BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

IUE-CWA LOCAL 800

and

WARVEL PRODUCTS COMPANY, INC.

Case 16
No. 63003
A-6092

(Greg Struck Grievance)

Appearances:

Stanley Eisenstein, Katz, Friedman, Eagle, Eisenstein & Johnson, P.C., Attorneys at Law, on behalf of the Union.

Dennis W. Rader, Davis & Kuelthau, S.C., Attorneys at Law, on behalf of the Company.

ARBITRATION AWARD

At all times pertinent hereto, the IUE-CWA, Local 800 (herein the Union) and Warvel Products Company, Inc. (herein the Company) were parties to a collective bargaining agreement dated March 19, 1999, and covering the period March 20, 1999 to March 19, 2004, and providing for binding arbitration of certain disputes between the parties. On November 19, 2003, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over an alleged violation of the collective bargaining agreement as a result of discipline issued to Greg Struck (herein the Grievant), and requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on February 5, 2004 and February 25, 2004. The proceedings were transcribed and the transcript was filed on March 15, 2004. The parties filed briefs by May 25, 2004 ,and reply briefs by June 23, 2004, whereupon the record was closed.

ISSUES

The parties were unable to stipulate to the framing of the issues. The Company would frame the issues as follows:

> Did the Company violate Article IV A and B by giving the Grievant a warning for harassing several female employees and creating a hostile work environment for them and then transferring the Grievant off first shift to avoid his continued contact with those female employees?
>
> If so, what is the appropriate remedy?

The Union would frame the issues as follows:

> Was the Company's written warning for proper cause?
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> If the warning was not for proper cause, what is the remedy?
>
> Independent of whether the warning was for proper cause, was the involuntary transfer from first shift for proper cause?
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> If the transfer was not for proper cause, what is the remedy?
>
> If the transfer was for proper cause, was the permanent ban from bidding on first shift for proper cause?
>
> If it was not, what is the remedy?

Having taken the parties' positions under advisement, the Arbitrator frames the issues as follows:

> Did the Company violate the collective bargaining agreement when it issued a written warning to Greg Struck and permanently transferred him from first shift for allegedly harassing certain female employees?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE IV

MANAGEMENT CLAUSE

A. Except to the extent expressly abridged by a specific provision of this agreement, the Company reserves and retains, solely and exclusively, all of its common law rights and statutory rights to manage the business as such rights existed prior to the execution of this agreement with the Union. No management employee should perform any production work performed by union employees except for training purposes and emergencies (being unplanned and unforeseen events affecting the normal production operations).

B. The management of the Company and the direction of the working forces, including the right to plan, direct and control the Company operations; to determine the products to be manufactured; to hire, promote, suspend or discharge for proper cause or failure to maintain reasonable production standards and quality; to transfer or relieve employees from duty because of lack of work or for other legitimate reasons; and the right to introduce new or improved methods or facilities, it is agreed, is vested solely in the Company, provided this will not be used for the purposes of discriminating against any member of the Union and provided the exercise of the above rights will not conflict with the other terms of this agreement.

. . .

ARTICLE XXVII

SHOP RULES

A. The Warvel Products Company Shop Rules shall be in full force and effect during the lifetime of this agreement. Any additions or deletions to those rules and any disciplinary action because of violations of these rules will be discussed with the Union.

B. The employee and Union Chairperson will receive a copy of documentation and written warnings that will be put into their personnel file.

. . .

OTHER RELEVANT LANGUAGE

SHOP RULES

. . .

DISCIPLINE

Penalties for most violations of the Shop Rules will be assessed by the foreman. Usually, the first violation, if minor will result in only a verbal warning. A more serious violation, or a second or subsequent related violation, will result in a written warning. All written warnings will become a part of the employee's permanent file. The time limit for issuing written warnings for absenteeism is 10 working days, the warning issuance time limit for all other offenses is 5 working days.

PENALTY FOR OFFENSE: The following penalties may be made at the discretion of the Company.

1st Offense – Written Warning

2nd Offense – 2nd Written Warning

3rd Offense – Written Warning and five (5) day lay-off or more, up to and including discharge.

After an employee has worked for 12 (twelve) months with no violations, his or her record shall be cleared. Also, after 12 (twelve) months from each violation, that violation will be cleared from the employee's record.

A foreman, at his discretion, may, when issuing warnings, limit the time the warning remains on the record, capable of being renewed, to six months.

. . .

GENERAL SAFETY POLICIES

. . .

Aisles are not to be blocked at anytime (sic). All aisles are to be kept open with yellow lines visible at all times unless aisles are marked and are not in use and ok'd by Safety Director. According to each individual capacity and common judgment, lifting of heavy parts will only be done with the help of another employee, lifts or proper equipment to prevent injuries.

. . .

INTOLERABLE OFFENSES

An employee violating a rule under this section is subject to immediate discharge. Regardless of an employee's past record, upon the commission of one intolerable offense he or she will be discharged.

. . .

