

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**GENERAL TEAMSTERS UNION, LOCAL 662**

and

**W. S. DARLEY AND COMPANY**

Case 5

No. 56405

A-5674

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Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney William H. Ramsey**, appearing on behalf of the Union.

Lindner & Marsack, S.C., by **Attorney Jonathan T. Swain**, appearing on behalf of the Company.

**ARBITRATION AWARD**

General Teamsters Union, Local 662, hereinafter referred to as the Union, and W.S. Darley and Company, hereinafter referred to as the Company, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The parties mutually agreed to the undersigned as the arbitrator to hear and decide a grievance over a suspension. Hearing was held in Chippewa Falls, Wisconsin on March 16, 2000. The hearing was transcribed and the parties filed post-hearing briefs which were exchanged by May 18, 2000.

**BACKGROUND**

The facts underlying the grievance are not in dispute. The grievant has worked for the Company for 13 years and has a clean record. In January, 1998, the grievant worked as a saw operator in the Company's machine shop. On January 16, 1998, the grievant was instructed by his supervisor, Jim Benesh, to paint a piece of plywood with paint and a roller given to him

by Benesh. The plywood was to be used as a divider between conforming and non-conforming parts. The grievant painted one side of the plywood with the paint which was purple in color and while it was drying, the grievant painted three legs on the conveyor on which material is put to slide up to the saw. The grievant then painted the other side of the plywood divider. The grievant had some paint left so he painted a door that is inside a large sliding door. The large door was white and the small door was now purple.

Benesh returned to the grievant's area and saw that the door was painted and he asked the grievant what he was doing and why he painted the door. The grievant shrugged and gave no explanation. Benesh then went to the Vice-President of Manufacturing, Frank Bucheger, and told him what the grievant had done. Benesh, at Bucheger's direction, again asked the grievant why he painted the door and conveyor legs and the grievant said he didn't know. A meeting was then held with the grievant, Benesh, Bucheger and Mary Knutson, the Personnel Manager, in Bucheger's office. Bucheger asked the grievant why he painted the door and the grievant responded that he had some paint left in the roller and tray and used it up by painting the door. The grievant offered to repaint the door on his own time but the Company said no. The grievant was suspended pending further investigation and the grievant went home.

The Company was seeking in 1997-1998 ISO 9000 certification which customers, both domestic and foreign, look to in deciding to do business with the Company. This certification was important to the Company's future growth and it had been preparing for a year to get certification and an ISO 9000 audit of the Company was scheduled for the week of January 19, 1998. The appearance of the workplace was a factor in impressing the auditors that the Company met quality standards. Jeffrey Darley, the Company's Chief Operating Officer and Executive Vice-President, decided to suspend the grievant for five and one-half days on the basis that he felt the grievant's real reason for painting the door was to detract from the final preparations for the ISO 9000 audit and thus the grievant was sabotaging the business. Additionally, he wanted the grievant out of the facility during the audit to guard against any further incident of this nature which might detract from the Company's efforts to be certified. The Company had the door repainted over the weekend and the Company passed the audit and was ISO 9000 certified.

The grievant grieved his suspension which was appealed to the instant arbitration.

### ISSUE

The parties stipulated to the following issue:

Whether or not the Company violated the collective bargaining agreement when it suspended the grievant for five plus days.

If so, what is the appropriate remedy?

**PERTINENT CONTRACTUAL PROVISIONS**

**ARTICLE 7**  
**DISCIPLINE, DISCHARGE OR SUSPENSION**

**Section 1. Disciplinary Action.** It is the Employer's responsibility to establish reasonable work rules. Disciplinary action may be imposed on an employee for failing to fulfill his/her responsibilities as an employee. Any disciplinary action or measure imposed upon an employee may be appealed through the regular Grievance Procedure.

If the Employer has sufficient reason to reprimand an employee, it shall be done in a manner that is not intended, nor likely to embarrass the employee before other employees or the public. The Employer recognizes every employee's legal Weingarten rights with respect to any disciplinary investigation involving the employee. Refusal on the part of a supervisor to honor an employee's invocation of Weingarten rights may result in an arbitrator's reversal of any disciplinary action taken against the employee.

