BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL 75, and its successor,
GENERAL TEAMSTERS UNION, LOCAL 662

and

GREAT LAKES CALCIUM CORPORATION

Case 2
No. 66904
A-6289

(Bryan Baeten Suspension Grievance)

Appearances:

YingTao Ho, Attorney, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appeared on behalf of the Union.

Ross Townsend, Attorney, Liebmann, Conway, Olejniczak & Jerry, S.C., Attorneys at Law, 231 South Adams Street, P.O. Box 23200, Green Bay, Wisconsin 54305-3200, appeared on behalf of the Company.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and Company, respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide the above-captioned grievance. A hearing was held on August 10, 2007, in Green Bay, Wisconsin at which time the parties presented testimony, exhibits and other evidence that was relevant to the grievance. The hearing was transcribed. The parties filed briefs by October 1, 2007, whereupon the record was closed. Having considered the evidence, the arguments of the parties, the applicable provisions of the agreement and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties did not stipulate to the issue to be decided herein. The Union framed the issue as follows:

> Did Great Lakes Calcium have just cause to suspend the grievant? If not, what shall be the remedy?

The Company framed the issue as follows:

> Under the terms of the collective bargaining agreement, did the Company have just cause to give Bryan Baeten a one day "decision making leave" for writing and posting the February 13, 2007 work request?

Having reviewed the record and the arguments in this case, the undersigned adopts the Union's wording of the issue. Thus, the Union's wording of the issue will be decided herein.

PERTINENT CONTRACT PROVISIONS

The parties' 2005-2008 collective bargaining agreement contains the following pertinent provisions:

> ARTICLE 7. LABOR MANAGEMENT RELATIONS
>
> (a) The management of the Great Lakes Calcium Corporation, the direction of the labor force and the right to hire and discharge employees for cause is vested exclusively in the Employer, except as specifically limited by this Agreement. The Union will not abridge such rights. The Union will be advised of the reason for discharge if it requests the information. The Employer shall have the right to implement and enforce reasonable work and safety rules. The decision of the management upon all questions of policy and of management shall be final.
>
> . . .
>
> (e) The Employer shall not discharge or suspend any employee without just cause.

PERTINENT COMPANY POLICIES

The Company (GLC) has adopted the following pertinent policies:

GLC Code of Conduct

. . .

Commitments to Our Employees

We promise to maintain a safe and healthy workplace for all of our Employees and to treat everyone with respect and dignity. . . .

. . .

GLC Employee Policies

Harassment Policy

Great Lakes Calcium intends to provide a work environment that is pleasant, healthful, comfortable, and free from intimidation, hostility or other offenses that might interfere with work performance. Harassment of any sort – verbal, physical, and visual – will not be tolerated.

What is Harassment?

Harassment can take many forms. It may be, but is not limited to: words, signs, jokes, pranks, intimidation, physical contact, or violence. Harassment is not necessarily sexual in nature.

. . .

Responsibility

All Great Lakes Calcium employees, and particularly managers, have a responsibility for keeping our work environment free of harassment. Any employee, who becomes aware of an incident of harassment, whether by witnessing the incident or being told of it, must report it to their immediate manager or any management representative with whom they feel comfortable. When management becomes aware that harassment might exist, it is obligated by law to take prompt and appropriate action, whether or not the victim wants the company to do so.

Reporting

Any incidents of harassment must be immediately reported to a manager or other management representative. Appropriate investigation and disciplinary action will be taken. All reports will be promptly investigated with due regard for the privacy of everyone involved. Any employee found to have harassed a fellow employee or subordinate will be subject to severe disciplinary action or possible discharge. Great Lakes Calcium will also take any additional action necessary to appropriately remedy the situation. No adverse employment action

will be taken for any employee making a good faith report of alleged harassment.

. . .

GLC Progressive Discipline Policy

Disciplinary Actions

The Discipline Policy applies to all regular employees who have completed the introductory period. This policy pertains to matters of conduct as well as the employee's competence. However, an employee who does not display satisfactory performance and accomplishment on the job may be dismissed. In certain cases, **without resorting to the steps set forth in this policy.**

Under normal circumstances, managers are expected to follow the three-step procedure outlined below. There may be particular situations, however, in which the seriousness of the offense justifies the omission of one or more of the steps in the procedure. Likewise, there may be times when the company may decide to repeat a disciplinary step.

To insure that Great Lakes Calcium Corporation business is conducted properly and efficiently, you must conform to certain standards of attendance, conduct, work performance and other work rules and regulations.

When a problem in these areas does arise, your manager will coach and counsel you in mutually developing an effective solution. If, however, you fail to respond to coaching or counseling, or an incident occurs requiring formal discipline, the following procedures occur.

Step One: First Work Rule Violation – Oral Reminder

Your manager will meet with you to discuss the problem, making sure that you understand the nature of the violation and the expected remedy. The purpose of this conversation is to remind you of exactly what the rule or performance expectation is and also remind you that it is your responsibility to meet that expectation.

You will be informed that the Oral Reminder is the first step of the discipline procedure. Your manager will fully document the Oral Reminder, which will remain in effect for 12 months. Documentation of the incident will remain in the department file and will not be placed in your permanent record, unless another disciplinary transaction occurs.

Step Two: Second Work Rule Violation – Written Reminder

If your performance does not improve within the 12 month period, or if you are again in violation of Great Lakes Calcium practices, rules or standards of conduct, your manager, after reviewing the situation with their manager, will discuss the problem with you, emphasizing the seriousness of the problem and the need for you to immediately remedy the problem.

Following the conversation, your manager will write a memo to you summarizing the discussion. The original memo will go to you and a copy will be routed to the Administrative Manager; the Administration copy of the memo will be placed in your file. Great Lakes Calcium expects that following a written reminder; you will conform to our expectations immediately. The Written Reminder will remain in effect for 24 months.