HARASSMENT POLICY

Because all employee (sic) have the right to work in a non-intimidating environment, HARASSMENT WILL NOT BE CONDONED OR TOLERATED AT WARVEL PRODUCTS. Harassment of any employee on the basis of his or her race, religion, color, gender, age, national origin, marital status, arrest and/or conviction record, veteran's status, sexual orientation, or the presence of any physical, mental or sensory disability is a serious violation of Company policy.

Harassment can take many forms. Harassment includes, but is not limited to, slurs, comments, jokes, innuendo, unwelcome compliments, cartoons, pranks, threats and/or other verbal or physical conduct (hitting, pushing, sexually assaulting, etc.) that occur because of an individual's membership in one of the categories listed above.

Sexual Harassment. Sexual harassment is another type of harassment and occurs when the types of verbal or physical conduct described above are sexually or gender-based. Conduct is "gender-based" when it would not occur but for the gender of the person to whom it is directed. Sexual harassment may exist in the workplace either in the form of the conduct described above ("hostile environment sexual harassment") or when submission to or the rejection of the conduct is used as the basis of an employment decision (for example, "do this or put up with this or you won't get a raise" – called "quid pro quo sexual harassment"). Both types of sexual harassment are unlawful.

Complaint Procedure for Any Type of Harassment. If you feel you have been subjected to harassment of any kind, you are encouraged to discuss the matter immediately with your foreman, your supervisor, anyone in the Personnel Department, or anyone in management with whom you feel comfortable.

Any complaint received will be investigated as promptly, professionally and confidentially as possible. (While Warvel Products will attempt to maintain

confidentiality, it cannot be guaranteed.) The investigation may include interviews with the parties directly involved and, when necessary, any witnesses.

If the investigation reveals that harassment has occurred, prompt and appropriate corrective action will be taken.

BACKGROUND

Greg Struck, the Grievant herein, is employed as a router operator at Warvel Products. For the thirteen years prior to the events leading to this arbitration he had worked on first shift. At the time of the events at issue here, he was also serving as Shop Chairman for the local bargaining unit. Struck has over the years exhibited a propensity toward staring, sometimes off into space and sometimes at other people. Co-workers who have observed this behavior have found it to be variously odd, annoying, disconcerting and harassing. Struck is also a stickler for shop safety rules and has a history of reporting potential violations to management, especially as regards the proper placement of pallets on the shop floor. This tendency has become more pronounced since Struck became Shop Chairman and also tends to be unpopular with co-workers.

In March 1997, a co-worker, Tammy Hottenstine, complained about Struck's staring at her, which resulted in an investigation by management. As a result of the investigation, management concluded that the staring was not deliberate, but Struck was admonished to not stare at her and he agreed to attempt not to do so in the future. A letter to this effect was placed in Struck's personnel file. In December 1997, Struck was counseled by General Foreman Tom Keiler about several attitude and behavior issues, including staring at other employees and being overzealous about employees' adherence to Company policy. After the 1997 incidents, there were no further complaints about Struck's staring until the events reported herein.

During the Spring and Summer of 2003, Struck's behavior became a source of conflict with two other first shift co-workers, Deanna Hillesland and Lisa Lange. Hillesland is a CNC lead worker who sometimes operated the router immediately next to Struck and Lange operated the router on the other side of Hillesland. Over the space of about six months, Struck had on four separate occasions reported to management on allegedly improperly placed pallets adjacent to Hillesland and/or Lange's work areas, resulting in management personnel ordering the pallets to be moved. Hillesland had confronted Struck about these complaints, but to no avail. On August 7, the matter came to a head when Struck again questioned the placement of pallets next to Hillesland's and Lange's machines and their supervisor, Curt Runge, ordered them moved. Hillesland tried to confront Struck about the safety complaint, but he refused to speak to her. She then told him, "This is enough bullshit!" and said she was going to file a complaint against him.

Later on August 7, Hillesland and Lange spoke to the General Foreman, Tom Keiler, about their complaints. Keiler arranged for them to speak to Human Resources Manager Evelyn Knoll and Assistant Human Resources Manager Susan Jalkanen. Hillesland and Lange told Knoll and Jalkanen that they were tired of harassment by Struck and wanted it to stop. Specifically they complained of his making of safety violation reports and constantly staring at them. Hillesland also reported an incident that occurred 6-8 weeks earlier where Struck, while bantering with her and two other female employees, had made an obscene gesture by sticking his tongue between his index and middle fingers. Hillesland and Lange stated that they wanted Struck fired and that if the Company didn't act they would file a complaint with an outside agency.

The Company commenced an investigation of the incident and, on August 11, placed Struck on administrative suspension with pay pending the outcome. Struck, for his part, denied any wrongdoing. On August 18, after completing its investigation, the Company issued Struck a written warning for harassing Hillesland and Lange and creating a hostile work environment for them by his staring, in violation of the Company's harassment policy. Additionally, Struck was involuntarily transferred to second shift, ordered to have no contact with the Hillesland or Lange under penalty of summary discharge and forbidden from posting into a first shift position at any time in the future. Struck grieved the discipline, which was processed through the contractual procedure to arbitration. Additional facts will be referenced, as necessary, in the discussion section of the award.