**Section 2. Just Cause Notification.** Employees shall not be disciplined or discharged without just cause. If the Employer feels there is just cause for suspension or discharge, the employee shall be notified in writing at the time of the discharge or suspension for the reasons therefor.

**Section 3. Procedure.** The Employer recognizes the concept of progressive discipline commensurate with the nature of the offense. The usual disciplinary progression shall include the following:

- A. Oral reprimand
- B. Written warning
- C. Suspension
- D. Discharge

Except in those instances where bypassing one or more of these steps is warranted by the severity of a given infraction, any infraction for which progression to the next disciplinary step is appropriate must be within the same classification as the infraction placing the employee on the preceding step. The three (3) separate classifications applicable for this purpose are:

- (1) Attendance (i.e., tardiness, unexcused absences and excessive absenteeism for any reason);
- (2) Productivity (i.e., deficiencies in the quality and/or quantity or production); and
- (3) Behavioral (i.e., all conduct not falling into either of the other two classifications).

Prior disciplinary actions shall remain in effect for purposes of progressive discipline per the following timelines:

Suspension – One (1) year  
Written warning – One (1) year  
Oral reprimand – One (1) year

The foregoing timelines notwithstanding, all infractions shall remain part of the affected employee's permanent record and may be considered by an arbitrator for whatever it may be worth in assessing the propriety of any disciplinary action being grieved.

The number of written warnings and the length of suspension shall be determined by the gravity of the violation, misconduct or dereliction involved, taking into consideration that such steps are intended as corrective measures. Any or all progressive steps may be bypassed depending on the severity of the employee's infraction. Without limitation by enumeration, examples of infractions for which bypassing of the usual disciplinary progression may be appropriate include theft of company property, intoxication, unauthorized possession of alcohol or controlled substances, industrial sabotage, willful and deliberate falsification of work records with the intent to deceive, or aggravated acts of violence.

### **Company's Position**

The Company contends that it had just cause to suspend the grievant for the five days for intentionally damaging three machine legs and the machine shop door. It asserts that the grievant admitted painting the door and legs without any direction to do so and his explanation for his conduct is unbelievable. It submits that the grievant was told to paint one piece of plywood and he should have then returned to his job as a saw operator; however, he decided on his own to paint the shop door and three machine legs, intentionally defacing Company property. It submits that the grievant's conduct is not excusable as well intentioned or

misunderstood, nor is his explanation believable as his initial response was no response, his second that he didn't know why he did it and the third that he had paint left over, does not justify his conduct. It observes that the grievant did not paint all the legs and did a very sloppy job and besides there were better ways to get rid of the leftover paint, so it is reasonable to conclude that his actions were motivated by more than efficient use of paint. It argues that his conduct was more egregious in light of the impending ISO 9000 audit and its importance to the Company. It states that the grievant knew he was, in effect, "tweaking" the Company and giving it more to deal with along with the impending audit.

The Company insists that it did not abuse its discretion in imposing a five and one-half day suspension and thus the arbitrator cannot modify that decision. It maintains that the arbitrator can only modify the discipline if it is determined that the Company abused its discretion when it imposed the level of discipline. It alleges that there is no evidence that the Company abused its discretion in assessing the penalty. It stresses the importance of the ISO 9000 certification to the future business of the Company and Jeff Darley concluded that the grievant painted the door on the last day prior to the audit to detract from the Company's preparation for the audit. It insists that the grievant knew this and knew that defacing and sabotaging the work environment would have a bad effect on the audit so the severity of the infraction gave the Company latitude to determine the length of the suspension. It states that the grievant's conduct was tantamount to industrial sabotage warranting significant discipline and the Company considered termination, but in light of the grievant's years of service, it declined to do so. It claims that arbitrators uphold various levels of suspension for damage to Company property and here the grievant's damage was measured and intentional so the Company correctly exercised its discretion in imposing the five and one-half day suspension.

The Company points out that the contract does not limit the maximum time for a suspension but a prior contract did limit it to two days, so there is no past practice that that limitation must continue as the contract no longer contains that limitation, and the plain language of the contract states that the length of the suspension shall be determined by the Company. It argues that the Arbitrator must apply Article 7, Section 2 and uphold the grievant's five and one-half day suspension. It claims that by ignoring the contract's clear language, the Arbitrator would be, in effect, writing a new agreement between the parties, rather than interpreting and applying the terms and provisions of the agreement as the parties have set forth.

