BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 78T, UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO

and

APPLETON MILLS

Case 40
No. 57882
A-5790

Appearances:

Attorney John S. Williamson, Jr., 103 West College Avenue, Suite 1203, Appleton, Wisconsin 54911, appearing on behalf of UFCW Local 78T.

Brigden & Petajan, S.C., by **Attorney John C. Patzke**, 600 East Mason Street, Milwaukee, Wisconsin 53202-3831, appearing on behalf of Appleton Mills.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, United Food and Commercial Workers, Local No. 78T (hereinafter referred to as the Union) and Appleton Mills (hereinafter referred to as the Employer or the Company) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff as arbitrator of a dispute over the termination of employe Richard Retzlaff. The undersigned was so designated. A hearing was held on October 20, 1999, at the Company's offices in Appleton, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted post-hearing briefs, which were exchanged through the undersigned on November 29, 1999, whereupon the record was closed.

Now, having considered the testimony, exhibits, other evidence, contract language, arguments of the parties and the record as a whole, the undersigned 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.

ISSUE

The issues before the arbitrator are:

1. Whether the Company violated the collective bargaining agreement when it terminated the grievant, Ricky Retzlaff?

2. If so, what is the appropriate remedy?

The parties stipulated that the collective bargaining agreement allows discharge for legitimate reasons, and require just cause for discipline.

BACKGROUND

At a meeting on May 13, 1999, Company Human Resources Manager Ed Butteris gave the grievant a letter terminating his employment:

> Dear Rick:
>
> As you are aware, employees concerned for their safety have come forward and accused you of making threats of revenge combined with statements about owning a trench coat and an AR-15, such statements made on or about Monday May 10, 1999. Our investigation leads us to believe that the allegations are true. In the best interests of health and safety of our workforce, Appleton Mills cannot tolerate direct or indirect threats of serious bodily harm or death toward its employees. On this basis your employment is terminated effective immediately for this single act.
>
> As an independent reason for your termination, your recent behavior relative to your fellow employees clearly indicates a continuing inability to work with others at Appleton Mills without causing undue confrontation. You have been repeatedly warned through the years about this problem, which has not been corrected through progressive discipline, and which does not give any indication that further corrective opportunities would be other than futile.

The basis of the letter was a series of reports management had received from other employes.

On Tuesday, May 11th, Vernon Lee, a Tacker Operator, went to Yarn Department foreman Jim Krebsbach and told him that the grievant had approached him and Lead Worker John Paalman the day before. According to Lee, the grievant came up to them as they were discussing a movie. The grievant sat down on a table next to Paalman's desk and started talking, trying to get into the conversation. Lee and Paalman continued their conversation, and the grievant started raising his voice. Finally, he said "Nobody here respects me anymore.

I'll never forgive or forget anybody." Lee replied "Rick, what's up with that? You haven't spoken to me in months." The grievant said he wasn't talking to him. Lee and Paalman started discussing the movie again, and the grievant interrupted, saying "That's what I'm talking about. Nobody respects me. If you guys only knew what was going on. I don't ever forgive and I don't ever forget." Lee asked him if he was still mad about a prank that had been played involving an orange placed in Lee's locker. In reply to the comment about forgiving and forgetting, Lee asked him if he didn't go to church or recall his catechism, where the first thing taught was to forgive. Paalman told him he was going to get a "hot ass" if he kept talking stupid, and the grievant responded that he didn't believe any of that "crap." Lee was taken aback by this statement, because he knew the grievant was a regular churchgoer.

The grievant said "If you only knew – I already have my trench coat and my 15." Lee asked him what a "15" was, and the grievant said he meant an AR-15, a type of assault rifle. Paalman said "Rick, you're not going to shoot me are you? We've been getting along pretty good lately." The grievant said he wasn't talking about Paalman, but as he spoke he became louder and more upset. Lee told him he knew he didn't have an AR-15 because he couldn't afford one and his wife wouldn't let him buy one. Paalman told the grievant that he wasn't smart enough to load an AR-15 if he had one, and the grievant replied that Paalman didn't know what he was capable of. Paalman said he'd seen the grievant shoot, and he didn't have anything to worry about. The grievant still seemed very agitated, and at this point, Lee got up and walked away. Paalman went back to working on the computer, and the grievant walked off.