Step Three: Third Work Rule Violation – Decision-Making Leave

If your performance does not improve immediately following a Written Reminder, of if you are again in violation of Great Lakes Calcium Corporation practices, rules or standards of conduct, you will be placed on Decision Making Leave. The Decision Making Leave is the final step of Great Lakes Calcium Corporation's disciplinary system.

Decision Making Leave is an un-paid, one-day disciplinary suspension. Employees on Decision Making Leave will spend the following day away from work deciding whether to correct the immediate problem and conform to all of the company's practices, rules and standards of conduct, or to quit and terminate their employment with Great Lakes Calcium.

If your decision following the Decision Making Leave is to return to work and abide by Great Lakes Calcium practices, rules and standards of conduct, your manager will write a letter to you explaining your commitment and the consequences of failing to meet this commitment. You will be required to sign the letter to acknowledge receipt. A copy of the letter will be routed to senior managers in your chain of command, and a copy will be placed in your personnel file.

You will be allowed to return to work with the understanding that if a positive change in behavior does not occur, or if another disciplinary problem occurs within the next 24 months, you will be terminated.

If you are unwilling to make such a commitment, you may be terminated.

. . .

BACKGROUND

The Company is a processor of limestone and calcium carbonate to create end products. The Union is the exclusive collective bargaining representative for the Company's bargaining unit employees. Bryan Baeten is in the bargaining unit. He was suspended without pay for one day in February, 2007. This case involves that suspension.

In August, 2006, the Company revised and/or adopted the policies contained in the section entitled **PERTINENT COMPANY POLICIES**. When it did so, copies of same were provided to employees.

Baeten is a payload operator on the second shift. He operates the pay loader to fill the dryer and mill with raw material (i.e. stone), keeps the yard clean, and dumps dust.

Employees who encounter workplace problems have been instructed to identify the problem via a work request form (also known as a trouble identification report). As the name implies, it's a document wherein a workplace problem is identified which needs to be addressed. The bulletin board where these work request forms are posted is located in the break room (which also functions as the employee lunch area). Everyone at the Company has access to this room.

On March 13, 2006, Baeten filled out a work request form wherein he proposed that the weekend payload operators dump dust. In the section of the form which says "please explain the reasoning/justification for the work", Baeten wrote: "Because the lowest paid people bust their ass to dump dust on straight time and the highest paid people can come in for overtime and double time and be lazy."

On March 16, 2006, Baeten filled out a work request form wherein he proposed that a floater be hired for the second shift to dump dust. In the section of the form dealing with the reason for the request, he wrote: "First shift payloader (leadman) is exempt from dumping dust. Second and third shift are pushed to dump dust. What is so different between these shifts that a lead man is not expected to do as much as the late shifts??? (A follow up answer is expected)."

On March 17, 2006, Company President Wesley Garner met with Baeten and talked to him about what he had written on the work request forms just noted. Garner told Baeten that his (Baeten's) comment about "the highest paid people can come in for overtime and double-time and be lazy" was malicious and an implicit attack on Roger Flaig, an employee who had been with the Company for 45 years. Garner then counseled Baeten to not make inappropriate statements on work request forms. Garner told Baeten that when he completed work request forms in the future, he was to limit his comments to the mechanical problem involved, and to not comment on other employees and/or matters. Garner further told Baeten that the reason he did not want Baeten to make inappropriate comments and/or rant on the work request forms was because he considered it bad for morale. Afterwards, Garner memorialized what

happened in the meeting and gave a copy of it to Baeten. In that document, he wrote in pertinent part: "Please do not use the team board as a 'rant' session. It destroys team morale by driving lines between employees and management (we are all in this together)."

A week later on March 24, 2006, Baeten complained on a work request form about the way management was assigning the work of dumping dust. Garner considered Baeten's comments to be ranting and inappropriate, and met with Baeten to tell him so on March 28, 2006. During that meeting, Baeten stormed out of the room. Garner followed Baeten out of his office and instructed him several times to return and complete the meeting. Baeten initially refused to comply with Garner's directions to return, and said "What am I, your dog?" This verbal exchange was heard and seen by people nearby. Afterward, Baeten returned to Garner's office and stayed until the meeting ended.

On March 31, 2006, Garner gave Baeten the following written warning for the incident just referenced:

> On 3/24/06, you used the team board as a place to display your dissatisfaction with the manner in which management was assigning work. You specifically stated that work should be distributed EVENLY and that it would be your LAST TIME dumping dust. Due to this violation, I am issuing you a written warning. This warning follows a meeting we had earlier in the week in which we specifically discussed previous postings of yours on the team board that were inappropriate. We consider teamwork and respect to be building blocks of our organization. Your remarks on the board are disparaging to coworkers and management and act counter to building a strong team.
>
> During our one-on-one discussion on Tuesday, March 28th, you left the room while I was speaking to you. After requesting you to return, you failed to do so immediately. Only after I left the room to find you, did you return with me. This is a violation of a direct work instruction and also constitutes a written warning.
>
> I will work with you over the next 24 months while these warnings are in place to help coach you to appropriate work behavior. It is up to you to decide if you are willing to change your behavior.

The Union grieved the discipline. The grievance was resolved when Garner agreed to reduce the written warning to a Step 1 verbal warning with the understanding that future violations would result in further disciplinary action.

After the grievance referenced above was settled, Garner sent a letter to Baeten which provided in pertinent part:

> I wanted to follow up on our discussion in the team room on April 6th. There are definitely issues in the plant regarding results and behavior in which we both agree and disagree. I appreciated the tone and manner in which we conducted ourselves. We should use this as a model for future discussions. We discussed various topics around performance and behavioral expectations. We discussed that many of your thoughts and ideas are excellent, but that the tone and delivery are often out of line from a behavioral standpoint. Due to this, your message comes across confused or is not listened to at all. There is a quote I use for this, "Say it straight, or they hear you crooked." Filter out the emotion, take a breath, and wait if you need to, before you speak.
>
> The other issue we discussed is patience. We are building a team and organization that will work at a very high level. This will be a team you will be proud to be a part of. As we put new systems in place, it will take time to get them up and running effectively. Have Patience. Participate in the systems. Encourage others to do the same. As part of this change, I too will try to be patient in helping people get up to speed in the new systems. I will also have patience in giving some leeway to those that struggle with change. In the end, change is expected. It will become a natural part of environment. We must get better if we want to be "World-Class."
>
> Brain, Oops, Bryan, your most of your ideas and thoughts are right on. You are smart and intelligent. We need to find ways to leverage that. As we begin our area meetings next week, please be a key player in supporting them. This will provide a place for you to give in put on a regular basis. It will also help us enhance communication across the shifts, pulling us together as a team.