With respect to suspensions since the language change, the Company maintains that it has reviewed all the facts and circumstances before issuing the suspensions and they were reasonable and justified. It insists that the Union is comparing apples to oranges and that the prior suspensions were based on their unique facts and circumstances and does not support a conclusion that the Company abused its discretion in the case at hand. It states that the testimony reinforces the Company's position that it has the authority to review the facts and

circumstances and to impose the length of discipline it believes is appropriate and reasonable. It asks that the discipline be upheld and the grievance denied.

### **Union's Position**

The Union contends that the Company did not have just cause to suspend the grievant for five and one-half days. The Union does not contest the fact that the grievant painted the door and the legs of the conveyor but insists that the punishment does not fit the offense. It argues that the Company did not have evidence that the grievant intentionally painted the door to sabotage the ISO 9000 audit and it was not justified in bypassing its contractual obligation to discipline him progressively. It points out that the grievant was punished more seriously than co-workers who committed more serious infractions.

The Union submits that the Company was committed to follow the disciplinary progression set forth in the agreement unless it found the grievant guilty of a particularly severe infraction. It notes that the examples of serious misconduct involve intentional misconduct. It argues that it follows that the Company must show that the grievant painted the door with intent to sabotage the Company's ISO 9000 audit. The Union cites RYDER TRUCK RENTAL, INC., 78 LA 542 (Allen, 1982), as being similar to the instant case. It maintains that the Company failed to meet its burden of proof that the grievant "deliberately damaged and defaced company property." It claims the suspension is based solely upon conjecture and assumptions that the real reason for the grievant's conduct was to detract attention from ISO 9000 preparations, but there was no proof to substantiate this. It notes that neither Darley nor any of his agents asked the grievant about their suspicions that the grievant's painting the door was to sabotage the ISO 9000 audit. It points out that the grievant was never made aware that he was suspected of industrial sabotage. It insists that just cause requires more than the "flimsy" evidence of the grievant's intent.

The Union admits that the grievant used poor judgment and should not have done what he did but the Company had no evidence of anything more than poor judgment on the grievant's part. It states that it was likely that Darley was focused on the ISO 9000 audit and he assumed the grievant painted the door to interfere with Darley's efforts and this explains Darley's testimony that he personally felt the reasons the grievant gave were inadequate. It observes that the grievant had a clean record and the suspension was neither justified nor necessary and the grievant immediately offered to repaint the door on his own time. It submits that the Company did not want the grievant in the building during the audit but this is not a proper consideration under the principles of progressive discipline. It insists the Company prejudged the grievant and believed he had sabotaged its ISO 9000 efforts and he could not be trusted, yet there is no basis for this assumption and the grievant should be progressively disciplined under the requirements of the contract.

The Union asserts that the grievant's suspension was discriminatory and unfair compared to discipline imposed for more serious offenses. It argues that a fundamental requirement of just cause is that employees who engage in the same misconduct must be treated essentially the same and if penalties are not applied evenhandedly, the discipline must be negated or modified. It refers to three suspensions in 1997 where one employee chest butted another employee, another employee struck a fellow employee in the head and a third employee pointed a nail gun at another employee and fired the gun in his direction but not at him. It states that the suspensions for the offenses were for two or three days. It also notes that in 1994 an employee threatened to bring a gun to work and take care of two employees and no suspension occurred. It argues that all these involved assault or threat of violence and the grievant with a spotless record, who merely exercised poor judgment and dumb behavior, was given a five and one-half day suspension. It insists that this suspension does not fit his offense and is unfair compared to punishments meted out for more serious misconduct. It asks that the grievance be sustained and the suspension reduced to a verbal or written warning and the grievant made whole for the losses he incurred.

### DISCUSSION

Article 7, Section 2 of the parties' collective bargaining agreement provides that employees shall not be disciplined or discharged without just cause. Article 7, Section 3 provides that the Company recognizes the concept of progressive discipline commensurate with the nature of the offense and it sets out the usual disciplinary progression as follows:

- A. Oral reprimand
- B. Written warning
- C. Suspension
- D. Discharge

Section 3 further provides as follows:

The number of written warnings and the length of suspension shall be determined by the gravity of the violation, misconduct or dereliction involved, taking into consideration that such steps are intended as corrective measures. Any or all progressive steps may be bypassed depending on the severity of the employee's infraction. Without limitation by enumeration, examples of infractions for which bypassing of the usual disciplinary progression may be appropriate include theft of company property, intoxication, unauthorized possession of alcohol or controlled substances, industrial sabotage, willful and deliberate falsification of work records with the intent to deceive, or aggravated acts of violence.