After work, Lee thought more about the conversation and discussed it with some friends and with his father-in-law, a retired police officer. This was only a few weeks after the deadly shootings by two students wearing trench coats and carrying AR-15's at Columbine High School in Colorado. His father-in-law advised him to report the matter. When he got to work on Tuesday, he went to Union President Eric Kuehnl, and told him about the grievant's comments. Kuehnl told him it wasn't a Union matter, and that he should report it to management. Around noon, he told Krebsbach about the conversation, and Krebsbach told him that Human Resources should deal with the matter.

Paalman also reported the conversation to management on the 11th. After the conversation on the 10th, a maintenance worker had made some comment about the Columbine shootings, and it occurred to Paalman that that was what the reference to trench coats and AR-15's meant. As Paalman recalled it, he went back and asked Lee if he thought the grievant was serious or not, and Lee told him that he was taking it seriously. They discussed it again the following morning, and Paalman asked a number of people, including Eric Keuhnl, what they thought he should do. After these conversations, Paalman told Krebsbach about the grievant's comments. Krebsbach went to Production Superintendent William Bast and told him what the two employes had reported. Bast called Paalman and Lee to his office to confirm Krebsbach's report. They did, and Bast contacted Butteris and told him to interview the two men. Bast then met with Needling Department Supervisor Dave Griesbach, Eric Kuehnl and Union Treasurer Jeff Bessette. He told Kuehnl and Bessette about the allegations, and

informed them that he would be investigating and would speak with the grievant. He asked if the grievant had been moody recently. Kuehnl said he had, and suggested referring him to the Employee Assistance Program. Bast noted that the grievant had already been seeing personnel at the EAP.

The grievant was not at work on the 11th until late in the day, because of a doctor's appointment. When he reported to work at 3:30 p.m., he was called into Bast's office and advised of the allegations. He said a group of employes had a conversation about guns, but that he was just one person in the conversation. The allegations upset him, and since it was almost quitting time, he was told to go home.

The grievant was not scheduled to work on May 12th or 13th. On the morning of the 12th, Yarn Department Lead Worker Steve Posselt went to Vice President of Manufacturing Mike Miller's office. Posselt told Miller he had heard about the allegations against the grievant, and said he thought he ought to report something he regarded as being very strange. According to Posselt, as he left work a week or two earlier, he had seen the grievant sitting in his truck in the parking lot by the employe entrance. Posselt thought it was odd, since it was the grievant's day off, but he assumed he was waiting for someone. Posselt was usually one of the last ones to leave, and when he looked behind him he didn't see anyone else. He waved to the grievant, but he made no response.

Later on the 12th, Operator Richard Unger went to Miller's office and told Miler that he, too, had witnessed odd behavior by the grievant. Specifically, Unger said that the grievant had recently been coming to the Yarn Department quite often and opening the door to the loading dock. Unger said that he just opened the door and looked out. While many employes would occasionally go out to the loading dock, the grievant was doing it more frequently than others, enough so that Unger noticed.

The next day, the grievant, Bast, Miller and Union Steward Ed Brown met in the Human Resources office. The allegations were laid out, and the grievant was terminated. The instant grievance was filed, protesting the termination. It was not resolved in the lower steps of the grievance procedure and was referred to arbitration. A hearing was held on October 20th, at which time, in addition to the facts recited above, the following testimony was taken:

Vernon Lee testified that discussion of weapons was not uncommon in the plant, and that the grievant had previously said he wanted an AR-15, but that he couldn't afford one and that his wife would not let him buy one. The grievant had mentioned that his brother-in-law owned an AR-15 and that he had fired the weapon. While he and the grievant did not get along and had not spoken outside of work related matters for four years, Lee recalled that four or five years before this incident, he had tried to sell the grievant a 9 mm pistol that he owned. At that time he didn't feel the grievant was dangerous.

Lee testified that there were a great many practical jokes played at the Company, and that the grievant was a frequent target of jokes. He expressed the opinion that the grievant

would usually respond with twice as many pranks against those who played jokes on him. One common joke is to take a person's scissors out of their pouch. Lee recalled an instance in which someone did this to the grievant, and placed the scissors on a console. The scissors fell off the console and someone kicked them over to the grievant. He picked them up and threw them at Dan Huss, an electrical engineer who is part of management.

