BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

McDONOUGH MANUFACTURING COMPANY

and

**GENERAL TEAMSTERS UNION,
LOCAL 662**

Case 5
No. 64992
A-6177

Appearances:

Weld, Riley, Prenn & Ricci, S.C., by **Mr. Stephen L. Weld,** 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Employer.

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Ms. Jill M. Hartley**, 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

ARBITRATION AWARD

Selecting from a panel of staff arbitrators, General Teamsters Union, Local 662, hereafter the Union, and McDonough Manufacturing Company, hereafter Employer, requested that the Wisconsin Employment Relations Commission appoint Coleen A. Burns as Arbitrator to hear and decide the instant grievance. Pursuant to the agreement of the parties, an arbitration hearing was held on December 8, 2005 in Eau Claire, Wisconsin. The hearing was not transcribed and the record was closed on February 22, 2006, following the parties' confirmation that they would not be filing reply briefs.

ISSUES

The Employer frames the issues as follows:

1) Did the Grievant waive his right to the grievance procedure under Article 8 when he entered into a binding Release and Resignation Agreement and received the compensation agreed to in that Agreement?

2) Did the Employer have just cause to terminate the Grievant in April, 2005?

The Union frames the issues as follows:

1) Was there just cause for the Grievant's discharge?

2) If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE 7 – DISCIPLINE AND DISCHARGE

Section 1. No post-probationary employee will be disciplined or discharged without just cause.

Section 2. The normal procedure for discipline and discharge shall consist of the following:

(a) Oral warning;
(b) Written warning;
(c) Suspension;
(d) Discharge;

provided, however, that in cases of serious infractions or repeated violations, such procedure may be accelerated. Acceleration, up to and including discharge, if there is found to be just cause for the discipline imposed, shall not constitute grounds to mitigate the discipline. The Union shall promptly be notified of any suspension or discharge.

Section 3. Employees shall have the right to be represented by the Union at any investigatory interview which the employee reasonably believes may result in disciplinary action.

Section 4. Disciplinary records, including oral or written reprimands and suspensions shall be dated. Employees shall be entitled to see and have reasonable access to their own personnel records pursuant to applicable State and Federal law.

Section 5. Written warning notices and suspensions shall not remain in effect for a period of more than twelve (12) months from the date issued.

RELEVANT BACKGROUND

David Kadlec, hereafter Grievant, began employment with McDonough Manufacturing Company in March of 1995. On April 13, 2005, the Employer's Plant Manager, Paul Peplinski, met with the Grievant and Union Steward Nathan Hilger and advised the Grievant that the Grievant was suspended. Later that day, Peplinski telephoned the Grievant and stated that the Grievant was suspended until further notice.

On April 14, 2005, Peplinski telephoned the Grievant to advise the Grievant that the Grievant had been discharged. On that same date, an Employer representative notified Union Business Agent Mike Schmidt of the Grievant's discharge.

After receiving notification of his discharge, the Grievant contacted the Employer's Vice-President, Matt Tietz, and asked that the Employer reconsider the discharge. The Grievant also contact the Employer's President, Sue Tietz, and asked for her assistance with his discharge situation.

On April 15, 2005, Matt Tietz telephoned the Grievant and confirmed that the Grievant was discharged. Matt Tietz also informed the Grievant that the Employer was willing to offer the Grievant a settlement package. On that same date, the Grievant returned to the Employer's premises and met with Peplinski, Matt Tietz and Sue Tietz. At this meeting, the Grievant signed a document that had been prepared by the Employer and which states as follows:

RELEASE AND RESIGNATION AGREEMENT

> This Release and Resignation Agreement is hereby entered into by and among McDonough Manufacturing Company ("Employer"), Teamsters Local 662 ("Union") and David Kadlec ("Employee"). This Agreement is voluntarily entered into to resolve all issues arising out of the employment and separation from employment of Employee.
>
> This Agreement is entered into by the parties in a mutual effort to avoid potential litigation for claims arising out of Employee's separation from employment that could be asserted under the Wisconsin Fair Employment Act, Title VII of the Civil Rights Act (42 U.S.C. 2000e) including rights arising under the Civil Rights Act Amendments of 1991, the Americans with Disabilities Act (ADA), the Fourteenth Amendment or any other provision of the United States Constitution, federal law, Wisconsin Statute, personnel policy, individual employment agreement or collective bargaining agreement.
>
> This Agreement is not to be construed by any person, administrative agency or court of law to be an admission of liability for any claim released and discharged by its terms.

The parties hereby agree as follows:

1. RESIGNATION. Employee hereby resigns his position with the Employer effective April 15, 2005. Employee agrees that, by resigning his employment, he is waiving any and all employment or re-employment rights with the Employer. Employee's personnel file shall reflect that he resigned.

2. COMPENSATION. Employer agrees to pay Employee through April 15, 2005.

3. HEALTH INSURANCE. Employer will pay Employee's health insurance premiums through June, 2005.

4. OTHER BENEFITS. Employer will pay to Employee the balance of his accrued but unused PTO hours.

5. UNEMPLOYMENT COMEPNSATION. Employer agrees that it will not contest any unemployment compensation requests made following the effective date of Employee's resignation. Said payments shall cease if the Employee becomes employed or is given a reasonable assurance of employment which would otherwise make him ineligible for unemployment compensation benefits.

6. LETTER OF RECOMMENDATION. Employer will respond to all employment inquiries with, "David Kadlec started working for McDonough Manufacturing Company on March 20, 1995. He resigned on April 15, 2005. He was being paid $18.11/hr. at the time of his resignation."

7. NON-PRECEDENTIAL. The parties agree that the resolution of these actions by virtue of this Agreement does not establish any precedent or past practice. The parties further agree that this Agreement may not be used in future collective bargaining, contract administration and/or litigation.

8. NON DISPARAGEMENT. In the event the Employee makes negative or disparaging comments about Employer, Employer's personnel or the Employer's services, Employee agrees to pay Employer five hundred dollars ($500.00) in the form of liquidated damages for breach of the Agreement.