POSITIONS OF THE PARTIES

The Company

The Company asserts that Struck has a practice of deliberately staring at female co-workers for the purpose of harassment going back over the course of several years. His manner of staring is different toward women and more directed than toward men and creates a hostile environment for them. It is also intentional rather than unwitting.

Struck's sexual harassment of female employees is also evidenced by the obscene gesture he made toward Hillesland and two other female employees. He did not deny the gesture, but did deny ever using it toward male employees. He did not deny that the gesture has a sexual connotation. It was a sexually degrading and demeaning gesture directed at women, making it a blatant violation of the Company's sexual harassment policy.

Struck's complaints about safety violations due to the placement of Hillesland and Lange's pallets was a pretext. Struck actually objected to not being able to see the workers next to him and wanted the loads moved to give him an unobstructed view. The safety issue, therefore, was just an excuse to facilitate Struck's ability to stare at Hillesland and Lange. This is buttressed by the fact that Struck would speak directly to male employees when he had concerns about placement of their loads, but always went to supervisors with complaints about the women.

The testimony of the female employees makes it clear that they felt harassed by Struck's staring and deliberately placed their loads so as to obstruct his view. Numerous administrative cases and arbitration awards recognize that staring may be a form of harassment (citations omitted). Further, many cases have held that harassment must be determined from the perspective of the victim, not the perpetrator. In ELLISON V. BRADY, 924 F.2D 872 (9th Cir., 1991), the court held that "a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." These employees were reasonable and their testimony as to Struck's conduct and its effect was credible.

Struck's misconduct constitutes an intolerable offense under the Company's sexual harassment policy because it was directed specifically at women because they were women and, as such, warranted his termination. The Company elected to impose the lesser penalty of a warning and a transfer to another shift, which it was permitted to do. The Company should not be punished for using restraint and if the grievance is sustained it will have the effect of forcing the Company to terminate employees in the future for similar conduct.

It should also be noted that the Management Clause in Article IV of the contract specifically restricts the "just cause" standard to cases of suspension or termination. Under the doctrine of *inclusio unius est exclusio alterius,* lesser acts of discipline are excluded from the just cause standard. Thus, because Struck was only issued a warning, the Company's action may only be reversed if it was found to be arbitrary or capricious, which it was not. Further, under Article IV, Section B, the Company may transfer employees for legitimate reasons. The only restriction on the Company's power to transfer is in Article IX, which refers to transfers in cases of layoffs or reductions in force. Thus, the transfer is also excluded from review under the just cause standard as long as the Company had a legitimate reason.

Struck was transferred due to his harassment of female employees, clearly a legitimate reason. It was necessary to protect the female employees on first shift. No lesser corrective would have been effective because Struck has a habit of pathologically lying and denies that he stares at the female employees. Far from mitigating his behavior, his denial of the conduct further supports management's actions. Further, he suffered no loss of wages or contractual benefits due to the transfer, so his complaints about the transfer are unjustified.

The Union

The Union asserts for a variety of reasons that the just cause standard should be applied to this case. The contract purports to restrict the standard to cases of suspension or discharge, but a third written warning leads to suspension and suspensions or discharges are often predicated on prior warnings, so just cause should apply to such cases. Arbitrators have held that to not enforce a just cause standard is the equivalent to applying an employment at will doctrine, even where the contract is totally silent (citations omitted). Further, Struck was

suspended for four days, thus requiring application of the just cause standard . Finally, according to the contract, the Company could only transfer Struck for legitimate reasons, which also, in effect, requires a finding of just cause.

Throughout his career, Struck has been a good employee. His work record shows no complaints about job performance. The only unusual aspect of his behavior is his propensity to stare, a characteristic that he is oblivious to. Nonetheless, it has not affected his productivity, so it cannot be a constant behavior and calls into question the assertion that his staring is excessive. Struck is also a stickler for shop safety, which has led him to report safety issues regarding many employees of both sexes, including the plant manager. One of the issues is the need for adjacent operators to be able to see each other to help in case of an accident or emergency. Another is the need for loads to be dropped behind yellow lines painted on the shop floor to indicate pathways that must not be blocked. During the six-month period prior to his discipline, Struck had made three or four inquiries to management about load placement at nearby stations, but did not complain about any specific employees. This is a very small number compared to the total number of loads dropped, which averages about 560 per month for the machines in the area. Further, in each case, Struck's concern was validated when the questioned loads were ordered to be moved. The Company cannot argue that his inquiries were for the purpose of sexual harassment when its own actions support the validity of his safety concerns.