On August 15, 2006, both the dryer and the mill ran out of stone on the second shift several times. That action, in turn, reduced productivity. As the second shift payload operator, Baeten was responsible for ensuring that that equipment did not run out of raw material. After Operations Manager Shari Aleksy investigated the matter, she concluded that Baeten had let his machine run out of stone too often that day and that warranted discipline. She subsequently issued the following Step 2 written warning to Baeten:

. . .

> In reviewing the dryer performance it came to my attention that the dryer had run out of stone 5 times on your shift. Further investigation uncovered the mill also experienced shortage of stone. There was only 1 aglime truck on your shift with 2 the day before. The dust you hauled was above what I normally observed at 12 trucks verses 7 or 8 and more than earlier in the month. When I asked why you were not able to keep the plant running you did not know why.

> We did talk about expectations and prioritization of your work. I have no reason to believe that the prioritization to keep the plant running has changed recently or that after being employed at Great Lakes Calcium for over 5 years you did not understand the responsibilities. I do acknowledge that the responsibilities have gotten more difficult with the restriction on the G Stone elevator and the start of aglime season. On occasion every pay loader operator has had stone run out. The issue with your performance is the excessive amount of times you did not get stone to the equipment.
>
> Your performance impacted the company in a negative way reducing productivity. In addition your fellow shift worker's jobs were increasingly more difficult as the equipment went up and down. Finally, all the union employees were affected as the production rates are tied to their incentive program which was negatively impacted by the lost production.
>
> Based on the blatant derelict of duties and the impact to both the company and fellow workers I am issuing you a written warning for failure to perform work duties and ask that your performance improve immediately.
>
> If you need assistance to improve your performance Mike Flaig, myself or Wes Garner are available.
>
> I want to close by saying your handling of the discussion was professional. I appreciate the issues and ideas you had on the up coming difficulties with the aglime season. I have acted on a few of the ideas and will continue to search for ways to improve the work scheduling issues.

This written warning was grieved. In denying the grievance, Aleksy noted that "Bryan has a verbal discipline outstanding and the next step in the disciplinary procedure is a written warning." This grievance was not appealed to arbitration.

On September 20, 2006, Aleksy met with Baeten and reviewed a number of work-related matters with him. One topic which Aleksy covered in that meeting was what Baeten had written on some work request forms. She reviewed several of them with him. One work request which she reviewed was dated July 5, 2006 wherein Baeten wrote: "Bucket scale in loader is a piece of crap." Another work request which she reviewed was dated August 9, 2006 wherein Baeten wrote: "No one gives a shit. I have to deal with it." Another work request which she reviewed was dated September 14, 2006 wherein Baeten wrote: "It is hard to get a good view from inside an office." Aleksy interpreted this comment as referring to her. Aleksy told Baeten that what he had written in these work requests was inappropriate and unacceptable because it was sarcastic, negative and not focused on the matter at hand. She counseled Baeten that henceforth when he wrote work requests, if his comment was not constructive, he was not to put it on the work request. At the end of that discussion, Baeten responded that he understood what she was telling him and would comply.

FACTS

In early February, 2007, the vibrator on the stone hopper machine was not working. The vibrator on this machine moves the stone in the hopper and keeps it (i.e. the stone) from sticking together. This malfunction caused the stone that was placed in the hopper to not flow down as fast as it would if the vibrator had been working properly. A remote control unit similar to that used in a garage door opener is used to operate the vibrator on the stone hopper machine. The problem with the vibrator was an electrical problem, so the Company's (only) electrician, Ken Brooks, tried to fix it. He replaced the battery in the remote control unit. That did not fix it and the electrical problem with the vibrator remained.

The electrical problem with the vibrator was a great irritation to Baeten because it affected the amount of stone he could put in the hopper machine. Thus, it interfered with the work he had to perform. Although he is not an electrician, he tried to fix it himself by doing the following: he checked the vibrator itself; he checked the hand button on the remote control unit; and he changed the fuse in the electrical box for the vibrator. None of these attempts to fix the vibrator worked and the electrical problem remained. According to Baeten, this problem "drove him nuts". He was angry and frustrated that it took a week to replace the battery in the remote control unit, and that the new battery did not fix the problem.

On February 13, 2007, after he had tried unsuccessfully to fix the vibrator on the hopper machine, Baeten wrote up a work request which dealt with fixing that machine. By his own admission, he was agitated when he wrote it. In the section of the form asking what happened, he wrote: "Remote for vibrator on stone hopper feed chute still not working – guess it wasn't the battery we waited a week for." In the section of the form asking what needs to be done to fix the trouble, he wrote: "Find an electrician with enough brain power to solve this complicated problem. Hopefully this is given to Pete from Van Ert. NOW." (Note: Van Ert is a local electrical contractor and Pete is one of their electricians who has done a lot of work at GLC).

The next day, someone who is not identified in the record brought the work request just referenced to the attention of supervisor Mike Flaig. That person told Flaig that Ken Brooks (the Company's electrician) would be offended if he read it. Flaig removed the work request. Several days later, Flaig sent an e-mail to Aleksy wherein he informed her of the foregoing. His e-mail provided in pertinent part:

> On Wednesday, Feb. 14, 2007, at approx. 7:05 am it was brought to my attention that there was a work request hanging on the info board that I should remove immediately. The person stated that Ken would be very offended if he was to read it. I removed it at once and read it. The WR was filled out by Bryan Baeten, the 2nd shift pay loader operator. I found the comments offensive, and directed at Ken Brooks ability to perform his job. I felt that if I did not remove this WR, that other members of the team would read this unacceptable behavior. As a team leader in the plant, I need every member to

> respect each other. Comments like I found on Bryan Baetens WR tear down the very foundation of what GLC is trying to build.