9. FINAL SETTLEMENT. Employee realizes that this is a final and complete settlement of his employment status.

10. RELEASE OF RIGHT TO SUE. The parties mutually agree to release and discharge each other and their officers, directors, employees, agents, successors and assigns, from any and all claims, demands or liabilities

whatsoever whether known or unknown or suspected to exist, which the party ever had or may now have against the other parties arising out of Employee's employment with Employer, including without limitations, any claims, demands or liabilities in connection with separation from that employment. Employee has not assigned any such claim or authorized any other person or entity to assert any claim on Employee's behalf.

11. WAIVER OF FUTURE CLAIMS. Employee waives any claim for damages incurred at any time after the date of this Agreement because of alleged continuing effects of any alleged wrongful acts or omissions involving Employer which occurred on or before the date of this Agreement and any right to sue for injunctive relief against the alleged continuing effects of past wrongful acts based on alleged factual omissions occurring prior to the date of this Agreement.

12. ENTIRE AGREEMENT. This Release and Resignation Agreement sets forth the entire agreement between the parties hereto and fully supersedes any and all prior agreements or understandings between the parties.

13. BINDING CONTRACT. The parties agree that the terms of this Agreement are contractual and not a mere recital.

14. NON-WAIVER. The parties agree, therefore, not to bring any actions arising out of the issues involving the settlement, excepting a violation of the settlement, and the parties expressly waive and release each other from any and all claims and actions arising out of the severance of employment. Notwithstanding the above, this Agreement shall not be construed to release Employer from its obligations to defend and indemnify the employee against claims by third parties arising out of employment with Employer.

15. COMPLETE AGREEMENT. In executing this Agreement, Employee affirms that the only consideration for entering into this Agreement is set out herein and Employee asserts that he has read the document and is signing freely and voluntarily and has not relied on any statements, promises, warranties or representations made by any person representing or claiming to represent Employer, but instead is relying on his own knowledge of the facts and advice given to Employee by Employee's attorney and/or advisors, who have indicated their approval of this Release and Resignation Agreement.

16. EFFECTIVE DATE. This Release and Resignation Agreement shall be considered to be finding and effective on execution by the parties.

TEAMSTERS, LOCAL 662 **McDONOUGH MANUFACTURING CO.**

By:_____ By:_____
Date Date

DAVID KADLEC

_____
Date

After the Grievant had signed the Release and Resignation Agreement, Sue Tietz sent a copy of this agreement to Teamsters Local 662 for their signature, but this agreement was not signed by any Teamsters Local 662 representative.

On or about April 29, 2005, the Grievant and a Union Steward filed a grievance alleging, *inter alia*, the following:

> Termination without just cause. Discipline procedures were not followed. Representation was denied throughout the firing. Profanity is condoned and used by management frequently. There have been no prior incidents or warnings involving profanity in the workplace.

The grievance requested the following settlement:

> Reinstate my employment and all benefits restored under the union contract.
> Backpay for hours missed at same rate as before firing.

On June 2, 2005, the Union filed an amended charge with the NLRB alleging, *inter alia,* that the Employer had terminated Union Steward David Kadlec in retaliation against his and other employee's union activities. In a letter dated June 22, 2005 and addressed to the NLRB, Region 18 office, the Employer's attorney asserted, *inter alia*, the following:

> Dave Kadlec was terminated because he called his supervisor "Captain Asshole." On Wednesday, April 13, 2005, a supervisor, Paul Peplinski, requested that Kadlec either turn down the volume or change the radio station so that employees could hear each other and, as a result, communicate. Kadlec refused to do either. He called Peplinski, his immediate supervisor, "Captain Asshole" to his face. Kadlec was not acting as a steward in doing so. McDonough placed Kadlec on unpaid suspension following the incident. While swearing is not uncommon at the workplace, swearing at a supervisor in response to a request is not allowed. It became immediately apparent that

> employees were watching McDonough's reaction carefully to determine whether it was OK to call supervisors "assholes." McDonough was fearful that Peplinski's ability to effectively supervise would be imperiled if Kadlec was not terminated. McDonough determined that it could not allow that perception or that result. On Friday, April 15, Kadlec and McDonough entered into a voluntary agreement by which Kadlec resigned pursuant to the attached Release and Resignation Agreement (Attachment A). Kadlec was given incentives to resign. He did so. McDonough paid him for the time he did not work and benefits he did not earn pursuant to that agreement. The Union then filed a grievance contrary to the agreement.
>
> Per a recent conversation with Union Representative Mike Schmidt, the grievance has been or will be processed to arbitration. The Board must defer to the arbitrator. See COLLYER WIRE, 192 NLRB 837 (1971) and its progeny.

In a letter dated July 13, 2005, the Acting Regional Director of NLRB Region 18, stated as follows

> . . .
>
> Regarding the remaining 8(a)(3) allegation concerning Dave Kadlec's termination, I am deferring further proceedings on the charge to the grievance/arbitration process, and therefore I will not issue a complaint.
>
> My reasons for deferring the charge are as follows:
>
> 1. Deferral is consistent with the Board's decision in Collyer Insulated Wire, 192 NLRB 837 (1971), as modified by United Technologies Corp., 268 NLRB 557 (1984).
>
> 2. A grievance has already been filed on the issue underlying this allegation, and the Employer has indicated that it is willing to process grievances concerning the issue in the charge and will arbitrate the grievance, if necessary.
>
> 3. It appears likely that the issue described in the charge will be resolved by your use of the grievance/arbitration procedure.

On July 21, 2005, the grievance regarding the discharge of the Grievant was processed to arbitration.

POSITIONS OF THE PARTIES

Employer

The record warrants the conclusion that the Grievant is not a credible witness. The credible evidence establishes that, on April 15, 2005, the Grievant voluntarily entered into a binding Release and Resignation Agreement with the Employer, which agreement provided the Grievant with significant benefits. The credible evidence also establishes that the Grievant never asked for any Union representation; that the Grievant was asked if he wanted to have the document reviewed by anyone; and that the Grievant responded that he did not need to have it reviewed by anyone. The Grievant was the Chief Steward for the Union and understood that, by signing the Release and Resignation Agreement, he was waiving access to the grievance procedure.

The contractual standard for discipline is just cause. The Employer does not contest the claim that profanity is relatively common on the production floor. However, none of the workplace incidents alleged by the Union involves profanity toward a supervisor.

