversation, and was not sure what may have happened before he saw Helminger with the can of soda in her hand. Thus, Bristol does not corroborate the Grievant's testimony.

Moreover, the Company states that Helminger's testimony was straightforward while the Grievant could not provide specifics of exactly where he was at the time of the incident or exactly what he said. Yet he testified that he was absolutely sure that she had taken the soda before any words were spoken. He did not tell anyone from the Company that he did not have a chance to comply with Helminger's order and disclosed this information for the first time at the arbitration hearing. In looking at credibility, the Grievant has something to gain while the supervisor has no ulterior motive to be misleading.

Finally, the Company asserts that the appropriate penalty is discharge. Insubordination is a serious violation in the industrial setting, for it can disrupt or destroy the safe and efficient operation of the plant. The Grievant had committed similar violations in the past. He is not a long-term employee with an exemplary work record. During his relatively short tenure, he has been the subject of numerous warnings and counseling. In March alone, he received a written warning for absenteeism, a second written warning for smoking, and was twice caught with open soda cans in the warehouse. The Company asks that the grievance be denied.

### **The Union**

The Union argues that the termination of the Grievant was unjust because the Grievant was not insubordinate on March 30<sup>th</sup>. The Union believes that this is a simple and straightforward case. The Company has made it very clear that the termination resulted from insubordination only. Joint Exhibit #3 points out that the comments made by the Grievant were not the grounds for termination along with the GMP violation of having a soda in a restricted area.



Helminger testified that she had seen a can of soda on Hurd's forklift about 8:00 a.m. on March 30<sup>th</sup>. She testified that she and Hurd had an exchange of words, after which she left with the can of soda. On cross-examination, she testified that the lab is not a restricted area. Yet in the Company's Exhibit #1, Rule #9 states that no food or drink is permitted in the manufacturing, processing, warehouse or tankyard areas, and that food and drink is limited to the lunchroom. All three Union witnesses testified that they have no knowledge of the lab being out the restricted area. The Union feels that this possibly caused some tension between Helminger and Hurd, as he previously questioned her as to why eating and drinking was allowed in the lab and not in the warehouse where all product is sealed.

The Union stated that Helminger testified that Hurd never refused to remove the soda. Bristol also testified that when he turned around, he saw Helminger standing by Hurd's forklift with a can of soda in her hand. He also testified that employees and management have on occasion either had drinks or food in restricted areas and no one has ever been written up or terminated for that type of behavior.

The Union points out that Hurd testified that Helminger already had the can of soda in her hand and was yelling at him when he turned toward her. He never refused to remove the soda because she had it in her hand all of the time. He also testified that employees and management occasionally either drink or eat in restricted areas. Hurd testified that he felt that Helminger may have been retaliating against him because he approached her about having cake and drinks in the lab.

While the Company asked why the Grievant had never made the Company aware that Helminger had the can of soda in her hand at all times, the Union President brought this to the attention of the Company. The minutes of the March 31<sup>st</sup> meeting also reflect that the Grievant stated that Helminger approached him and grabbed the soda.

The only difference in all of the testimony is whether Helminger had the soda immediately or if she removed it from the Grievant's forklift after a short exchange of words.

The Union asks that the Grievant be reinstated with no loss of seniority and be made whole for any losses he may have incurred.

### DISCUSSION

The only definition of insubordination that will be used in this Award is the one that the Company used for the termination of the Grievant, as found in Joint Exhibit #3. In that exhibit, the Company clearly states that the Grievant was terminated for insubordination, and the "insubordinate act was Jim's refusal to remove an open can of soda from a restricted area as directed by a supervisor." Thus, it is the Company's burden to prove that the Grievant refused to remove an open can of soda as directed by a supervisor. (There is no doubt that the warehouse is a restricted area and that the Grievant knew it.)

The only relevant evidence is the testimony of Helminger and the Grievant. Bristol did not hear what was said. His testimony only confirms that he saw Helminger with a can of soda in her hand, and she confirmed that she took the soda in her belief that the Grievant was not going to remove it. Thus, the evidence comes down to a narrow bit of testimony about what happened and what was said by Helminger.

The Company's case is somewhat weakened by the fact the Helminger did not directly tell the Grievant to remove the soda. However, the Grievant knew exactly what she wanted because he had been through the same drill before with Helminger. Only a week before, he had removed the soda from his forklift when Helminger asked him to. On March 30<sup>th</sup>, Helminger was saying - didn't I tell you this before - or something to that effect. The Grievant knew and admitted that he had been "busted" with a can of pop in the warehouse. He knew that having an open can of soda was clearly against the GMP's.

Instead of responding by making any attempt to get rid of the soda or apologize to Helminger, the Grievant got angry and argued with her about people in the lab having cake and sodas. He also told her to get out of his face or to get "the hell" away from him. Helminger did not pick up the soda until the Grievant angrily told her to get away from him. Accordingly, the Grievant had made no attempt to comply with the supervisor's directive to remove the soda. If Helminger had not taken the soda at the point she did, it appears as though the Grievant would have continued to keep it on the forklift, something that was unacceptable to the Company.

While the Grievant testified that Helminger had the can of soda in her hand the whole time that she was talking or yelling at him, he never made that claim until the arbitration hearing. He had an opportunity to tell the Company before hearing that he was not insubordinate in his opinion where Helminger had the soda in her hand before he could remove it.

I find that the better interpretation is that Helminger did not take the can of soda until the Grievant argued with her and hold her to get away from him. Thus, the Grievant's testimony that she had the soda in her hand all the time is discounted. Bristol's testimony does not help either party, because he did not hear what was said and turned around after Helminger was already at the forklift with the soda in her hand.

Moreover, Helminger's report written on the same day shows that the Grievant told her to get "the hell away" from him before she took the soda. Helminger would have had no way of knowing that the Grievant would later claim that she had the soda in her hand the whole time.

The evidence is clear enough that the Grievant quickly became combative and argumentative and showed no sign of getting rid of the can of soda. Therefore, the Company has proved that the Grievant was being insubordinate as it charged.

While the penalty of termination may seem extreme, the Company has a strong interest in keeping its premises and products in a certain manner. Whether or not people may eat food and drink sodas in the lab is irrelevant to this case, and it should have been irrelevant to the Grievant. He worked in the warehouse, not the lab, and he knew what the rules were for the warehouse. He knew he had been violating them, on a regular basis. In March of 1999 alone, he was counseled on March 23<sup>rd</sup> for a violation of the GMP's and given a written notice on March 26<sup>th</sup> for violating the no-smoking policy.

The past disciplinary measures did not have the desired effect of rehabilitating the Grievant. This is an employee who constantly flaunted the Company's rules, as he admitted by telling Bentley that he often smoked in unauthorized areas but had not been caught. He told Bentley that he did not know why he kept breaking the GMP's. This employee did not respond to progressive disciplinary measures. The Company's decision to discharge him under those circumstances was not arbitrary or unreasonable or excessive.

#### AWARD

The grievance is denied. The Company had just cause to discharge the Grievant, Jim Hurd.

Dated at Elkhorn, Wisconsin, this 6<sup>th</sup> day of October, 1999.

Karen J. Mawhinney /s/

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Karen J. Mawhinney, Arbitrator