After Aleksy got Flaig's e-mail, she interviewed Baeten about the work request dated February 13, 2007. In that interview, Baeten admitted that he wrote the work request in question. When Aleksy told him that what he had written was inappropriate, he disagreed and said there was no harm (in what he had written) because he had not named a name. Thus, Baeten felt he had not done anything wrong in writing the work request in question.

Aleksy then had two separate conversations with the Union's shop steward, Pete Ziber, about this matter. Following those conversations, she decided to discipline Baeten for what he wrote on the February 13, 2007 work request, and specifically to give him a one-day "decision day". (Note: That is what the Company calls a one-day suspension). The suspension letter which she prepared was incorrectly dated January 27, 2007; the letter should have been dated February 27, 2007. The suspension letter provided in pertinent part:

> Your behaviors continue to be out of compliance with the Great Lakes Calcium values, code of conduct and harassment policy.
>
> Last spring it was brought to your attention that writing work requests that attack your fellow employees is unacceptable. You feel that because you do not name a person specifically your behaviors are acceptable. The reality is you insinuate who the person is in such a way that your fellow employees are clear on who you are attacking. This is the behavior from last spring and it is the current behavior. This judgmental, attacking behavior is unacceptable.
>
> Completing work requests correctly is a requirement of this job. To eliminate any possible misunderstanding on what is acceptable I will clarify that you are to state what is not mechanically working in the trouble statement and indicate what the permanent fix looks like mechanically. No added commentary on the speed that it takes to complete work, how other employees do their job, qualifications of the employees or other unnecessary opinions are to be on the work request.
>
> Your behaviors continue to make the work environment uncomfortable for your fellow employees and violate Great Lakes Calcium's work rules of disrespect to a co-worker and violating the company's code of conduct and harassment policy. I remind you that our harassment policy states that the harassment may be, but not limited to, words, signs, jokes, pranks, intimidation. . .
>
> Based on Great Lakes Progressive discipline I am issuing a step three – "decision making day" for violation of work rules of disrespect to a co-worker and violating the company's code of conduct and harassment policy. Your day off will be March 7th (Weds), 2007.

> This is a very serious position to be in as any further work rule violation brings you to termination. Great Lakes Calcium offers you assistance at your request through an outside organization employee assistance program (EAP). The EAP program is a resource to help solve work related problems.

This discipline was grieved. The grievance was processed through the contractual grievance procedure and was ultimately appealed to arbitration.

. . .

At the hearing, Baeten testified that he did not know that Ken Brooks, the Company's only electrician, had worked on the vibrator when he wrote the February 13, 2007 work request. He further testified that on occasion, he engaged in "shop talk" with Brooks, and that Brooks was not offended by it. He further testified that his "brain power" comment on the February 13, 2007 work request was a reference to his own inability "to solve this complicated problem", and that rather than riding Brooks, he was simply riding himself because he was not smart enough to fix the problem with the vibrator. Brooks did not testify at the hearing.

POSITIONS OF THE PARTIES

Union

The Union's position is that the Company did not have just cause to suspend Baeten for one day. It makes the following arguments to support that contention.

First, with regard to the level of proof that the Company needs to meet to prove that Baeten engaged in the wrongdoing alleged, the Union contends that the Company has to prove its case by clear and convincing evidence. According to the Union, the Company did not meet its burden of proof under that standard.

Next, the Union argues that what Baeten wrote on the work request form does not constitute misconduct because he did not intend for his comments to be insulting to anyone except himself. The Union avers that the Company misinterpreted who the target was of Baeten's "brain power" comment. According to the Union, the target was not Brooks as the Company assumed; rather, Baeten was mocking himself with his "brain power" comment. To support that premise, it cites Baeten's testimony that what he meant by his "brain power" comment was that he was not smart enough to fix the complicated electrical problem himself, so the Company needed to find someone smarter than him to accomplish that task. The Union submits that the reason Baeten mentioned "Pete from Van Ert" in the next sentence was because Pete was the most proficient electrician Baeten knew of, and knew the Great Lakes plant inside and out. The Union also cites Baeten's testimony that he did not know that Brooks had worked on the vibrator to support the premise that Baeten did not have Brooks in mind when he wrote the work request. Building on the foregoing, the Union reasons that since Baeten did not intend his remark to offend or ride Brooks, he should not be disciplined for it.

It cites several arbitrators who reversed discipline where the employee did not intend to offend the listener. The Union also argues that there is no evidence that Baeten's work order offended or interfered with the work performance of anyone, or was likely to have such effect. It submits that the statement contained in Mike Flaig's e-mail that he "found the comments offensive" was hearsay, since Flaig did not testify. The Union also calls attention to the fact that the Company did not call Brooks to testify that he was offended by Baeten's work request.

Next, the Union acknowledges that Baeten has been previously counseled about writing improper work requests. It emphasizes however that he was not charged with that offense here. Instead, it maintains that Baeten was disciplined for violating 1) the Company's work rules by "disrespect to a co-worker"; 2) the code of conduct policy (which requires employees "to treat everyone with respect and dignity"); and 3) the harassment policy. The Union contends that Baeten did not violate those policies as the Company alleged. Here's why.

First, it contends that Baeten could not have violated the harassment policy because that policy is "inherently unenforceable because it does not define the term harassment." It notes that while the section entitled "What is Harassment?" goes to great length to define sexual harassment, it does not define harassment, per se; it only defines harassment in terms of the mediums through which harassment can take place. As the Union sees it, such a definition is insufficient to place the employees on notice as to what is considered harassment at the Company. For example, while the policy explains that words may be harassment, it makes no attempt to define what type of words, under what circumstances, how offensive they must be, or what effect they must have to constitute harassment. Additionally, it notes that while the harassment policy states that its aspiration is to create a work environment free from "intimidation, hostility or other offenses that may interfere with work performance", it avers that nothing in the policy puts the employee on notice that any conduct that may interfere with work performance constitutes harassment. The Union contends that an employer cannot discipline an employee using a policy when the policy omits important definitions (in this case, the definition of the term harassment), and fails to put the employee on notice as to what conduct violates the policy.