The incident on August 7, 2003, occurred when Struck questioned the placement of a load by Amy Lisowe's router, which Deanna Hillesland was told to move. This prompted a confrontation between Hillesland and Struck and ultimately Hillesland and Lange's harassment complaint. No complaint was made by Lisowe. Hillesland confronted Struck and then enlisted Lange to assist her in attempting to get Struck fired. They did not mention sexual harassment, but said they were tired of his reporting on them for safety violations and staring. They had never complained of his staring previously, although they had worked alongside him for years. Given the validity of his safety inquiries, this smacks of a vendetta by the two women against a fellow employee they disliked.

In rendering discipline, the Company should not have considered the two month old incident wherein Struck made a gesture at three female employees. In context, the act took place while Struck was engaged in good natured banter with the other employees and should not be considered sexual harassment. Further, the Company did not reveal to the Union prior to the hearing that the incident was considered in issuing the discipline. Nothing was said about it in two previous grievance meetings and the written warning is silent on the issue.

Three women witnessed the act, which occurred during a lighthearted conversation after a meeting in which all parties were engaged in teasing one another. Amy Lisowe believed the gesture to have been innocent and in response to a statement by Ruth Spang. Ruth Spang did not testify, although she is a management employee, and the arbitrator should draw an inference adverse to the Company from its failure to produce her. The Company relied only on Deanna Hillesland's statement that the act was harassing, despite the fact that she made no mention of the incident for two months.

In disciplining Struck, the Company was bowing to a threat of blackmail by Hillesland and Lang to file a claim with an unspecified outside agency if the Company did not act. There is no evidence that Hillesland and Lange ever identified the agency they were threatening to go to or that either of them considered Struck's behavior to be sexual harassment. The Company drew this conclusion, however, and acted precipitously to protect itself without a thorough investigation or due process. Struck did not commit the intolerable offense of sexual harassment. He has a habit of staring at everyone, regardless of gender. Under federal case law, if his behavior is directed at persons of both sexes, it cannot be considered sexual harassment (citations omitted). In fact, Struck has been a competent and productive employee for thirteen years, which his staring apparently did not hinder. The Company had long known of this trait and did nothing about it for years, but then tried to dredge up a warning several years old to buttress its case for discipline, in clear violation of the shop rules that call for an employee's record to be cleared after a year of no further violations.

The Company's action in issuing a permanent warning and first shift ban also violated its own shop rules. The rules require that an employee's record be cleared after twelve months with no violations. If, *arguendo*, any discipline was warranted, the Company exceeded its authority by making the sanctions permanent. The Company claims that the ban was to segregate Struck from the complaining employees, but the warning fails to identify the employees. In so doing, however, the Company violated Struck's job bidding rights guaranteed in Appendix A of the contract.

The record reveals that the Company conducted an inadequate investigation and did not even discover that Struck had apologized to Hillesland over the gesture incident until the hearing. It is clear that this was a case of a vendetta against Struck by Hillesland, which can be seen by her suggestions to Amy Lisowe that she engage in behavior specifically to "piss Greg off." It is also notable that the Company accepted Hillesland's harassment claims uncritically although the record reveals that she frequently uses foul language and makes sexual innuendos on the shop floor. Neither Hillesland nor Lange ever approached Struck about his staring, which might have taken care of the entire matter. Instead, they tried to get him fired and the Company overreacted. The grievance should be sustained.

The Company in Reply

The Union's characterization of Struck as a victim is a distortion of the record. To accuse the women of carrying on a vendetta is no more than typical male chauvinism by the Union – blame the victim not the wrongdoer. There is no doubt that Struck's obscene gesture had a sexual connotation, as he himself admitted, which the Union characterized as mere "tongue wagging." Notwithstanding that the warning does not make reference to it, the gesture does support the Company's contention that Struck is a sexual harasser and, contrary to the Union's claim, the act was discussed with the Union at the August 11, 2003 meeting with Struck. Further, contrary to the Union's assertion, it is not a defense that Struck was an "equal opportunity harasser." Such behavior is only mitigated when engaged in in the same way and to the same degree with both sexes, which Struck's was not. He stared at women

more frequently and in a different fashion than at men, as revealed by the record. Thus, there is no merit to the Union's contention that this case is about the women's annoyance at Struck's preoccupation with safety rules. The record makes it clear that Struck's motive was to be able to stare at the women and he hid behind the safety rules only as a pretext for his true purpose.

Struck's staring is not a personality quirk, as the Union maintains, but is a deliberate act that he can control. Although he refuses to admit the habit, it is attested to by even his own witnesses. It is invasive, is intended to intimidate and makes the women working near him uncomfortable.

The Union's argument that the complaining employees didn't identify Struck's behavior as sexual harassment has no merit. The employees complained of the behavior and it is not necessary that they be familiar with the proper term or the laws or rules forbidding the conduct. Likewise, it is not necessary for them to have identified the outside agency to which they would have complained, or even for them to have known which agency to complain to. Further, there is no basis for making adverse assumptions from the Company's failure to call Ruth Spang as a witness on the basis that she as a management employee. The record is clear that Spang is a non-union clerical employee, but is not a supervisor or manager. Further, her testimony about Struck's gesture would have been mere surplusage.