Lee recalled that the grievant was very upset during the conversation on the 10th, and appeared quite serious. It seemed to Lee as if it wasn't really him talking, and that he wasn't really talking to them. He characterized the discussion as spooky, though he did not feel personally threatened. He did not discuss it with Paalman afterwards, but did discuss it with Jeff Steed, who had heard about it and asked him. The next day, before reporting it, he spoke with Paalman, and they both concluded that they would feel bad if they didn't report it and something bad happened.

John Paalman testified that he had known the grievant for a long time, and that he seemed to have his ups and downs in mood. For several weeks before this incident, he had been acting differently, and he told Paalman that there were problems in the Department and that it was the Foskett thing all over again. This was a reference to an incident in which an employe named Foskett had choked the grievant. Paalman asked him who the employe was who was choking him, and the grievant declined to answer, saying only that management was aware of the situation and was watching the other person.

Paalman said the grievant was quite angry when he spoke on May 10th, and that he seemed very serious. Paalman did not feel threatened by the comments, but later when someone mentioned the Columbine shootings he realized what the grievant meant by having a trench coat and an AR-15. He then spoke with Lee, who said he was taking it seriously. Since the foreman was gone for the day, Paalman did nothing further until the following morning.

Paalman testified that there had once been a good deal of horseplay in the plant, but that it subsided after the choking incident involving the grievant and Foskett. All of the employes were called into the office and warned of discipline if it did not subside. Paalman said he had also witnessed the incident in which the grievant threw a scissors at Huss. He said it was a hard throw. He also recalled an incident years before this when he and the grievant were feuding. He pointed a stick at the grievant, and the grievant hit it and bloodied Paalman's lip. Paalman said it was his fault, since he had taunted the grievant.

Greg Butteris testified that the grievant had been suspended and issued a warning letter in April of 1998, for a confrontation with another employe, Al Foskett. The letter was sent to the Union, and read:

> A written warning with one (1) day suspension is being issued to Mr. Retzlaff for his repeated provocation of employees and his failure to back away from a confrontation with a co-employee. Mr. Retzlaff had previously been warned not to engage in behavior which tends to provoke other employees into verbal or

> physical altercations. Despite this warning, on or about March 25, 1998 Mr. Retzlaff left a derogatory written message directed at Mr. Al Foskett at the workplace. Furthermore, when confronted by Mr. Foskett on March 25, 1998, Mr. Retzlaff failed to back away from the confrontation despite the continued opportunity to do so, and participated in repeated obscene name calling of Mr. Foskett. This behavior is totally unacceptable, as such may lead to physical violence. Further provocation or harassment of employees will result in additional discipline up to and including immediate termination. Additionally, participation in any fight or assault on company premises is cause for immediate termination.

The grievant had also been referred to the Employee Assistance Program on March 25th. Subsequently, the Union grieved over the letter and the suspension and demanded back pay for the time he spent at the EAP and on suspension. A grievance settlement was reached, which allowed pay for 5.3 hours for his initial meeting with the EAP on the 25th, and removed the word "written" from the phrase "derogatory written message" in the letter. The balance of the letter was unchanged, and the suspension was not rescinded.

After this incident, Butteris decided to formulate a formal policy on workplace violence. An interim memo was sent to employes on July 10th, reminding employes that "threats of violence, violent and/or aggressive behavior, threatening gestures, and intimidation of any form will not be tolerated." The memo advised employes that such behavior would trigger discipline "up to and including termination of employment." On November 15th, a formal policy was issued, titled "Appleton Mills Zero Tolerance Violence Policy." The policy defined violence as including "verbal or written threats or jokes, aggressive behavior, or physical confrontation or action," and warned that confirmed acts of violence would be subject to discipline "up to and including immediate discharge." This policy was posted in the employe break room.

Butteris testified that he interviewed both Lee and Paalman. He had the impression that Lee was genuinely frightened by what the grievant had said, while Paalman was worried but not to the same extent as Lee. He considered both of them good employes and he believed what they told him. He then reported to Miller and Bast about his interviews. They discussed what to do, and Butteris told them that the 1998 discipline was a significant aggravating factor.