The Union argues in the alternative that even if the harassment policy can be construed as prohibiting intimidation, harassment, or other offenses that might interfere with work performance, it maintains there is no evidence Baeten's work request interfered with Brooks' or anyone's work performance. It submits that given the history of Baeten and Brooks riding each other, Baeten would have expected Brooks to laugh it off.

Second, the Union contends that Baeten did not violate either the Company's code of conduct policy or work rules since those policies/rules are too vague to have put him on notice that the work request he wrote was so different from permissible shop talk. In support thereof, it cites decisions by various arbitrators who have held that an employer cannot discipline an employee when the work rule that the employee allegedly violated is too vague to put the employee on notice that his conduct is unacceptable. As the Union sees it, neither the code of conduct policy nor the work rules define the line between acceptable shop talk and

unacceptable "disrespect", and places employees on notice as to the scope of their prohibition. The Union maintains that the Company never put Baeten on notice that remarks he deemed to be acceptable shop talk are in fact disrespect (prohibited by the work rules) or failure to treat co-workers with respect and dignity (prohibited by the code of conduct policy). It asserts that while the Company had previously counseled Baeten about writing improper work requests, it never informed him that improper work orders violated the work rules, the code of conduct policy, or the harassment policy.

Finally, the Union argues that even if Baeten did violate the Company's rules, and the Company had a proper basis for disciplining him for writing the work order, the appropriate discipline under the circumstances is a written warning; not a one-day suspension. Here's why. It notes that prior to the discipline imposed here, Baeten had received verbal warnings for his prior work rule violations and a written warning for a work performance violation when his machine ran out of stone too often. It asserts that neither the Company's own progressive disciplinary procedure nor principles of just cause allow the Company to compound work performance and work rule violations into the same disciplinary sequence. According to the Union, the Company's own progressive disciplinary policy requires the maintenance of separate tracks for work performance and work rule violations. The Union argues in the alternative that if the Company's progressive discipline policy can be read as permitting the compounding of work rule and work performance violations, then that policy is unreasonable because compounding of unrelated violations defeats the notice, warning and opportunity to improve functions of a properly administered progressive disciplinary system. Building on that premise, it's the Union's position that the Company cannot use Baeten's written warning for poor work performance to satisfy a step of Baeten's progressive discipline sequence for work rule violations. Thus, it's the Union's view that the Company skipped the written warning step, and directly advanced Baeten from a verbal warning to a suspension for the next work rule violation. The Union avers that except for certain safety violations, the Company has not skipped a step in disciplining employees for violations that would normally call for the application of progressive discipline. It maintains that skipping a step for Baeten constituted disparate treatment.

In sum, it is the Union's position that the Company did not have just cause to suspend Baeten. It therefore asks that his suspension be reduced to a written warning or eliminated, and that he be made whole.

Company

The Company's position is that it had just cause to suspend Baeten for one day because of what he wrote on the February 13, 2007 work request. According to the Company, Baeten committed misconduct by his action which warranted discipline. It elaborates on these contentions as follows.

The Company initially addresses Baeten's contention that he did not intend for his work request to be insulting or derogatory to the Company's only electrician – Brooks – but only to

himself. It argues that Baeten's claim that he intended the work request form to refer to himself is simply not credible. Here's why. First, it notes that Baeten wrote that the Company should find "an electrician with enough brain power. . ." to solve the problem. According to the Company, Baeten's claim that this language refers to himself is belied by the fact that Baeten is not an electrician. It asserts that if he were referring to himself, he would have said something like "find another employee" or "find a person". He did not. As the Company sees it, by using the word "electrician", Baeten demonstrated that he had Brooks – the Company's only electrician – in mind when he wrote his statement. Second, the Company maintains that Baeten's testimony suggests that he had Brooks in mind. While Baeten testified that he did not know that Brooks was attempting to solve the problem by replacing the battery, he knew 1) that the problem with the vibrator was an electrical problem; and 2) that someone was trying to fix that electrical problem. The Company believes that given those circumstances, Baeten had to be aware that it was the Company's electrician who was trying to solve that electrical problem. Third, it submits that Baeten had to know that it was Brooks' responsibility to fix that electrical problem. As the Company sees it, that is why Brooks was the obvious target of Baeten's anger and frustration. Fourth, the Company calls attention to what it characterizes as Baeten's extensive track record/history of using the work request form as a weapon to vent his anger and heap malicious and sarcastic remarks on co-workers and management. It notes that Baeten even did it at the hearing. According to the Company, this track record/history helps establish that even if Baeten's target was not Brooks, it was some co-worker. Fifth, the Company argues that Baeten's use of the adjective "complicated" when referring to the "problem" is obvious sarcasm. Given the foregoing, the Company believes that Baeten's claims that he was simply "riding" himself in the form and did not intend to target or attack anyone are simply not credible.

Next, the Company argues that even if the arbitrator believes Baeten's claim about what he intended with his "brain power" remark (i.e. that he was "riding" himself with his "brain power" comment), that still does not excuse or change the fact that the comments on the left hand side of the form were also malicious and sarcastic in that he attacked and insulted the employee who replaced the battery. According to the Company, the comment "guess it wasn't the battery we waited a week for" drips with sarcasm and communicates no useful or constructive information about the problem. Additionally, it communicates to the reader that, in Baeten's opinion, the person who had replaced the battery had taken a ridiculous amount of time to do so. The Company also submits that the term "guess", when used in that context was sarcastic, because Baeten knew at that point that the problem was not caused by the battery. As the Company sees it, Baeten's language tells the reader that, in his opinion, the person who thought they had fixed the vibrator by replacing the battery was incompetent.