Supervisor Peplinski recalled one incident in which an employee was suspended for swearing at Peplinski. Peplinski offered to reduce the suspension to a verbal warning if the employee apologized; which offer was accepted by the employee. At the suspension meeting, Peplinski made the same offer to the Grievant.

The Grievant's insubordination, as well as his use of profanity towards his supervisor, standing alone, justifies his discharge. The Grievant also had been given notice of the need to correct his behavior.

Focusing on incidents that occurred within the previous twelve month period, the Grievant had been suspended for insubordination and unauthorized absenteeism on April 14, 2004. The next step in progressive discipline is termination.

The Employer's decision to discharge the Grievant was neither disproportionate to the offense nor an abuse of management discretion. The grievance should be dismissed in its entirety.

Union

As the party challenging arbitrability, the Employer bears the burden of proof on that question. Although the Employer notified the Union on April 14, 2005 that the Grievant had been discharged, it did not notify the Union that it intended to make an offer of settlement. Notwithstanding the Grievant's request for Union representation, all discussions concerning the Release and Resignation Agreement occurred solely between the Employer and the Grievant.

The credible evidence establishes that the Grievant signed the Release and Resignation Agreement under duress, thereby invalidating his signature. The Union did not sign the Release and Resignation Agreement. Without the Union's signature, the Release and Resignation Agreement, by its own terms, is not binding and effective.

The Employer sent a copy of the Release and Resignation Agreement to Local 662 Business Agent Mike Schmidt for his signature. This letter clearly recognizes that the Release and Resignation Agreement is not effective and binding until both the Union and the Employer have signed the agreement and that no payments can be made until that is accomplished.

The Release and Resignation Agreement is invalid. The grievance protesting the Grievant's discharge as without just cause is arbitrable.

Although there is no written notice of discharge in this matter, the hearing testimony established that the Employer discharged the Grievant for alleged insubordination and verbal disrespect. Neither discipline that is more than 12 months old, nor matters for which the Grievant never received discipline, are proper for consideration. Supervisor Peplinski acknowledged that, in making the decision to terminate, he did not consider discipline which was more than one year old.

Established arbitral precedent prohibits the Employer from changing the grounds for discipline and/or discharge at the time of hearing. The Employer may not now take the position that, even if the Grievant's conduct on April 13, 2005 provided insufficient grounds for discharge, under all the circumstances, his overall record reflects an additional reason for his termination.

The Grievant was never given an order that he refused to carry out. Union and Employer witnesses acknowledged that profanity and obscene language is commonplace and tolerated on the shop floor.

Believing that they were having a frank discussion regarding ways to resolve what Supervisor Peplinski perceived to be a problem with the morale of shop bargaining unit employees, and feeling frustrated by Peplinski's placement of blame solely upon the employees, the Grievant, who was also the Union Steward, bluntly told Peplinski that if he did not walk around the shop like "captain asshole" some days, things might be better. The Grievant's comment was made out of frustration, a mitigating factor which negated just cause for discharge.

On at least one occasion, a supervisory employee directed a similar profanity toward a bargaining unit employee, with Peplinski's knowledge, and was not terminated. Given management's prior comments towards employees, the Grievant's termination is not only unjust, but also is hypocritical.

The Grievant's use of profanity does not constitute insubordination, nor is it an offense that is punishable by termination. The Employer has not sustained its burden of proving just cause for discharge. The Grievant must be reinstated and made whole for all wages and benefits lost as a result of his unjust discharge.

DISCUSSION

Issues

The parties were not able to stipulate to a statement of the issues. The Employer has proposed the following issues:

1) Did the Grievant waive his right to the grievance procedure under Article 8 when he entered into a binding Release and Resignation Agreement and received the compensation agreed to in that Agreement?

2) Did the Employer have just cause to terminate the Grievant in April, 2005?

The Union has proposed the following issues:

1) Was there just cause for the Grievant's discharge?

2) If not, what is the appropriate remedy?

The first issue proposed by the Employer presents an issue of arbitrability. The Union denies that there is any merit to the Employer's arbitrability arguments, but does not contest the right of the Employer to raise an arbitrability issue with respect to either the Release and Resignation Agreement or the receipt of compensation.

The arbitrability issue proposed by the Employer presumes that the Release and Resignation Agreement is binding. The issue of whether or not the Release and Resignation Agreement is binding is one of the issues to be decided by this arbitrator. Accordingly, the undersigned is persuaded that the Employer's arbitrability issue is more appropriately framed as follows:

> Has the Grievant waived his right to the grievance procedure by signing the Release and Resignation Agreement and receiving compensation that would be due the Grievant if the Release and Resignation Agreement were in effect?

Each party agrees that, under the parties' labor agreement, the Grievant cannot be discharged without just cause. If the Employer's arbitrability arguments are without merit, then there are additional issues which must be decided by this arbitrator. These additional issues are most appropriately stated as follows:

Did the Employer have just cause to discharge the Grievant?

If not, what is the appropriate remedy?

Arbitrability

The Release and Resignation Agreement, hereafter "Release," was prepared by the Employer. The first paragraph of the "Release" states that the "Release" is "hereby entered into by and among McDonough Manufacturing Company ("Employer"), Teamsters Local 662 ("Union") and David Kadlec ("Employee"). . ." The final paragraph of the "Release" states as follows:

> 16. EFFECTIVE DATE. This Release and Resignation Agreement shall be considered to be binding and effective on execution by the parties.

Immediately following Paragraph Sixteen are the following signature lines:

TEAMSTERS, LOCAL 662 **McDONOUGH MANUFACTURING CO.**

By:_____ By:_____
Date Date

DAVID KADLEC

_____
Date

Under the express terms of the "Release," there are three parties to the "Release, *i.e.,* the Grievant, McDonough Manufacturing Co., and Teamsters, Local 662, and the "Release" is binding and effective on execution by the parties. It is undisputed that the "Release" was signed by the Grievant, but that no representative of Teamsters Local 662 has signed the "Release."

The "Release" has not been executed by all three parties. Thus, by the express terms of the "Release," it is neither binding nor effective. By signing an ineffective and non-binding "Release," the Grievant has not voluntarily resigned his employment and has not waived any right to file and process the instant grievance under Article 8 of the parties' labor agreement. Having concluded that the "Release" is not valid because the "Release" has not been executed by all three parties, the undersigned need not, and has not, addressed other Union arguments that attack the validity of the "Release."