They met with the grievant and Steward Ed Brown on May 13th and described the allegations to him. He told Butteris that he had never said anything about owning a trench coat. He admitted having discussed his interest in owning an AR-15 with other employes, but denied making any threats. When asked about whether he had been sitting in the parking lot on his day off and frequently checking the door to the loading dock, he said nothing, but simply shook his head. Given that nothing the grievant said persuaded them that Paalman and Lee were wrong, the management representatives went forward with the discharge.

Rick Retzlaff, the grievant, testified that he had been at Appleton Mills for 11 years, and in that time had received only a reprimand for attendance and a one-day suspension in 1998.

On May 10th, the grievant had two conversations with Lee and Paalman between 10 and 11 in the morning. Around 10:00 a.m. he was walking through the area on his way back from the rest room and Lee called him over to Paalman's desk. Lee made a comment about how he had finally found the break room, and asked why the grievant could take a break with the other crew but not with his own crew. The grievant replied "After everything you guys have done, I don't forgive and forget." Lee asked if he was still mad about the prank with the orange, and the grievant just repeated that he would not forgive and forget. He then left and returned to work.

At around 11:00, he was again returning from the rest room, and as he passed Paalman and Lee were discussing a scene from a western movie involving guns. The grievant paused and said he liked 15's. Lee asked him what a 15 was, and he said it meant an AR-15. Paalman said it was not a practical gun, and the grievant said that it was like a Cadillac – not practical but it shouted "smooth." Lee told his wife wouldn't let him have one, and Paalman chimed in that he wasn't smart enough to load it and couldn't shoot it anyway. He told them that he did a lot of target shooting, and they would be surprised at what he could do. They continued to discuss how expensive AR-15's were, and after a time he walked away. He denied ever saying that he had a trench coat, or that he owned an AR-15, or making any comment about "If you guys only knew what was going on." Neither Lee nor Paalman mentioned religion or the catechism in relationship to forgiving or forgetting, and neither man told him to stop talking stupid.

The grievant acknowledged that he knew the company had a zero tolerance policy on violence, and that employes could be discharged for making threats, but he denied making any threats. He said that he had been somewhat moody around that time because of a back injury and because of some problems with Jeff Steed. One Saturday in April, Steed had choked him several times and threatened to kick his ass. He told Krebsbach about it, and asked him to keep an eye on Steed.

The grievant explained that the scissors throwing incident was in 1995 or so, and was part of a series of practical jokes that started when Dan Huss put some tape on his back. He put the tape on Huss's back, and Huss then took his scissors. Huss dropped them, and bent the tips. When the grievant got them back he said "If you want them that bad, take them" and tossed them over by Huss's feet. Huss picked them up, chuckled, and went to get the grievant a new pair from the supply room.

He explained that the reason he had been in the parking lot was to pick up another employe, who was going to do some welding work for his brother-in-law. He did not return Posselt's wave simply because he didn't see him. As for the trips to the loading dock, the grievant explained that he had a bad back, and that he went outside to get fresh air and stretch. He tried to explain this to Butteris and Miller at the meeting on May 13th, but they didn't want to hear his side of things and cut him off.

James Krebsbach testified that the grievant never reported anyone choking him. One Saturday in April, the grievant did ask Krebsbach to spend more time in the Needling shop where he was working, but he wouldn't tell Krebsbach why he wanted him to do so.

William Bast testified that he had been told of a confrontation between Steed and the grievant when he spoke with Paalman and Lee. He and Butteris investigated the incident on May 14th by interviewing Steed. Steed told him that he offered to help the grievant with a roll and the grievant rejected his offer. They argued with one another and exchanged profanities. Steed denied making any physical contact with the grievant. Steed was issued a written warning for violating the zero tolerance policy on verbal confrontations.

Additional facts, as necessary, are set forth below.

ARGUMENTS OF THE PARTIES

The Position of the Employer

The Employer takes the position that the grievant made what must reasonably be understood to have been threats of violence to his co-workers, and that this constitutes grounds for termination. Workplace violence is a serious and growing concern, and is the third largest cause of death from injury at work. In response to these problems, the U.S. Department of Labor has recommended that employers establish zero tolerance policies against violence. The Company maintains just such a policy, promulgated after the last incident involving the grievant. That policy underlies the discharge in this case. It is, on its face, a legitimate and rational rule, one which the Company is entitled and indeed obligated to strictly enforce.