Next, the Company contends that the discipline which it imposed (i.e. a one-day suspension) was justified under all the relevant facts and circumstances. Here's why.

First, it emphasizes that before Baeten was given the suspension at issue here, he had been given three separate verbal warnings for inappropriate use of the work request form. Additionally, he had been given a written warning for unacceptable work performance. The

Company maintains that since Baeten had received a written warning, the Company's decision to impose a suspension (i.e. a "decision making leave") was appropriate and consistent with the Company's progressive discipline policy.

Second, the Company disputes the Union's assertion that it "skipped a step" in the progressive discipline system. It asserts that the facts show otherwise. It notes in this regard that Baeten was given two verbal warnings in March of 2006, a written warning in August of 2006, and another verbal warning in September of 2006. As the Company sees it, that previous discipline establishes that Baeten was at step two of the progressive discipline policy when he wrote and posted the February 13, 2007 work request form at issue here. However, even if the Company did "skip a step" as the Union claims, it is the Company's view that the progressive discipline policy gives it the right to do exactly that. To support that premise, it cites the language therein which provides that "there may be particular situations. . . in which the seriousness of the offense justifies the omission of one or more of the steps in the procedure. . ." According to the Company, the record contains at least four examples of other employees where the Company "skipped steps" in disciplining them.

Third, the Company disputes the Union's assertion that it improperly "compounded" offenses of different types to move Baeten up the disciplinary ladder. It notes that the Union argument in this regard is that since the step two (i.e. written warning) discipline which Baeten received in August of 2006 was for poor work performance, the Company could not "reasonably" use that discipline as the basis for a move to step three of the process (i.e. suspension). The Company argues that the Union's compounding argument is without merit. For the purpose of context, it notes that while the term "compounding" was used during the hearing, it avers that arbitral authority typically uses the terms "single track system" or "multi-track system". A "single track system" is one in which an employee moves up the progressive discipline ladder for each succeeding violation or issue regardless of the nature of that violation, and there is no requirement that succeeding violations be of the same variety as preceding violations. Conversely, a "multi-track" system is one in which violations will not move an employee up the disciplinary ladder unless the succeeding violation is of the same type or variety as the former violation; separate, multiple tracks of progressive discipline are maintained for different uses and offenses. The Company contends that its progressive discipline system is a single track system and that all forms of misconduct and performance issues are considered together in the disciplinary process. In other words, it's the Company's view that its disciplinary policy does not create one track for work rule violations and another track for poor work performance violations. To support that premise, it relies on the following: 1) the language itself, which the Company views as broad and includes any violation – not just the same violation as occurred in the preceding step; 2) Aleksy's testimony that the Company's policy is a single-track system; and 3) what it characterizes as the parties' past practice.

Since the Union disagrees with the Company's construction of its policy, and argues that the Company's discipline policy is essentially a multi-track system, the Company asserts that the Union has to prove that the Company's construction is wrong and that GLC's

progressive discipline system is a multi-track system. It cites arbitral support for its position. The Company contends that the Union did not meet its burden to prove that, so its argument should fail.

The Company also argues that the Union's contention that a single track system is per se unreasonable and unenforceable lacks merit. It cites numerous arbitration decisions which have upheld and applied single-track progressive discipline systems. In its view, single track systems are not only legitimate and appropriate but constitute the norm – rather than the exception – in labor relations.

Finally, the Company argues that Baeten received due process before he was disciplined. It avers in this regard that Aleksy's investigation into the February 13 work request form was deliberate, unrushed and thorough. According to the Company, she gave Baeten ample opportunity to explain the document and to tell his side of the story. She also consulted twice with Baeten's union representative. It maintains that in none of those conversations did Baeten or the Union offer any satisfactory explanation for Baeten's conduct. It specifically notes that while Baeten claimed at the hearing that the work request form was intended to "ride" himself, he did not make that claim to Aleksy prior to the hearing. The Company submits that only after gathering and evaluating all available information did Aleksy make her decision.

In sum, it is the Company's view that Baeten's one-day suspension was justified under the circumstances and should not be overturned. It therefore asks that the grievance be denied.

DISCUSSION

While the parties did not stipulate to the issue to be decided herein, both sides referenced just cause in their proposed wording of the issue. I adopted the Union's wording of the issue because I believe it adequately states the issue to be decided herein.

The phrase "just cause" is not defined in the parties' collective bargaining agreement, nor is there contract language therein which identifies what the Employer must show to justify the discipline imposed. Given that contractual silence, those decisions have been left to the arbitrator. Arbitrators differ on their manner of analyzing just cause. While there are many formulations of "just cause", one commonly accepted approach consists of addressing these two elements: first, did the employer prove the employee's misconduct, and second, assuming the showing of wrongdoing is made, did the employer establish that the discipline which it imposed was commensurate with the offense given all the circumstances. That's the approach I'm going to apply here.

As just noted, the first part of the just cause analysis being used here requires a determination of whether the employer proved the employee's misconduct. In making that call, I will address two separate components: did the employee do that which was alleged, and if so, was that misconduct? These two components will be addressed in the order just listed.

The conduct in question is this: On February 13, 2007, Baeten filled out a work request form and posted it on the bulletin board. Here's what he wrote. On the left hand side of the form, he wrote: "Remote for vibrator on stone hopper feed chute still not working – guess it wasn't the battery we waited a week for." On the right hand side of the form he wrote: "Find an electrician with enough brain power to solve this complicated problem. Hopefully this is given to Pete from Van Ert. NOW."

When Aleksy asked Baeten about what he had written, Baeten responded that he had not done anything wrong (by writing the work request) because he had not named a name. Thus, in his view, what he wrote was not insulting to anyone. That was the only defense Baeten offered to Aleksy at the time about what he had written.

At the hearing though, Baeten offered a new defense about what he had written. It was this: he said that his reference to "brain power" was a reference to his own inability to solve this "complicated problem." Thus, Baeten maintained at the hearing that he did not intend to "ride" Brooks with what he had written; rather, he was "riding" himself.