The Union's miscellaneous arguments are erroneous. It points out that Struck apologized to Hillesland for the gesture, but fails to note that the apology was forced. It attacks Hillesland's shop floor behavior, but wrongly equates her behavior around other female employees with Struck's harassment of women. It complains that the women should have approached Struck directly about his staring, but disregards the fact that they knew Struck had been warned about staring in the past with no apparent effect. Any attempt on their part would have been equally fruitless. The Union also mischaracterizes Struck's record as impeccable. In fact, he had been warned about staring in 1997. The record is silent about Struck's disciplinary record thereafter. When the women complained of his staring again in 2003, the Company acted to stop it.

The Union also errs in perception of the standard of review. It misquotes How Arbitration Works, Elkouri and Elkouri, 6th ed., to say that all arbitrators apply a just cause standard to contracts, even when they are silent, but in fact it states that many arbitrators do so. Further, it cites a case where there was no contract language to support its case, but here there is a just cause standard, but it is limited to cases of suspension or termination, which is common in labor contracts. It also argues for a one year limitation on the transfer, but the contract imposes no such restriction on management's transfer power. Management could have fired Struck, but chose not to. To reverse the discipline issued would be to undercut women's rights in the workplace. The clear language of the contract allows management to transfer employees for legitimate reasons and does not limit this power. The Company should not be penalized for its leniency toward this employee.

The Union in Reply

There is no evidence of sexual harassment in the record, nor is there even evidence that Struck stared at Hillesland or Lange at any time in the week leading up to their complaint. Hillesland only claimed to have been stared at several times over a number of years. The staring charge must, therefore, be a pretext for some other motive.

The Company argues that Struck stares differently at women than at men, but the evidence indicates that he stares at everyone without even knowing he is doing it. Witnesses testified to having to get his attention to snap him out of his staring on numerous occasions. Other than the overreaction by Hillesland to the events of August 7, Struck has an exemplary record despite the Company's efforts to discredit him.

Lange and Hillesland appear to have been motivated by anger over Struck's reports of safety violations. In fact, Hillesland and Lange testified that this is what motivated them, not a claim of sexual harassment. The Company claims the safety reports were intended to facilitate Struck's staring, but there is no evidence of this and it should be noted that each of Struck's reports was validated by the Company and that he reported perceived problems without reference to the gender of the other employees involved. Management employees testified that the reporting of safety violations was not a factor in the discipline decision and thus the Arbitrator should not consider those reports in his analysis.

The Company uses vague generalities, stale testimony of events years old and unsupported claims regarding the nature of Struck's staring. It also passes over the testimony regarding graphic sexual references by Hillesland in the workplace when discussing the gesture incident involving Struck.

Finally, the Arbitrator should not credit the *ad hominem* attacks on Struck or the Union's counsel contained in the Company's brief, nor the arguments which have no basis in the record. The Company asserts that Union counsel referred to Struck as a "jerk," "bully" and "harasser," but the record reveals that these were terms used in a general question to Plant Manager Rich Reed and did not refer to Struck personally. This case is no more than a matter of petty differences on the shop floor that got out of control and Struck should not be punished for it. The Arbitrator should reverse the Company's action and not give in to the threat that overruling the discipline will force the Company to be more harsh in future discipline cases.

DISCUSSION

Standard of Review

It is the Company's view that the just cause standard does not apply in this case because the contract expressly limits just cause specifically to cases of suspension and discharge.

Rather, the Company believes the discipline here should be sustained unless the Company's action was arbitrary and capricious. For a variety of reasons the Union maintains that the Arbitrator should ignore this language and apply the just cause standard.

I note that while the contract does not refer to lesser forms of discipline, the shop rules do. The section on Discipline on page 10 specifically mentions verbal and written warnings as available forms of discipline for most first offenses and minor violations. Parties are capable of agreeing by contract to standards for imposing discipline. Where, as here, they have limited the just cause standard to cases of suspension and discharge, one can assume they intended to exclude lesser forms of discipline, especially when such lesser forms are provided for elsewhere and the language is silent as to the standard for imposition of discipline. It is my view , therefore, that in this setting written warnings that do not automatically result in disciplinary suspension or discharge are not subject to the just cause standard and will be sustained unless the action was found to be arbitrary or capricious. 1/

1/ The Union also argues that just cause should apply here because Struck received a suspension on August 11, 2003. The record reflects, however, that this was an administrative suspension pending investigation for which Struck was paid (Jt. Ex. #7, Tr. 221). Discipline was not issued until the written warning that Struck received on August 14. An administrative suspension is not disciplinary per se, but is an interlocutory step while the issue of whether discipline is appropriate is reviewed. It is not of the same character as a disciplinary suspension and is not, in my view, subject to the same standard of review.

A separate issue is raised by the involuntary and permanent transfer of the Grievant to second shift. There is no reference to transfer in any portion of the contract or shop rules dealing with discipline. Rather, the Company grounds its action in the language of Article IV, Section B., which gives the Company power to transfer ". . . because of lack of work or for other legitimate reasons. . ." The Company argues that this action is also not subject to just cause, but I disagree.