The arbitrator must take what was said, and how it was said, in the context of the time in which it was said. The grievant had previously been disciplined for physical confrontations. On May 10th he was clearly disturbed and angry. He spontaneously started speaking to two co-workers, one of whom he did not socialize with and had not spoken to in months. He made comments indicating a grudge against his co-workers, words to the effect that no one respected him, and that he would neither forgive nor forget. He dismissed religious beliefs as "crap," even though he was thought to be a religious person. His tone and his words were so odd that they gave his two co-workers the impression that someone else was speaking through him. Then, just weeks after a slaughter at a Colorado High School by students wearing trench coats and carrying AR-15 assault rifles, he told Paalman and Lee that they did not know what was going on, but that he already had his trench coat and his AR-15. Both Paalman and Lee credibly testified that they took him seriously and that this was not simply a matter of someone joking around.

The Company argues that it was entitled to believe Paalman and Lee and that the arbitrator should also believe them. The grievant's defense is that they are lying, but there is no reason to think that they are. Neither man has any apparent motive to lie in the first place, much less to conspire against the grievant. The only evidence that the two men are lying is the testimony of the grievant. However, he had a clear motive to lie, and he lied at several points in his testimony. He claims that he was cut off during the May 13th meeting with management and was not allowed to tell his story, but the managers who were there deny that, and Union Steward Ed Brown, who was present at that meeting, was never called to back him up.

Likewise, he explained that he was sitting in his truck in the parking lot on his day off because he was picking someone up, but that employe was never called to confirm his story. The only reasonable conclusion is that the grievant is lying throughout, and that he did, in fact, make the threats attributed to him.

The Company concedes that, in retrospect, the grievant did not actually kill anyone. However, the Company argues that it cannot be forced to wait until violence occurs before taking action. It is obliged to respond immediately and, in choosing discharge as its response, it acted reasonably. Discharge is an appropriate response, and it is well settled that an arbitrator cannot overturn an appropriate penalty, even if he might have made a different decision if the decision was his in the first instance. The grievant is a long-term employe, but the Company factored that in when it gave him and the Union every opportunity to refute the charges. He did not do so, and the Company cannot be forced to tolerate threats of violence, even if they are made by long service employes.

The Union presented evidence that might suggest that others have engaged in violent conduct without disciplinary consequences, suggesting that the penalty here is discriminatory. This consists of the grievant's claim that he had been strangled by another employe. However, there is no evidence to support this claim. The grievant claimed to have reported this to a supervisor, but the supervisor testified and denied any such report. Thus, there is no evidence of discrimination.

In summary, the grievant had been given an unmistakable warning in April of 1998 that the Company would not tolerate confrontations and violence. As a direct result of his confrontation with another employe, the Company promulgated a zero tolerance policy on violence and threats of violence. He was counseled and he was referred to the Employee Assistance Program. Notwithstanding this, in May of 1999, he confronted two other employes and made threats of catastrophic physical violence in the workplace. His response has been to deny it happened, even though the evidence overwhelmingly establishes that it did. Given his personal history, his blanket denials, and his refusal to take any responsibility for his actions, the grievant is not entitled to any benefit of the doubt. The Company is obliged to safeguard its workers from intimidation and actual harm, and the arbitrator should, accordingly, uphold the discharge and deny the grievance.

The Position of the Union

The Union argues that the grievant did nothing wrong, and that he should be reinstated and made whole for his losses. The grievant is a long service employe, who is accused of morally reprehensible conduct, conduct which demands at least clear and convincing proof of guilt. The evidence here does not even satisfy a preponderance standard.

The termination here is the result of two other employes, for reasons of their own, fabricating a tale about the grievant. Certain elements of their stories, such as him saying he could not forgive or forget, expressing an interest in having an AR-15, and saying he was

better with a gun than Paalman thought he was, are based on statements that the grievant concedes making. Other elements, such as him claiming to own a trench coat and to own an AR-15, are pure invention. These latter statements are, on their face, implausible. The grievant would not have claimed to own an AR-15 when both Paalman and Lee knew it to be untrue. Moreover, his motives for speaking to Paalman and Lee are completely incomprehensible. It cannot have been to confide in someone since, if he did own an AR-15 and have some sort of plans for it, he hardly would have confided in Lee, a person he did not get along with. It cannot have been to threaten them, since both of them acknowledge that they did not feel threatened. It cannot have been to spread the word of his "threats" since he said nothing about telling others. In short, there is no reason for him to have said any of this.