I find that Baeten's claim that he intended his "brain power" comment to refer to himself as a self-depricating dig is not credible for the following reasons. First, Baeten started his comment on the right hand side of the form by saying "find an electrician. . ." What is noteworthy about this phrase is that Baeten is not an electrician. If he were referring to himself as he claimed, he would not have referred to himself as an electrician; he would have used some other phrase such as "find someone else" or "find another employee". By using the word "electrician" in that phrase, Baeten made his intent crystal clear: he was targeting that comment at Ken Brooks – the Company's electrician. Second, Baeten testified that he knew that the problem with the vibrator was an electrical problem (as opposed to say, a mechanical problem) and that someone was trying to fix that electrical problem. Under those circumstances, it can logically be inferred that Baeten knew that the Company's electrician was trying to fix that electrical problem. Even if Baeten did not know for sure that it was Brooks (the Company's electrician) who replaced the battery, he surely must have suspected it was Brooks. After all, since the Company has just one electrician (Brooks), who else could it be that would be trying to fix an electrical problem? Third, as will be noted in more detail later, Baeten has an extensive history of making malicious and sarcastic remarks on work request forms. Insofar as the record shows, when he's done that previously, he did not make those comments about himself; instead, he made those comments about co-workers and/or management. When these points are considered together, they persuade me that Baeten did not intend to target himself with his "brain power" comment. Instead, I find – as did the Company – that the intended target of Baeten's written dig was the Company's electrician – Brooks.

Even if I were to credit Baeten's claim about what he intended by his "brain power" remark (i.e. that he was "riding" himself via his comments on the right side of the form), that would still not address and/or excuse what he wrote on the left side of the work request form. I'm referring, of course, to the statement: "guess it wasn't the battery we waited a week for."

The word "guess" was obviously sarcastic because Baeten knew when he wrote it that the problem with the vibrator was not the battery. Thus, he did not have to "guess" at it. The phrase "guess it wasn't the battery we waited a week for" tells the reader of the form that the person who thought they had fixed the vibrator by replacing the battery was incompetent. Thus, in this statement, Baeten attacked and insulted the employee who replaced the battery. As was noted above, Baeten then went on, via his comments on the right hand side of the form, to identify who his intended target was. While Baeten did not explicitly name his intended target in the work request, it was implicit to those who read it, including this arbitrator, who the intended target was. It was Brooks, the Company's only electrician.

It would be one thing if Baeten had never used a work request form to vent his anger and frustration at a co-worker or management. However, that is not the case. The record indicates that Baeten has a propensity for using the work request form to heap sarcastic remarks on co-workers and others. Simply put, he's done it many times before. Because of that, Company officials Garner and Aleksy had spoken to him about how he (Baeten) was using the work request form and counseled him about the proper use of that form. Their instructions were clear and specific; there was nothing obtuse about them. They told Baeten to not make malicious or sarcastic comments, or be negative, but rather to make constructive comments which dealt with the underlying problem. They further told him that if he did not change his behavior, he would be disciplined. Thus, Baeten was put on notice what was expected of him with regard to the work request forms. Prior to the incident involved here, Baeten received three separate verbal warnings for inappropriate use of work request forms: one from March 17, 2006; one from March 31, 2006 (i.e. the written warning which was later reduced to a verbal warning); and one from September 20, 2006.

It is in that context that Baeten wrote the work request in question. While he had previously been warned and directed to not use work requests to insult and attack co-workers, that's exactly what he did in the work request dated February 13, 2007. What he wrote therein was malicious and sarcastic, and attacked the competence of a co-worker. As such, it violated the work instructions he had previously been given by Garner and Aleksy to not use work requests to insult and attack co-workers. Since he did so in his February 13, 2007 work request, he committed workplace misconduct by writing it.

The Union offered several defenses for Baeten's conduct which, in its view, should excuse or justify his conduct. Those defenses are addressed next.

One defense is that the Company did not call Brooks, the employee who Baeten supposedly offended, to testify that he was offended by Baeten's work request. As the Union sees it, his failure to testify was significant. I disagree. In my view, the fact that Brooks did not testify is of no great significance because the question is not whether Brooks was offended by the wording of Baeten's work request. Instead, the question is whether management officials were offended by the wording of Baeten's work request. They were. The reason the latter question is dispositive here and not the former is because management officials have been entrusted with the authority to make that call via the management rights granted them in Article 7(a).

Another defense is that Baeten and Brooks have supposedly engaged in rough shop talk with each other. Building on that premise, the Union avers that what Baeten did, via the comments in his work request, was engage in a type of shop talk that he thought was acceptable. I do not find this contention persuasive for the following reasons. Even if shop talk covers written words, as opposed to just spoken words, it is generally understood in labor relations that shop talk involves words intended for a small/limited audience. Here, though, the audience was not small/limited because the written comments were posted (published, in a sense) for everyone at the plant to see. The irony, of course, is that it was Baeten who published it. By doing so, he converted what might have been a private matter involving shop talk between he and Brooks into a public matter, so to speak. Once that happened, the Company had no choice but to take action against Baeten.

Having found that the defenses referenced above do not excuse Baeten's conduct, the next question is whether that misconduct warranted discipline. I find that it did for the following reasons. First, as was noted above, Baeten had previously been warned and directed to not use work requests to insult and attack co-workers. Baeten violated those work instructions with his work request on February 13, 2007. The Employer has a legitimate and justifiable interest in ensuring that employees follow work directives which they are given. Second, the Employer concluded that Baeten's misconduct violated several of the Company's policies. Specifically, it averred that Baeten violated the Company's code of conduct policy and the Company's harassment policy with his February 13, 2007 work request. In its brief, the Union went into great detail about those policies and asked me to find them unenforceable on numerous grounds. I decline to do so. In my view, I don't need to do that to decide this case. Instead, all I need to decide, insofar as it relates to the Company's policies, is whether Baeten's work request violated the Company's code of conduct policy and the Company's harassment policy. I find that it did. While the Union correctly notes that Baeten was not previously told that writing inappropriate work requests would violate those Company policies, I don't consider that fact dispositive. What I consider dispositive is that Baeten had been warned repeatedly to not write inappropriate work requests. When he disregarded that directive and wrote an inappropriate work request on February 13, 2007, the Company rightfully disciplined him for it. The Company does not have a specific work rule/policy that says "don't write inappropriate work requests", so it shoe-horned what Baeten had done into some of their existing policies which prohibit certain bad behavior, namely their code of conduct policy and their harassment policy. It could do that.