Apparently believing that the "Release" was binding and effective, the Employer paid the Grievant certain compensation that was due the Grievant under the terms of the "Release." The payment of such compensation may be considered when determining an appropriate remedy should the Union prevail in its grievance claim that the Grievant was discharged without just cause. However, the payment of such compensation does not preclude the Arbitrator from asserting jurisdiction to hear and decide the merits of the Union's grievance claim.

In summary, the Employer's arguments that the Grievant has waived his right to the grievance procedure under Article 8 are without merit. Accordingly, the undersigned turns to the issue of whether or not the Employer has just cause to discharge the Grievant.

Alleged Misconduct

As the Union argues, the Grievant's discharge was not accompanied by any written notification of discharge, or reasons therefore. The statements of Plant Manager Peplinski, who made the decision to instigate disciplinary action against the Grievant, indicate that the Grievant was disciplined for "disrepectfulness/insubordination" that "directly threatened" his authority as the Grievant's supervisor. As of September, 2002, the Employer's "Employee Conduct and Work Guidelines" has included the following:

> We expect our employees to follow guidelines of conduct that will protect the interests and safety of all employees and the Company. It is not possible to list all the forms of behavior that are considered unacceptable in the workplace, but the following are examples of conduct that may result in disciplinary action, including suspension or termination of employment (except where noted)
>
> . . .
>
> - Insubordination or other disrespectful conduct.

On April 13, 2005, the posted shop rules included the following:

> Date: February 18, 2003
> To: All employees
> From: Paul Peplinski
> Re: Shop cleanliness
>
> Our shop needs to be kept clean. Please clean up your area during your run time. If time does not permit, assure your area is clean before you leave at the end of your shift. Put tools away, clean your machine and bench areas when done at that work station.

> Spitting on the floor is not allowed. Please do not spit sunflower seeds on the shop floor. If a few accidentally fall on the floor, sweep them up.
>
> Music must be kept at an acceptable level so that others in the immediate area can carry on a conversation and not be annoyed.

According to Peplinski, he issued the music rule because he had repeatedly asked that radios be turned down and it was not happening. Peplinski states that the music needed to be low so that employees and management would be able to communicate relevant information, including safety warnings.

It is undisputed that, on April 13, 2005, the Grievant had a radio at his work station and that this radio was playing music. Peplinski's written account of the events of April 13, 2005, which he states was prepared on April 13, 2005, includes the following:

> I was in the area of Dave K. and Terry h. work area. I was talking and I shut down the radio, as it was too loud. I requested that they turn down the music numerous times in the past. When I turned it down and preceded to walk away, someone made a whooping noise that I have heard when they are displeased with me. I kept walking and someone turned the music back on loud again. I turned around and pulled the plug on the radio.

At hearing, Peplinski confirmed the above and added that he was talking with the Grievant and Henke (Terry h.) about the job; that he had told them to put the radio on at an acceptable level; that, when the radio came back on loud, he became ticked, but did not confront anyone because he just wanted them to get back to work.

The Grievant and fellow worker Terry Henke each recall that, on April 13, 2005, Peplinski unplugged the radio; that the radio was turned back on; and that Peplinski then unplugged the radio a second time. The Grievant states that Peplinski did not make any comment regarding the radio when he unplugged the radio on the first, or second, occasion.

Henke states that these events occurred many months ago and that, although he did not recall Peplinski saying anything, it was possible that Peplinski had a conversation with the Grievant and Henke, as recalled by Peplinski. According to Henke, he plugged in the radio on each occasion that Peplinski had turned the radio off because he thought that Peplinski was "horsing around."

Peplinski and the Grievant agree that, later on in the day, the Grievant was walking in the vicinity of Peplinski's office and that Peplinski initiated a conversation with the Grievant. According to Peplinski's April 13, 2005 written account of the conversation, he told the Grievant that, on numerous occasions, he (Peplinski) had asked the Grievant to turn down the music; that nothing seems to happen; that he now wanted all radios in the shop to play only easy listening or talk radio at a normal volume; that the Grievant was upset with that; that

Peplinski then told the Grievant he could play his music but that it must not be loud; that the Grievant could play his station at a level that can be heard when the Grievant was close to the radio but not across the bay or we can eliminate radios all together; and that the Grievant left, still upset. At hearing, Peplinski confirmed his written account and added that this conversation with the Grievant was specific to the Grievant not turning down the radio.

The Grievant recalls the following: Peplinski talked about the volume of the radio being unacceptable; that there was going to be a new rule that the radio would have to be on talk or easy listening channels; and that, before returning to the shop, the Grievant told Peplinski that it was ridiculous that Peplinski would implement such a rule. According to the Grievant, this conversation started in the office and continued out the door. The Grievant states that he was not upset; that it did not take long for "the rule" to get around the shop; and that the Grievant did not tell employees to turn to classical or talk radio. The Grievant believes that Henke was present at the end of this conversation.

Peplinski's written account indicates that, later on, Peplinski was in the shop and heard classical music being played near an employee named Shawn; that Peplinski went over to this employee and told the employee that he could play his regular music, but just don't play it loud; that this employee laughed and said he had heard that employees had to play this or talk radio; and that Peplinski said that was not the case and reiterated that the employee could play his normal music at a normal level. According to Peplinski's written statement, he then went to three other employees, *i.e.*, Earl, Jim and Glen, and heard that their radios were playing at a normal level; that he asked them to keep the radios at that normal level; and that they all agreed.

At hearing, Peplinski recalled that he asked why Shawn was playing classical music; that Shawn responded that the Grievant had said that we have to play classical music; and that he had talked to the other employees so that there would be no miscommunication. Peplinski further recalled that he did not talk to either the Grievant or Henke at that time. Neither Shawn, nor the other three employees testified at hearing.