To begin with, the contract specifically requires the Company to justify a transfer with legitimate reasons. The requirement of legitimacy, in and of itself, means that there is an expectation of reasonableness in the action that rises above merely not being arbitrary or capricious. Further, such a transfer interferes with important contract rights of the employee. Appendix A of the contract provides that job posting and filling shall be according to plant-wide seniority. The transfer of Struck, purely for disciplinary reasons, precludes him from ever posting for a first shift position, regardless of seniority, qualification, or any other factor. Arguably, this action has a greater long-term effect on the employee than a limited term suspension precisely because it is intended to be permanent. It is not clear, nor is it under review here, what interplay occurs between the transfer and posting provisions under other circumstances. Where the transfer is disciplinary in nature and permanent, however, and given the requirement of a legitimate reason, I hold that such a sanction must be subject to a finding of just cause.

The Merits of the Case

According to the Company, the discipline issued to Greg Struck in this case arose out of complaints made by co-workers Deanna Hillesland and Lisa Lange on August 7, 2003, about harassment. The harassment, as alleged by Hillesland and Lange, was manifested in three ways: 1) by Struck's repeated reporting to management of possible safety violations in the placement of loads of materials by their work stations, 2) by Struck's continual staring at them while at work, and 3) by an obscene gesture Struck made in the presence of Hillesland while engaged in conversation with her and two other female employees approximately 6-8 weeks earlier. Hillesland and Lange requested Struck's termination and stated that unless something was done they would seek redress from an outside agency. The Company's first response was to place Struck on a paid administrative leave pending an investigation. Upon completion of the investigation, the Company issued a written warning to Struck for ". . . harassing several female employees by repeatedly staring at them and creating a hostile work environment for them." Struck was also involuntarily transferred to second shift, forbidden from posting back to first shift in the future and prohibited from having any future contact with the female employees in question. (Jt. Ex. #1)

At hearing, the Company maintained that the discipline was not based upon Struck's reporting of safety concerns, but rather upon the repeated staring and the obscene gesture incident. Indeed, it appears from the record that the reporting of safety concerns was not all that frequent. Both Hillesland and Struck testified that there were perhaps 3-4 reporting incidents in the previous six months. Furthermore, in each case management ordered the loads moved, indicating that Struck's concerns were legitimate. It also appears that Struck's reporting was not restricted to female employees alone, but that on various occasions he has reported male employees, including Plant Manager Rich Reed. According to Hillesland and Tom Keiler, the General Foreman, Struck's reporting increased perceptibly after he became Shop Chairman. Ordinarily, one would expect the efforts of an employee to report valid safety concerns a matter to be commended, not criticized, so it would be odd, not to say impermissible, for the Company to punish an employee on this basis.

Nevertheless, the Company argued that Struck had an ulterior motive for his reporting; that, in fact, it was a pretext to remove obstacles preventing his staring at the women and that he hid behind the safety concerns as a way of achieving his real ends. Struck, on the other hand, testified that he was worried about ingress and egress to the work stations in case of emergency and that he felt the workers should be able to see one another for safety reasons. Thus, while the Company disclaims any intent to discipline Struck due to the safety reporting, it does view the reporting as an action in furtherance of his other supposed harassing behavior, notwithstanding the validity of his reports.

Interestingly, it appears that to Hillesland and Lange the reporting was a bigger problem than the staring. Tom Keiler and Assistant Human Resources Manager Susan Jalkanen both spoke to Hillesland and Lange on August 7 and both testified that the women complained of Struck's staring. This is understandable because their focus would be on the

reports and the evidence that addressed potentially harassing behavior, rather than the irrelevant reporting of legitimate safety concerns. This does not mean, however, that Hillesland and Lange were primarily concerned about the staring. Lange testified that she was bothered by the staring, but on direct testimony stated that her reason for testifying against Struck was that she had "had enough" after the fourth safety report and that ". . . you're not supposed to go rat out on your other union members." (Tr. 104) Hillesland testified that her decision to report Struck on August 7 was prompted by a safety report by him, which resulted in her being ordered to move a load of materials by Supervisor Curt Runge. She confronted Struck about the report and when he wouldn't speak to her she said, "This is enough bullshit," and told him she was reporting him for harassment. (Tr. 28-29) Further, she had confronted Struck about the safety reporting issue at least once previously. (Tr.78) Nevertheless, neither Hillesland nor Lange ever confronted Struck about the staring. (Tr. 79, 110) Hillesland also testified that she told Sue Jalkanen and Human Resource Manager Evelyn Knoll that her primary complaint was Struck's reporting on the placement of their loads. (Tr. 33). Hillesland further testified that her threat to complain to an outside agency was prompted by her annoyance at Struck's safety reporting. (Tr. 42)