The credibility of Paalman and Lee is seriously undermined on several other fronts. They claim to have seen the grievant once forcefully throw a pair of scissors at a management employe. Yet there is no record of any discipline for this alleged incident. Clearly the grievant's version of this incident, that he tossed the scissors to the man's feet, is the truth. Yet Paalman and Lee distorted it to make it seem that the grievant is a violent man. If true, how can it be that neither man felt the least bit threatened by the grievant's alleged comments? Both testified to feeling no personal threat, and both felt free to openly report the matter to management. None of this is consistent with the portrayal of the grievant as violent. These inconsistencies highlight the distortions and half-truths upon which the Company's case depends. The two accusers also lied about how they came to report this conversation to management. Lee claims that he reflected on it and discussed it with family and friends on the night of the 10th but denies having discussed it with Paalman that day. Paalman testified that they discussed it shortly before Lee quit for the day. The two failed to coordinate this detail of their stories, and this discrepancy draws both men's testimony into question.

The grievant denies making any threats, and the only thing that can even loosely be construed as a threat in Paalman and Lee's reports is the statement "If you only knew; I already have my trench coat and my 15." Even assuming that he said this, it cannot reasonably be construed as a threat. Lee immediately replied that the grievant did not own an AR-15, and Paalman disparaged his skills with a weapon. Thus, the two men to whom the threat was supposedly uttered knew it was not serious, and did not treat it as a threat. The Company apparently viewed this as some type of global threat to all employes, but that is a very strained and very speculative interpretation of what was allegedly said. A threat that is not credible, has no object, and does not frighten anyone is no threat at all. Under a just cause standard, it cannot possibly be the basis for the discharge of an otherwise competent and long service worker.

Even if the arbitrator were to somehow conclude that the grievant said the words attributed to him, and somehow concluded that they constituted a threat, he cannot sustain the discharge. The Company acknowledges that the grievant's prior suspension, his alleged moodiness, his presence in the parking lot on a day off and his frequent visits to the loading dock were all part and parcel of the decision to discharge him. Aside from the suspension, none of this represents misconduct. Thus, since he was discharged, in part, for innocent conduct, the entire discharge must fall. Moreover, the Company admits that its "zero

tolerance" policy does not require termination and that, in fact, another employe who violated the policy received a mere warning. Given the long and excellent service of the grievant, the shaky evidence upon which these charges rest and the lack of any actual threat or harmful conduct, the arbitrator must sustain the grievance and reinstate the grievant to his former position.

DISCUSSION

The questions before the arbitrator are (1) whether the grievant made the statements attributed to him by Lee and Paalman; if so, (2) whether these statements constitute threats of violence in violation of the Company's rules; and, if so, (3) whether discharge is an appropriate penalty. Each is addressed in turn. First, however, there is the issue of the appropriate burden of proof. Given the seriousness of the charges, the Union argues that there must be proof of guilt beyond a reasonable doubt. Given the civil nature of arbitration, the Company suggests that a preponderance of the evidence is all that is required. A just cause standard is commonly understood to require different degrees of proof, depending upon the nature of the offense. The charge against Retzlaff is one involving moral turpitude and possible criminal conduct. As noted in Bornstein 1/ ". . . it is almost certainly the "clear and convincing evidence" standard that will be applied (either expressly or by implication) by arbitrators in cases involving accusations of criminal conduct or moral turpitude . . ." This is because the grievant's reputation and future employability are at greater risk in the face of charges that he threatened workplace violence than they would be in, for example, an attendance case.

1/ See BORNSTEIN, ET AL., LABOR AND EMPLOYMENT ARBITRATION, (2D EDITION, MATTHEW BENDER), VOLUME 1 (RELEASE NO. 18, APRIL 1998), AT SEC.§506, FOOTNOTE 1.

Were the Statements Made?