In his written statement, Peplinski states that, he then went over to where the Grievant and Henke were working; that Peplinski told them that they can play their music at a normal level; that both the Grievant and Henke became upset; that Henke stated that, in the shops that he had worked in, they could play their music loud; that the Grievant asked why the level of music mattered and that it was turned down when customers were around; that the Grievant asked why Peplinski was talking only to him about this; that Peplinski responded that he had also talked to Shawn, Earl, Jim and Glen, as their radios could also be loud at times; that Peplinski told the Grievant that the level of his radio was too loud, it is annoying and people needed to hear each other; that before Peplinski could finish, the Grievant stated "you got to be the big man on campus-captain asshole;" and that Peplinski responded that is inappropriate and that the Grievant needs to watch himself. Peplinski's recollection of events at hearing was consistent with this written account.

The Grievant recalls that, as he was working in the general assembly area, Peplinski and he had a conversation in which Peplinski was chewing on the Grievant about shop morale and attitude; that Peplinski was having a bad day; and that Peplinski was agitated and talking about employee respect. The Grievant recalls that he told Peplinski either that, when Peplinski was having a bad day, it doesn't help if Peplinski is stomping around like captain asshole or that, if Peplinski was not stomping around like captain asshole, then morale would not be that bad. The Grievant further recalls that Peplinski then said you called me an asshole; that the Grievant responded no, you are acting like captain asshole; that Peplinski again said that the Grievant had called him an asshole; that the Grievant responded "I did not;" and that Peplinski walked away. According to the Grievant, no one else was present during this conversation and that the Grievant could not see Henke. The Grievant states that he made a "big man on campus" statement, but that this statement was made during a subsequent conversation in which the Grievant learned that he had been suspended.

Henke recalls that, after the initial encounter with Peplinski, he was in and out of the shop for job related reasons; that as he came back into the shop, he observed the Grievant coming out of the door to the office; and that the Grievant told Henke that Paul said that radios can only be on talk radio or classical. In Henke's opinion, the Grievant was smirking or joking. According to Henke, Peplinski then stepped out and said you can listen to what you want at an acceptable level; and that Henke then stated that, at the other shops in which he had worked, volume was not a huge problem. According to Henke, this conversation occurred at the office door and that he did not notice anyone present other than the Grievant and Peplinski. Henke recalls he was not upset; that the Grievant was somewhat upset; and that, inasmuch as the Grievant and Peplinski were arguing, he tuned them out and went to his machine. Henke further recalls that everyone began playing classical music and that, after the employees began playing classical music, Peplinski came out of the shop and said this is worse than before and you can play what you want at a normal level; that Peplinski and the Grievant then had another conversation; that, if Henke was near them, he had tuned them out and kept working; that he tries to tune out arguments; and that he does not recall hearing a "captain asshole" remark.

The Grievant and Peplinski are the only witnesses who recall a "captain asshole" remark. As a review of the above reveals, there are material differences between the Grievant's and Peplinski's account of the "captain asshole" conversation.

Crediting the Grievant's account, the Union argues that the Grievant, a shop steward, used derogatory language in describing his supervisor's attitude in the context of a discussion regarding shop morale. Crediting Peplinski's account, the Employer argues that the Grievant's conduct was insubordinate, offensive and abusive and constituted a serious challenge to the authority of a supervisor.

Credibility

At hearing, the Grievant acknowledged that, in 1997, he arrived late to work and when questioned about being late, attributed the lateness to jury duty even though he had known that

he had been excused from jury duty the night before. The Grievant also acknowledged that it was probably not a miracle that the receipt that he had submitted in May of 2000, for reimbursement of boots that were purchased before the Union had negotiated an increase in the allowance, had had the date snipped off.

Regardless of whether or not the 1997 and 2000 incidents may be relied upon by the Employer as prior discipline under Article 7, Section 5, of the parties' collective bargaining agreement, the Grievant's testimony concerning these events is appropriately considered when determining credibility. The Grievant's testimony concerning these events provides a reasonable basis to question the Grievant's trustworthiness.

The Grievant's sworn statement of May 7, 2005 includes the following:

1. That on April 14, 2005, I was fired over the telephone by Paul Peplinski, for using profanity on April 13, 2005.

2. That on April 15, 2005 I received a phone call from Matt Tietz asking me to come in and sign some papers.

3. That on the phone with Mr. Tietz I asked to have access to the guys in the union and he indicated that I could not. He indicated to me that they wanted things to go as smoothly and as quietly as possible and in exchange for that they would make sure I got my unemployment and would extend my health insurance benefits until June 2005. That he indicated, he (Mr. Tietz) was sympathetic to my situation, in that I have three children to feed and he was willing to do that for me.

4. That after speaking with Mr. Tietz I tried to contact my union agent by telephone, however, was unable to reach him.

5. That when I arrived at McDonough I met with Sue Tietz, Paul Peplinski and Matt Tietz and reviewed the papers they wanted signed.

6. That I asked to take the papers with me to be reviewed by my union agent and they refused to let me do so.

7. That they indicated that if I did not sign them right then and there, that they would deny my unemployment and cancel my insurance.

8. That at the meeting they made reference again to the fact that I have three children to feed.

9. That reluctantly I did sign the agreement, without representation and under duress.

. . .

When the Grievant initially recalled the meeting of April 15th, the Grievant stated that he asked if he could take the "Release" for the weekend and the Employer said "no, sign it now" or it would be withdrawn. Subsequently, the Grievant recalled that he asked if he could take it to the Union and they refused. At hearing, the Grievant further recalled that he asked what would happen if he did not sign the "Release" and they said that they would immediately cancel his insurance and not pay the balance of the PTO. The Grievant states that he skimmed the "Release" and then signed it because, if he did not sign the "Release," then he would have nothing. The Grievant recalls that he then stated that he enjoyed working there; he appreciated their generosity; and it seemed like a good deal.

According to the Grievant, the Employer did not offer to let the Grievant take the "Release" home, but that he was asked if he needed time to read the "Release." The Grievant states that it is absolutely false that the Employer asked the Grievant to take the "Release" with him.

Matt Tietz recalls that the Grievant came in at 3 p.m.; that the meeting was somber; that the "Release" agreement was summarized by Sue Tietz; that Matt Tietz asked the Grievant if he wanted time to read the "Release"; that the Grievant responded "no, I trust what you say;" and that the Grievant signed the "Release" right away. According to Matt Tietz, the Grievant stated that the offer was generous; the Grievant apologized; and the Grievant stated that maybe someday he would learn his lesson.