On the other hand, the testimony about Struck's staring was rather vague in time and degree. Hillesland and Lange characterized Struck's staring as continual. Further, Sue Jalkanen also testified that Hillesland and Lange reported that Struck's staring was continuous, but also that there were no concerns about Struck's productivity or work quality, which militates against a finding that he was always engaged in staring at his co-workers, rather than at his own work station. (Tr. 157) Further, neither complaining witness identified any particular incident of staring. Hillesland stated that Struck had stared at her "several times" over the years they had worked together and that, in addition to Lange, his staring was offensive to other female employees. One of those employees, Cheryl Kuhn, testified, however, that she was unaware whether Struck stared at her, but objected to his reporting of safety issues. (Tr. 141-142) Another, Nancy Miller, testified that Struck stared at her and other female employees "a lot," but couldn't quantify it any more specifically than that. She also admitted that constant staring would be inconsistent with paying attention to his own work station. (Tr. 118, 121) As noted previously, management registered no complaints about Struck's work quality or productivity. The third employee, GeorgAnne Henkle, did not testify. Lange referred to problems Struck had had in the past with Sherry Ericson and Tammy Hottenstine. Sherry Ericson testified that she had reported that Struck stared at her "years ago," but didn't mention any contemporaneous problems, nor that her previous report had resulted in any action against Struck. (Tr. 131) Tammy Hottenstine did not testify, but there is evidence that Struck's discipline was in part based on a warning he received for staring at Hottenstine in 1997, about which more will be said later. (Tr. 210)

The matter of the obscene gesture arose about 6-8 weeks prior to August 7 when, after a Kaizen meeting, Struck was engaged in conversation with Hillesland and two other employees, Ruth Spang and Amy Lisowe. After some lighthearted conversation, involving teasing and bantering among the participants, Spang took a parting shot at Struck and he responded by sticking his tongue out at her between his first and middle fingers. (Tr. 243-245) That the event took place is a matter of record and Struck admitted as much. (Tr. 338-339)

Lisowe did not find the act to be offensive and Spang did not testify. Neither Lisowe nor Spang reported the incident to management, but both confirmed the incident when questioned during the investigation. (Tr. 161-162) Hillesland professed to have been offended by the gesture and later confronted Struck about it and obtained an apology that she characterized as "forced." (Tr. 71-73) She did not report the incident to management, however, until several weeks later when she decided to complain about the safety reporting and staring, but neglected to report that Struck had apologized. (Tr. 72-73, 163)

The Company maintains that it did Struck a favor by only issuing a warning instead of terminating him, but I would find it difficult to sustain the discipline under a just cause standard on this record. This is primarily due to the credibility, or lack thereof, of the complaining witnesses. Greg Struck will clearly never win any popularity contests. His staring behavior is well documented by witnesses on both sides and generates reactions anywhere from amusement, to derision, to annoyance, to discomfort. It is apparent, however, that even more annoying is his role as self-appointed "shop cop" to observe and report suspected safety violations. Again, witnesses on both sides testified to disliking this behavior and having been in conflict with Struck at various times because of it. It is clear to me that this, rather than the staring, was the primary motivation behind Hillesland and Lange's actions. Their testimony suggests as much and Hillesland's behavior on the shop floor clearly indicates that she was enraged enough by the reporting to confront Struck about it on multiple occasions, but neither she nor anyone else said anything about the staring until the August 7 meeting with Evelyn Knoll and Sue Jalkanen, which was precipitated by a reporting incident, not a staring incident. Nevertheless, both Hillesland and Lange also knew that Struck had been in trouble previously for staring at Tammy Hottenstine. The Company has cited cases that hold that "harassment is in the eye of the beholder," which is to say that in such cases the perception of the target of the behavior is more important than the intent of the actor. Nevertheless, even in such cases the credibility of the complainants must be weighed and in this case I find it lacking.

The matter of the obscene gesture is admittedly more troubling. Looked at in a vacuum there can be no question that the gesture was immature, inappropriate and offensive. It did not occur in a vacuum, however, it occurred on a shop floor in a setting of teasing and bantering where only one of the four participants found the gesture to be offensive. Ordinarily this would not matter, because one's entitlement to feel offended does not require that everyone else share the sentiment. The "offended" party, however, was Hillesland, who then confronted Struck and obtained an apology, only to dredge up the incident several weeks later to buttress her harassment case against him. What might seem odd behavior becomes only more so when considering Hillesland's behavior on the shop floor. Her own testimony indicated that she swears once or twice a week and never makes off color remarks. (Tr. 72) Amy Lisowe's testimony, however, paints a rather different picture. Lisowe testified that Hillesland uses a lot of foul language. (Tr. 240) On one occasion Lisowe testified she used the term "blow job" in a conversation with a mixed gender group of employees. (Tr. 241) Further, she has referred to another male employee as having a "nice ass" on numerous occasions. (Tr. 246) She also frequently "flips off" Struck as well as other employees when

she is angry at them. (Tr. 242, 246) She also, during the week prior to her complaint, encouraged Lisowe to drop her load of materials in a particular way specifically to "piss Greg off." (Tr. 240) Lisowe's testimony suggests that at the least Hillesland was holding Struck to a standard of behavior she didn't apply to herself, and seriously calls into question her protestations about being offended by Struck's gesture. It also at least suggests the possibility that Hillesland was attempting to orchestrate an incident whereby Struck would make a safety report and give her the excuse to file a complaint. There is no evidence that Lisowe was biased or predisposed toward Struck or against Hillesland and I find her testimony to be more credible.