The first question turns purely on a credibility determination. There are only three witnesses to what was and was not said between the three men on May 10th – Paalman, Lee and the grievant. Paalman and Lee both agree on their version of events, while the grievant has a substantially different version. There is no way to reconcile the accounts. In Paalman and Lee's telling, there was a single conversation late in the afternoon, initiated by the grievant. He made specific, unusual references paralleling events at Columbine High School, and there was a conversation about the catechism and religious teaching. None of this could have been said and then forgotten by him. By the grievant's telling, there were two conversations in mid to late morning. The first was initiated by Lee calling him over to give him a hard time about not taking breaks with the rest of the crew, and the second was a friendly discussion of guns.

The Union points to what it believes are inherent inconsistencies in the versions by Paalman and Lee, placing great stress on Lee's testimony that the two men did not discuss the incident afterwards on the 10th in contrast to Paalman's testimony that they did discuss it. The Union points to this as evidence of a failure to coordinate their lies. That is a more sinister reading than the record justifies. According to Paalman, after speaking with some maintenance personnel, he stopped and told Lee that having thought it over, he took it as a threat, asked if Lee saw it the same way and Lee said he did. Lee recalled speaking with Paalman the next day, but not that afternoon. This is a minor discrepancy and not particularly telling. There are always variations between witnesses' recollections of details months after events took place. If there were other inconsistencies in the men's stories, this might add to their cumulative weight. Standing alone, it does little to shake their overall credibility.

The Union also suggests that it is absurd to think that the grievant would confide some nefarious plan to Lee, since they were at odds and did not speak to one another. There are two responses to this. First, if the comments are taken as threats of violence against those who have done him wrong, it makes perfect sense that he might utter them in the presence of one of those people. Second, if it makes little sense that he would make this statement to Lee because they were at odds, it makes even less sense that he would casually walk up to him and strike up a conversation about how much he liked AR-15's. According to the grievant's version of events, Lee had harassed him not an hour earlier, and he'd told Lee he would not forgive and forget the treatment he had received. Yet he then strolled up and engaged in idle conversation with a man he hadn't spoken to in months.

The greatest problem faced by the grievant and the Union in this case is explaining why Paalman and Lee would engage in this plot. While they do not bear any burden of proof, this is a credibility case and the testimony, once given, begs for some explanation. There is none. There was some friction between Lee and the grievant, but that leaves Paalman's role unexplained. Both Paalman and the grievant agree that they were getting along reasonably well. Yet, if the grievant is telling the truth, Paalman and Lee must consciously have decided to coordinate a fairly elaborate lie, involving details about the catechism and telling him not to act stupid. They must then have communicated this to the Union and to management. Thereafter, Paalman for some reason feigned not being too concerned about it, since that was the impression he left with Butteris. That attitude is not consistent with a plan to get the grievant fired, since conveying great concern and fear would normally provoke more of a response. It is also notable that the statements attributed to the grievant could have been somewhat clearer if they were merely a fabrication in the first place. The reference to an AR-15 works as a reminder of Columbine, but both of them knew the grievant did not own an AR-15, and a statement could have been invented that served equally well.

Crediting the grievant's testimony involves discrediting Paalman and Lee. It also requires that Butteris, Bast and Krebsbach, to varying degrees, be discredited. The grievant claims he told Krebsbach he was being choked and assaulted by Steed, while Krebsbach testified that the grievant asked him to keep a closer eye on his department, but refused to tell

him why. The grievant claims that he was not allowed to explain his presence in the parking lot or his trips to the loading dock, while Butteris and Krebsbach both testified that he was asked about them and merely shook his head. This is a fairly significant point, and there was a Union Steward present in the room during the meeting. Yet he did not testify in support of the grievant. There is no explanation for the wide-ranging conspiracy that must have gone forward if the grievant is telling the truth on all of these points. Taking the record as a whole, and weighing the problems inherent with the grievant's version of events, I conclude that he did not testify truthfully, and instead credit the testimony of the other witnesses. It necessarily follows that he made the statements reported by Paalman and Lee.

Were the Statements a Threat?