Matt Tietz states that the Grievant never stated that he wanted to look at the "Release" or have a lawyer or Union representative look at the "Release." Matt Tietz states that the Grievant never asked for Union representation or for Nate Hilger to attend the meeting. Matt Tietz states that the Grievant may have asked what would happen if he did not sign, but that Matt Tietz did not recall this. Matt Tietz states that he believes that the Grievant was told that he could take the "Release" to his attorney or someone to have it looked at.

At hearing, Sue Tietz recalled that, at the 3 p.m. meeting of April 15th, she summarized the terms of the "Release;" offered the Grievant time to read the "Release" or to take the "Release" and go over it with legal counsel. Sue Tietz also stated that the Grievant did not request Union Representation, a Union Steward, or an attorney; that the Grievant agreed to sign the "Release"; and that the Grievant stated that the settlement was fair and generous.

The Employer's written notes of the meeting of April 15th include the following: "Sue read the agreement to Dave. Asked if he had any questions or did he need time to think about it. Dave said "No, you're being generous with me." Dave signed the agreement." At hearing, Peplinski stated that these notes were accurate.

Peplinski recalls that the Grievant signed the "Release" in his presence; the Grievant thanked the Employer; and the Grievant said that they were being very generous. Peplinski

states that he believes that the Grievant was offered the opportunity to take the "Release" home with him, but that the Grievant said that he would sign it here. Peplinski further states that the Company did not sign the agreement because they were going to have the Teamsters sign it. According to Peplinski, the Grievant never requested any Union representation.

Peplinski's statements regarding the meeting of April 15th are internally consistent, as well as consistent with the testimony of Sue Tietz and Matt Tietz. The Grievant's statements regarding the meeting of April 15th are inconsistent with the testimony of Sue Tietz and Matt Tietz. Additionally, there is a material inconsistency between the Grievant's notarized statement of May 7th "That reluctantly I did sign the agreement, without representation and under duress" and his testimony that he stated that he appreciated their generosity and that it seemed like a good deal.

In summary, the record provides a reasonable basis to conclude that the Grievant is a less reliable witness than Peplinski. Accordingly, with respect to the "captain asshole" conversation of April 13, 2005, the undersigned credits Peplinski's account of this conversation.

Crediting Peplinski's account, the undersigned rejects the Union's assertion that the Grievant made the "captain asshole" comment to Peplinski during a conversation regarding what Peplinski considered to be the dismal shop morale of the bargaining unit. Crediting Peplinski's account, the undersigned is persuaded that, as Peplinski sought to enforce the posted music work rule, the Grievant interrupted Peplinski and told Peplinski "you got to be the big man on campus-captain asshole."

The fact that Henke chose to tune out the argument between the Grievant and Peplinski does not alter the fact that the Grievant made the comment in the presence of at least one other employee. Accordingly, the undersigned also rejects the Union assertion that the conversation between the Grievant and Peplinski was private.

Alleged Request for and Denial of Union Representation

The Grievant and Matt Tietz agree that, on April 15, 2006, they had a telephone conversation in which Matt Tietz advised the Grievant that the Employer was willing to make an offer in return for the Grievant's resignation. They disagree with respect to the content of that conversation.

The Grievant's notarized statement of May 7th includes the following:

> 3. That on the phone with Mr. Tietz I asked to have access to the guys in the union and he indicated that I could not. He indicated to me that they wanted things to go as smoothly and as quietly as possible and in exchange for that they would make sure I got my unemployment and would extend my health insurance benefits until June 2005. That he

> indicated, he (Mr. Tietz) was sympathetic to my situation, in that I have three children to feed and he was willing to do that for me.

The notarized statement of May 7th claims "That on the phone with Mr. Tietz I asked to have access to the guys in the union and he indicated that I could not." This statement is ambiguous in that "guys in the union" could be guys in the Union's bargaining unit or union representatives.

At hearing the Grievant recalled that he asked if he could speak with anyone in the shop; that Matt Tietz said no, that would cause too many problems; that the Grievant asked if he could come in and say good bye to the guys in the shop; and that Matt Tietz said no. The Grievant states that he made this latter statement in an attempt to get into the shop. According to the Grievant he asked that the meeting be moved from 3:00 p.m. to 1:00 p.m., in part so that he could attend a wrestling event, and, in part, because he wanted to talk to people in the shop. The Grievant states that Matt Tietz gave the Grievant a general idea of the release and that the Grievant agreed to come in to meet with Tietz. The Grievant states that he knew that the employees in the shop would be gone by 3:00 p.m.

According to the Grievant, he did not ask to talk to a Union representative; he did not say that he wanted to talk to the guys about the terms of the release; and he did not mention anyone by name. The Grievant states that he could not recall if he mentioned "union" when he asked to speak with the guys in the shop; that he did ask if he could consult with the guys in the shop; and that he could not recall what he specifically said when he made his request to consult. Given this testimony, the most reasonable construction of the notarized statement is that "guys in the union" are the Grievant's fellow bargaining unit employees.

Matt Tietz states that, on April 15th, he made written notes of the April 15, 2005 telephone conversation. These written notes include the following:

> A lot of consideration
> Decision stands
>
> We know you have a family
> We are willing to offer
>
> Health Ins
> 37 hours PTO paid out
> Pay for a full weeks pay this week
> Not contest unemployment
>
> Sign an agreement – He will
> Come in today 3 pm

At hearing, Matt Tietz recalled that the Grievant asked to come in earlier; that Matt Tietz said "no;" that the Grievant asked if he could come in at 1:00 p.m. so that the Grievant could go with his son to a wrestling match and that Matt Tietz responded that the Employer would rather keep the meeting at 3:00 p.m. According to Matt Tietz, the Grievant then made no counter proposal regarding the scheduling of the meeting. Matt Tietz recalls that the Grievant asked if he could say goodbye to the guys and that Matt Tietz responded that he would rather not have that. Matt Tietz states that he probably explained that the Employer did not want to subject itself to further problems.