I am also concerned about the Company's reliance on the Tammy Hottenstine incident as part of its rationale for issuing discipline. According to the record, in 1997 Struck was accused of staring at co-worker Tammy Hottenstine. A meeting was held between management and union personnel, as well as Struck, at which the matter was resolved. In a follow-up memo, dated March 19, 1997, that was placed in Struck's personnel file, his staring behavior was characterized by the Company as "unconscious." (Co. Ex. #4) Later that year there was another meeting about Struck's behavior that was also documented for his file in a memo dated December 23. That document reveals that Struck was again asked not to stare at people. Interestingly, it also indicates that Struck was told that he should not try to enforce company policy and that other people view his doing so as harassment. (Co. Ex. #5) These are apparently the matters that Sue Jalkanen was referring to as partial justification for the discipline.

The Company's own shop rules state that rule violations are to be expunged from an employee's record after twelve months without a violation. Since Struck was accused of staring inappropriately at other employees, and since the Company maintains this is a violation of its harassment policy, these are technically records of violations, or at least alleged violations, and should have been removed from his record after 1998 at the latest. The Company may argue that these documents don't reflect disciplinary action and, therefore, the rule doesn't apply, but if true that makes their appearance in a disciplinary case six years later even more egregious. If the Company, by its own rule, cannot maintain a record of legitimate discipline past twelve months of good conduct, it should not be able to do so with records of mere allegations and discussions in order to use them against the employee years later.

Thus, as stated before, I believe the Company would have a heavy burden sustaining the discipline here under a just cause standard. Nevertheless, as also previously stated, just cause does not apply to a written warning in this contract and, while I am not impressed with the quality of the evidence against Struck, I cannot say that the Company's action was arbitrary and capricious. As has been often held, to be considered arbitrary and capricious a party's behavior must be bordering on irrationality or be in bad faith and I cannot draw that conclusion here. It matters not whether I or someone else would have made a different decision on the same facts, only whether there is a basis in reason for the decision the Company made. Whatever their true motivations, Hillesland and Lange raised a valid harassment issue with management by complaining that Struck's staring created a hostile work environment. In investigating the matter, the Company received confirmation about the staring from other

female employees, although they didn't join in the complaint. They also learned of the incident with the obscene gesture and were entitled to conclude that the gesture was inappropriate. The complainants, therefore, made a *prima facie* case of harassment to management. Management thereafter did conduct an investigation and, based on the results of that investigation, concluded that a written warning was warranted. I cannot find that the Company's action in this regard was arbitrary or capricious.

The permanent transfer to second shift, however, is another matter. The Company characterized this act as a "last chance" opportunity, to allow Struck one more chance to turn over a new leaf prior to termination and based this move on its authority to transfer "for legitimate reasons" contained in Article IV, Section B of the contract. There is no question that this action was disciplinary and the Company concedes as much. As noted above, I have concluded that such a transfer must be subject to a finding of just cause based on the contract language and the potential impact on the employee. For the reasons noted above, I do not find sufficient basis in this record to conclude that there was just cause to transfer Struck from first shift. His safety reporting, while perhaps annoying, was apparently justified and he should not be punished for it. If there are employees who cannot abide working in such circumstances, then they may avail themselves of transfer opportunities, but shouldn't insist on the removal of Struck.

Even were just cause established, however, the Company would not be justified in imposing the first shift ban for more than a year, assuming no intervening violations, based on the shop rules mandating the removal of discipline from an employee's work record after that period. A shift ban inevitably runs afoul of an employee's posting rights under Appendix A and it is highly debatable that the Company could justify such a ban beyond that period where there is no additional evidence of misconduct. One assumes that if there were additional evidence of harassment that met the just cause standard the issue of posting rights would likely become moot.

For the reasons set forth above, therefore, and based on the record as a whole, I hereby enter the following

AWARD

The Company did not violate the collective bargaining agreement when it issued a written warning to Greg Struck on August 18, 2003, for allegedly harassing certain female employees. Pursuant to the shop rules mandating that employee records be cleared after twelve months, however, the warning is to be removed from Struck's permanent record forthwith, assuming no intervening discipline has occurred.

The Company did violate the contract by transferring Struck from first shift and permanently banning him from posting back to first shift without just cause. The Company shall, therefore, reinstate Struck to first shift forthwith should he so desire and shall allow him to exercise his contractual posting rights in the future without restraint.

The Arbitrator shall retain jurisdiction of this Award for a period of thirty days for the purposes of addressing any issues arising in the implementation of the award.

Dated at Fond du Lac, Wisconsin, this 27th day of January, 2005.

John R. Emery /s/
John R. Emery, Arbitrator

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