The second part of the just cause analysis being used here requires that the Employer establish that the penalty imposed was appropriate under the relevant facts and circumstances. In reviewing the appropriateness of discipline under a just cause standard, arbitrators often consider the notions of progressive discipline, due process protection and disparate treatment. The undersigned will do likewise in reviewing the appropriateness of the discipline imposed here (i.e. a one-day suspension). These matters will be addressed in the order just listed.

With regard to the first matter referenced above (progressive discipline) it is noted at the outset that an employee who has already been disciplined is rightly exposed to more severe

consequences for their actions than another employee with a clean record. It is basic progressive discipline that as disciplinary steps become more severe, employees are supposed to modify their behavior. If they do not, they can justifiably be disciplined more severely.

Before I address this topic in detail, I've decided to review Baeten's disciplinary history once again. Prior to the incident involved here, Baeten had received three separate verbal warnings for inappropriate use of work request forms. In addition, Baeten had received a written warning for poor work performance.

The Union raises two separate defenses relative to progressive discipline. The first defense is that the Company improperly "compounded" offenses of different types to move Baeten up the disciplinary ladder. The second defense is that the Company improperly "skipped a step" in the progressive discipline system when it suspended Baeten. Both of these contentions are addressed in the discussion which follows.

The Union's argument that the Company improperly "compounded" offenses of different types to move Baeten up the disciplinary ladder is based on the premise that the written warning which Baeten received in August of 2006 was for poor work performance, and that that discipline could not be used as a basis to move Baeten to the suspension step for inappropriate use of the work request form. I find this argument unpersuasive for the following reasons. It is noted at the outset that while the Union used the term "compounding" in its argument, I'm going to use different terms in my discussion. The terms I'm going to use are single-track and multi-track. What I mean by the phrase single-track is a disciplinary system where an employee moves up the disciplinary ladder for each succeeding violation regardless of the nature of the violation. Under this system, there is no requirement that succeeding violations be of the same variety as preceding violations. What I mean by the phrase multi-track is a disciplinary system where violations will not move an employee up the disciplinary ladder unless the succeeding violation is of the same type as the former violation. Under this system, separate or multi-tracks are kept/maintained for different offenses. The Union contends that the Company's disciplinary system is a multi-track system. The problem with this contention is that it is not supported by either the contract language or the Company's disciplinary policy. With regard to the contract language, it is noted that some labor agreements include specific language that identifies how discipline will be handled. This collective bargaining agreement does not. Additionally, it does not include language which establishes a multi-track disciplinary system. Given the absence of such language, this collective bargaining agreement does not require the Company to have one track for work rule violations and another track for poor work performance violations. Second, the Company's disciplinary policy does not establish a multi-track disciplinary system either. Since neither the contract language nor the Company's disciplinary policy requires the Company to use a multi-track disciplinary system, it does not have to use one. That being so, it can use a single-track disciplinary system whereby all previous discipline – whether it's for misconduct or performance reasons – is considered in deciding the appropriate level of discipline. That's what the Company did here. When it looked at imposing discipline on Baeten for his February 13, 2007 work request, it considered Baeten's entire disciplinary history (i.e. his

three verbal warnings as well as his written warning). While the written warning was for a performance reason, that did not matter. It could still be considered because neither the contract language nor the Company's disciplinary policy precluded its consideration.

As a practical matter, this finding disposes of the Union's contention that the Company "skipped a step" in the progressive discipline system. It did not skip a step because prior to the incident involved here, Baeten had received three verbal warnings and a written warning. The next step for Baeten was a suspension. That's what the Company issued, so Baeten was progressively disciplined.

With regard to the second matter referenced above (due process protection), there is no evidence that Baeten was denied due process before he was suspended. This finding is based on the following facts. First, upon learning of the February 13, 2007 work request form, Aleksy conducted an investigation over the next two weeks. She first met with Baeten and questioned him regarding the document. In that interview, Baeten admitted writing the document, but claimed that because he had not "named names" on the form, he had done nothing wrong. Next, Aleksy had two subsequent conversations with shop steward Pete Ziber on February 22 and 23, 2007. At that point, Aleksy concluded her investigation and made the decision to give Baeten a one-day suspension. On February 27, Aleksy met with Baeten and Ziber, informed them of her decision, and gave Baeten the suspension letter. In my view, there is nothing in the facts just noted that raise any so-called red flags regarding procedural due process problems. Accordingly, I find that the Company gave Baeten due process before it imposed discipline.

With regard to the third matter referenced above (disparate treatment), it is noted at the outset that the principle of equal treatment dictates that an employer must enforce rules and assess discipline in a consistent manner; employees who engage in the same type of misconduct are to be treated the same unless a reasonable basis exists for variations in the assessment of punishment. Insofar as the record shows, no one else has engaged in the same type of misconduct as Baeten has (i.e. writing inappropriate work requests). That being so, it does not appear that Baeten was subjected to any disparate or arbitrary treatment in terms of the punishment imposed.

Accordingly, then, it is held that the severity of the discipline imposed here (i.e. a one-day suspension) was not excessive, disproportionate to the offense, or an abuse of management discretion, but rather was reasonably related to Baeten's proven misconduct. The Company therefore had just cause within the meaning of Article 7(e) to suspend Baeten for one day.

In light of the above, it is my

AWARD

That Great Lakes Calcium had just cause to suspend the grievant for one day. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 22nd day of January, 2008.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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