It is admitted that the grievant painted three legs on the conveyor and the pass through door of the sliding door with a purple paint. He was not told to paint these items but was only to paint a plywood divider. The grievant admitted doing so and his explanation for doing so is pretty lame. The only issue presented is the penalty or punishment for the grievant's conduct.

The Company has argued that the grievant's conduct falls in the category of industrial sabotage because it occurred the Friday before the start of the ISO 9000 audit. Industrial sabotage is a listed offense whereby the progressive steps in the disciplinary procedures may be bypassed. A review of the evidence fails to establish that the grievant's painting the legs and the door rises to the level of sabotage. Mr. Jeffrey Darley who made the decision on the suspension felt that there was an alternative motive for the grievant's conduct. This was based on the lame excuses given and the timing of the painting in relation to the ISO 9000 audit. Darley felt the grievant intended to undermine preparations for the ISO 9000 audit but he acknowledged that he had no specific evidence of this. The evidence is insufficient to establish any alternative motive. There was no evidence that the grievant was opposed to the ISO 9000 certification or the audit. No evidence was presented that he had said or done anything that indicated he was opposed to it. It was not only to the Company's benefit to increase its market share but was also to the benefit of the employees and there is nothing in the record to indicate that employees including the grievant were anything but in favor of the Company being ISO 9000 certified. Also, sabotage generally means damage to equipment or facilities. In this case, the grievant was not putting graffiti on the door or damaging the door or conveyor legs. All that occurred was a sloppy paint job with an ugly colored paint which could and in fact was, painted over. The legs and door were still usable and the grievant offered to repaint these on his own time. This is not to excuse his conduct but indicates he was willing to rectify the situation before the audit. Clearly, this is not an action intended by a saboteur. At most, the grievant defaced Company property and exercised very poor judgment. The grievant's poor excuses are believable because when one exercises poor judgment and does something stupid, any excuse for such conduct is lame. Thus, the undersigned must conclude that the grievant did not engage in industrial sabotage. Mr. Darley also testified that the ISO 9000 audit was scheduled for the entire week after this incident and he felt that it was important that the grievant should be out of the workplace during that week so the Company would not be confronted with another incident of the same or similar behavior. The grievant was a 13-year employee with a clean record so it would be unlikely that he would repeat this conduct. Also, Article 7, Section 3 provides that any disciplinary steps are intended as corrective measures. A preemptive removal of the employee by supervision to prevent possible future misconduct does not meet the definition of a corrective step. Thus, this rationale fails to support the imposition of a suspension.



The Company has argued that its disciplinary decision should not be set aside unless it was an abuse of discretion. This is generally true but here the punishment was too severe such that it was an abuse of discretion. Furthermore, the Company has agreed in Article 7, Section 3 to follow the concept of progressive discipline and while it may bypass progressive discipline for severe infractions, the instant case is not so severe as the examples listed in Section 3, nor is it comparable to any of the examples.

The grievant exercised poor judgment and engaged in stupid behavior when he sloppily painted the legs and door and thereby defaced Company property. The penalty for this misconduct falls within the progressive disciplinary procedures set forth in Article 7, Section 3. Inasmuch as the grievant had a clean record the discipline warranted for his conduct is an oral reprimand as provided in Section 3.

Based on the above and foregoing, the record as a whole and the arguments of counsel, the undersigned makes the following

**AWARD**

The Company violated the collective bargaining agreement when it suspended the grievant for five and one-half days. The Company is directed to replace the suspension with an oral reprimand and make the grievant whole for the five and one-half day suspension. The undersigned will retain jurisdiction for a period of thirty (30) days from the date hereof solely for the purposes of resolving any dispute with respect to the remedy herein.

Dated at Madison, Wisconsin this 24th day of May, 2000.

Lionel L. Crowley /s/  
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Lionel L. Crowley, Arbitrator

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