Relying upon the Grievant's testimony, the Union argues that, during the telephone conversation between the Grievant and Matt Tietz, Matt Tietz refused to allow the Grievant to meet with any Union stewards or other bargaining unit employees prior to signing the Agreement; telling him that the Company wanted things to go as smoothly and quietly as possible. Upon consideration of the record as a whole, the undersigned is satisfied that, while on the telephone with Matt Tietz, the Grievant did not make a request to meet with Union stewards or any other representative, Union or otherwise. Rather, the most reasonable construction of the record evidence is that the Grievant requested to speak with bargaining unit employees on the Employer's premises and during the employees normal work times and Matt Tietz refused this request because the Employer wished to avoid further problems with the Grievant. To refuse such access to a terminated employee is not unusual and provides no reasonable basis to infer that Matt Tietz explicitly, or implicitly, refused a Grievant request for access to Union Stewards or any representative, Union or otherwise.

At hearing, the Grievant stated that, during their telephone conversation, Matt Tietz portrayed to him that there could be no Union representative involved or the deal was off. The record, however, fails to establish that Matt Tietz made any statement that could be reasonably construed to mean that the deal was off if the Grievant sought Union representation. Rather, the most reasonable conclusion to be drawn from the evidence of their telephone conversation is that the only condition that Matt Tietz placed upon the Grievant was that the meeting be held at 3:00 p.m., rather than at 1:00 p.m.

In his notarized written statement, the Grievant claims that, at the meeting on April 15, 2005, "That I asked to take the papers with me to be reviewed by my union agent and they refused to let me do so." As discussed above, this testimony of the Grievant is inconsistent with the testimony of the three Employer representatives who were present at the meeting. Giving these inconsistencies, as well as the evidence that provides a reasonable basis to question the Grievant's reliability as a witness, the undersigned does not credit the Grievant's claim that, during the meeting of April 15, 2005, he asked to take the papers with him to be reviewed by his Union agent and the Employer refused to let him do so.

As the Union argues, prior to the time that the Grievant signed the "Release," the Union was not a party to any discussions regarding the "Release." It is not evident, however, that, on April 15, 2005, or at any other time, the Grievant made a request to the Employer for Union representation regarding the "Release." Nor is it evident that any Employer

representative told the Grievant that the Grievant could not have the "Release" reviewed by the Union or that the Grievant could not otherwise consult with the Union regarding the "Release." Rather, the most reasonable conclusion to be drawn from the credible evidence is that, during the meeting of April 15th, Employer representatives offered the Grievant the opportunity to take the "Release" and have the "Release" reviewed by someone other than the Grievant and that the Grievant, concluding that the offer was generous, refused this offer.

In summary, the credible evidence fails to establish that, on April 15, 2005, or any other time, the Grievant made a request for Union representation that was denied by the Employer. Additionally, the credible evidence fails to establish that, on April 15, 2005, or at any other time, the Employer conditioned its offer of settlement to the Grievant upon the Grievant not involving the Union or that the Employer refused any Grievant request to have access to the Union for any purpose, including reviewing the "Release."

Insubordination

The Union argues that, in order to establish insubordination, the Employer must prove that the Grievant knowingly and intentionally refused to follow a supervisor's directive. While such conduct has been found to be insubordinate, such conduct is not the only basis for insubordination. The definition of insubordination set forth in *Robert's Dictionary of Industrial Relations*, (BNA, 4th Ed.) contains the following: "Under certain circumstances, use of objectionable language or abusive language toward supervisors may be deemed to be insubordination because it reveals disrespect of management's authority. Insubordination is considered a cardinal industrial offense since it violates management's traditional right and authority to direct the work force."

By interrupting the Plant Manager, as the Plant Manager was attempting to enforce a posted work rule, and telling this supervisor, in the presence of a fellow employee, "you got to be the big man on campus-captain asshole," the Grievant exhibited a significant disrespect of management's authority under circumstance that are likely to seriously undermine the Employer's traditional right and authority to direct the work force. As Peplinski concluded, the Grievant's conduct involved "disrepectfulness/insubordination" that "directly threatened" Peplinski's authority as the Grievant's supervisor.

Crediting the Grievant's account of the conversation, the Union argues that the Grievant was frustrated by Peplinski's comments because the Grievant perceived any lack of morale among employees to be directly influenced by Peplinski's own behavior within the shop and that such "frustration" is a mitigating factor. Having credited Peplinski's account of the conversation, the undersigned rejects the Union's "frustration" arguments.

The Grievant's Status as a Union Steward

As Arbitrator Nielsen recognized in AMERICAN BUILDING MAINTENANCE JANITORIAL SERVICES, INC., Case 12, No. 56977, A-5728 (5/99):

> Stewards are not immune from discipline for their conduct, but where insubordination charges are leveled as a consequence of actions taken to advocate for employes, there is a stronger degree of protection afforded a steward than to other employes. 1/ This protection does not extend to conduct which is particularly egregious or flagrant, 2/ but, in order to get beyond that threshold, if the grievant's acts were taken in her official capacity, they must by definition go at least somewhat beyond those which would ordinarily be considered "just cause" for discipline. The first issue, then, is whether the grievant was, in fact insubordinate. If so, the question is whether her conduct was protected concerted activity. If so, the next question is whether her behavior was so egregious as to strip her of the Act's protection. If the grievant was removed from the Act's protection, the final question is whether the penalty imposed is consistent with a just cause standard.
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> ***1/ See SOUTHERN INDIANA GAS & ELECTRIC, 85 LA 716 (NATHAN, 1985); MAXWELL AIR FORCE BASE, 97 LA 1129 (HOWELL, 1991); BORNSTEIN, ET AL., LABOR AND EMPLOYMENT ARBITRATION, 2ND ED. (Matthew Bender, 1997), AT §12.03(3) and cases cited therein.***
>
> ***2/ See TRANS-CITY TERMINAL WAREHOUSE, 94 LA 1075 (VOLZ, 1990) holding that obscenity and personal insults directed towards a supervisor while protesting managerial decisions may remove a Union president from the protection of the NLRA; See also HAMBURG INDUSTRIES, 271 NLRB NO. 108 (1984); CATERPILLAR TRACTOR CO., 242 NLRB 523 (1979); TRAVERSE CITY OSTEOPATHIC HOSPITAL, 260 NLRB 1061 (1982); UNION CARBIDE CORP., 171 NLRB 1651 (1968).***
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Having failed to credit the Grievant's account of the "captain asshole" conversation, the undersigned concludes that, at the time of "captain asshole" conversation, Peplinski was not addressing the Grievant in his capacity as Union Steward and that the Grievant was not responding in his capacity as Union Steward. It is not evident that, during the "asshole conversation," that the Grievant was acting on behalf of any individual other than himself.