The grievant told Paalman and Lee something to the effect of "No one respects me. If only you knew what was going on. I don't ever forgive and forget." They discussed forgiveness and the grievant went on "If you only knew – I already have my trench coat and my 15." Paalman asked if he meant to shoot him, and the grievant said he didn't mean him. The Union forcefully argues that this cannot be taken as a threat, because neither Paalman nor Lee felt immediately threatened and the grievant did not identify anyone else as the object of a threat. With all due respect to the Union's arguments, any reasonable person would take this as a threat of violence. It begins with a complaint of not being respected and a vow not to forgive or forget, and goes on to make a direct reference to reenacting a widely reported massacre that took place only weeks before. The fact Paalman was ruled out as a victim does not mean that there was no intended victim. The Columbine massacre itself did not have specific individual targets at the outset, merely general groups that the shooters had identified as having wronged them. Moreover, when Paalman asked if the grievant meant to shoot him, he did not say he was not going shoot anyone. He merely said he wasn't talking about Paalman. That rather clearly suggests that he was talking about someone else.

The Union also disparages the notion of a threat because both Paalman and Lee knew the grievant did not have an AR-15, and said as much. The fact that he did not have the actual weapon he specified does little to reduce the threat inherent in his statements. The mention of an AR-15 and a trench coat was obviously intended to refer to Columbine, and the threat carried by that reference is to violently retaliate against those who had tormented him, regardless of whether the retaliation uses precisely the same weaponry. Moreover, the grievant had previously told his co-workers that he had access to an AR-15, through his brother-in-law. Thus, it was not impossible that he could have used that specific weapon in an attack.

It is possible, of course, to speculate that this was all a bad joke or an inappropriate effort to blow off steam. However, according to Paalman and Lee, the grievant was angry and became even more agitated as he spoke. He seemed disturbed and made comments about religion being "crap," comments that were inconsistent with his known beliefs. These are not

attributes of a joke. More importantly, he never explained, at the time, at the grievance meetings or at the arbitration hearing, that he said it, but didn't mean anything by it. He consistently denied saying these things. Assigning some innocent meaning to the statements requires me to invent an explanation that the grievant himself did not offer. Instead, I conclude that the grievant's words, taken in the context of his angry demeanor and his personal history of conflicts with other employes, are most reasonably taken as a threat of violence. This violates the Company's rule prohibiting threats of violence, and constitutes just cause for discipline.

Is Discharge An Appropriate Penalty?

The grievant made what can most reasonably be understood as a threat of violence against his co-workers. Given the context, the Company and his co-workers were entitled to take it as a serious threat. He made this threat in the face of a suspension and a warning letter from a year earlier, cautioning against provocative conduct and confrontations with his fellow employes, as well as a written Company rule warning that violence and threats of violence would lead to discipline, up to and including discharge. The grievant himself conceded that he was aware of the rule, and knew that threats of violence could result in discharge. All of this argues in favor of the Company's choice of a severe penalty.

Balanced against the aggravating circumstances are the facts that the grievant has 11 years of service, and that no one was actually harmed. This latter point cannot be accorded great weight, inasmuch as the Company's action pre-empted any possible workplace action.

This is a closer case on the issue of penalty than it is on the merits. However, the question is whether the Company abused its discretion in determining the penalty when it made its decision, not whether the arbitrator, at a remove of many months, believes that there was a superior choice. Management was faced with employe reports of a credible threat of violence from an employe with a history of bad relations with co-workers, recent evidence of unusual behavior, and prior involvement with the EAP. 2/ When confronted with the allegations, the grievant denied them, and management did not believe him. All of this took place in an atmosphere of greatly heightened awareness of gun violence, both in the workplace and in society in general. It may seem unfair that the penalty suffered for an action can vary, depending upon when the action takes place and what the general atmosphere regarding the action is at the time. But, where the issue is the reasonableness of the decision, that assessment cannot be completely divorced from the overall context in which the decision is made, in no small part because that is the context in which the threat was made.

2/ The observation about EAP involvement is offered solely for the proposition that the grievant had already had the benefit of counseling over his workplace relations. Involvement in an EAP is not evidence of any misconduct or general unfitness for employment.

Weighing the grievant's length of service against the seriousness of the threat and the Company's obligation to safeguard its other workers, I cannot conclude that the Company abused its discretion in deciding to discharge the grievant rather than imposing some less serious penalty. Accordingly, I have denied the grievance in its entirety.

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

AWARD

The Company did not violate the collective bargaining agreement when it terminated the grievant, Ricky Retzlaff. The grievance is denied.

Dated at Racine, Wisconsin, this 10th day of March, 2000.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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