In summary, when the Grievant engaged in the "disrepectfulness/insubordination" conduct for which he was disciplined, the Grievant was not acting in his official capacity as Union Steward and was not involved in any other protected, concerted activity. Nor does the record establish that the Employer's decision to discipline the Grievant was motivated, in any part, by animus toward or retaliation for the Grievant's activities as a Union Steward, or for the exercise of any other protected, concerted activity.

Disparate Treatment

Jeff Burgess, who is currently a Union steward, has been employed at McDonough for nearly 29 years. Burgess states that profanity is used by employees and management every day; that employees and management have arguments in which each side uses profanity; but

that there is not name calling. Burgess further states that he would not call a supervisor an asshole to his face because to do so would be disrespectful.

According to Henke, he uses profanity; profanity is fairly common for employees and some managers; and he was not aware of anyone being disciplined for using profanity. Henke also states that, out of respect, he had never called a supervisor an asshole.

Peplinski agrees that employees use profanity on the shop floor and have never been disciplined. Peplinski states that no other employee had called him asshole or any other name to his face.

Bargaining unit employee Robert Black, has been an employee of the Company for approximately five years. According to Black, he questioned supervisor Randy Schofield about changes in a shop order in front of Schofield's friends; that Schofield had recently moved from a bargaining unit position to a supervisory position; that Black saw that Schofield was becoming upset and that Black made a point. Black recalls that Schofield followed Black and told Black, at least three times, that Black was an asshole. It is not clear that these remarks were made in the presence of any other employee.

Black further recalls that he immediately told Schofield that he was not taking this and that Black then reported this incident to his Union Steward, Jeff Burgess. Black states that he went with Burgess to complain to Peplinski. Black further states that Peplinski initially told Black that he probably deserved it; and that, later, Peplinski came to Black and apologized for Schofield's behavior.

According to Burgess, after Black complained to him, Burgess went to the supervisor and told the supervisor that you can't do that; that Burgess then went to Peplinski and said that the supervisor can't do that; that Peplinski agreed that the supervisor can't do that; and that Peplinski told Burgess that he would talk to this supervisor. Burgess states that Peplinski did not say that Black probably deserved it while Burgess was present.

Peplinski could not recall the incident and Schofield did not testify at hearing. The record does not reveal whether or not Schofield was talked to by Peplinski or received any discipline for his conduct. As the Union argues, it is evident that Schofield was not terminated for the incident.

Peplinski recalls that, on one occasion prior to the Grievant's discharge, he reduced an employee's discipline to a verbal warning after the employee apologized to Peplinski. Peplinski states that he made this same offer to the Grievant when they met with Union Steward Hilger on April 13, 2005 and that the Grievant responded that he would never apologize and kiss up to Peplinski. The record does not establish the specific nature of this other employee's misconduct.

As the Union argues, Employer and Union witnesses agree that profanity is common in the workplace and that employees have not been disciplined for using profanity in the workplace. The Grievant, however, was not disciplined because he used profanity in the workplace. Rather, the Grievant was disciplined for calling the Plant Manager a profane name under circumstances that involved "disrepectfulness/insubordination" that "directly threatened" Peplinski's authority as the Grievant's supervisor. Notwithstanding the Union's argument to the contrary, the record fails to establish that the Grievant engaged in shop talk of a type that has been accepted on the shop floor.

The undersigned does not consider Schofield and the Grievant to be similarly situated employees. Thus, the failure of the Employer to terminate Schofield does not warrant the conclusion that the Grievant has been the recipient of disparate treatment. Nor does the record otherwise establish that the Grievant has been the recipient of disparate treatment.

Prior Disciplines

As the Union argues, Section 5 of the contract limits the amount of time that disciplines remain in effect. As the Union further argues, in his testimony at hearing, Peplinski acknowledged that he did not give consideration to any discipline that was more than one year old. Such consideration is consistent with Article 7, Section 5, of the parties' collective bargaining agreement.

The discipline considered by Peplinski is that which is reflected in Employer Exhibit #10. This discipline involved a one day suspension for "unauthorized absenteeism and insubordination" due to the Grievant's failure to follow a work instruction to work scheduled overtime.

The discipline referenced in Employer Exhibit #10 was issued on April 14, 2004. Under the terms of Article 7, Section 5, it was in effect at the time that the Grievant engaged in his misconduct. Accordingly, it was appropriate for Peplinski to give consideration to this discipline.

Conclusion

The term "just cause" is not defined in the contract and the parties have not stipulated to a definition. Absent an agreed upon definition, the undersigned considers the just cause standard to require the Employer to demonstrate that the Grievant engaged in conduct in which the Employer has a disciplinary interest and that the discipline imposed for such conduct is appropriate.

On April 13, 2005, the Grievant interrupted the Plant Manager, as the Plant Manager was attempting to enforce a posted work rule, and told the Plant Manager, in the presence of a fellow employee, "you got to be the big man on campus-captain asshole." By this conduct, the Grievant exhibited a significant disrespect of management's authority under circumstance that

are likely to seriously undermine the Employer's traditional right and authority to direct the work force.

The Grievant's conduct, which involved "disrepectfulness/insubordination" that "directly threatened" Peplinski's authority as the Grievant's supervisor, is conduct for which the Employer has a disciplinary interest. Given the egregious nature of this conduct, as well as the Grievant's prior suspension for misconduct involving insubordination, the undersigned concludes that the discipline imposed upon the Grievant is appropriate.

Based upon the foregoing, and the record as a whole, the undersigned makes and issues the following

AWARD

1. The Grievant has not waived his right to the grievance procedure by signing the Release and Resignation Agreement and receiving compensation that would be due the Grievant if the Release and Resignation Agreement were in effect.

2. The Employer has just cause to discharge the Grievant.

3. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 15th day of June, 2006.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

CAB/gjc
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