

BEFORE THE ARBITRATOR

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In the Matter of a Dispute Between

**DUO-SAFETY LADDER CORPORATION**

and

**DUO-SAFETY LADDER INDEPENDENT BARGAINIGN UNIT**

Case 29

No. 69069

A-6377

(Discipline Grievance)

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**Appearances:**

**Philip W. Schwab**, President, Duo-Safety Ladder Corporation, 513 W. 9<sup>th</sup> Avenue, P.O. Box 497, Oshkosh, Wisconsin 54902-0497, appeared on behalf of Duo-Safety Ladder Corporation.

**Andrew J. Phillips**, Attorney, Kindt, Phillips, Friedman & Fremgen, S.C., 141 N. Sawyer Street, P. O. Box 1338, Oshkosh, WI 54903-1338, appeared on behalf of Grievant Thomas Burgett and the Duo-Safety Ladder Independent Bargaining Unit.

**ARBITRATION AWARD**

Duo-Safety Ladder Corporation, herein the Corporation, Company or employer, and the Duo-Safety Ladder Independent Bargaining Unit, herein the Bargaining Unit or Union, are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission to resolve a grievance filed on behalf of Thomas Burgett, herein Burgett or Grievant, concerning a disciplinary suspension. The Commission designated Commissioner Paul Gordon as arbitrator. Hearing was held in the matter in Oshkosh, Wisconsin on July 28, 2009. No transcript was prepared. A briefing schedule was set and the Union filed a written brief on September 1, 2009. On September 11, 2009, in response to an inquiry from the arbitrator, the Corporation informed that it had no intention of filing any extra arguments, and the record was closed.

**ISSUES**

The parties did not stipulate to a statement of the issues. The Union states the issues as:

Did Duo-Safety Ladder Corporation violate the parties' Collective Bargaining Agreement by issuing discipline to Thomas Burgett on March 27, 2009?

If Duo-Safety Ladder Corporation did violate the Collective Bargaining Agreement by issuing the discipline, what is the appropriate remedy for an award by the arbitrator?

The Corporation states the issue as:

The Agreement language was not violated. Was Mr. Burgett treated equally as the other employee who was involved in the confrontation on March 27<sup>th</sup>?

The record best reflects the issues to be decided as:

Was there just cause to suspend Grievant for the balance of the day on March 27, 2009 in compliance with the collective bargaining agreement?

If not, what is the appropriate remedy?

### **RELEVANT CONTRACT LANGUAGE**

#### **Article I – Recognition**

##### **Section 1**

The Company recognizes the Bargaining Unit as the exclusive collective bargaining agency with respect to wages, hours and working conditions for all employees, excluding clerical, executive and supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action.

For the purpose of collective bargaining with respect to all matters pertaining to wages, hours and other conditions of employment, the Company's employees who are members of the Bargaining Unit, shall act on all such matters autonomous, separate and distinct from the employees of other employers.

##### **Section 2**

The Bargaining Unit recognizes the Companies unilateral right to manage its properties and direct all working forces as necessary to maintain the efficient and profitable operation of the plant, except insofar as they may be abridged or modified elsewhere in this Agreement.

### **Section 3**

The Company recognizes and will not interfere with the right of its employees to become or remain members of the Bargaining Unit. There shall be no discrimination, interference, restraint or coercion by the Company or any of its agents against any employee because of membership in the Bargaining Unit.

### **Section 4**

No employee shall engage in any Bargaining Unit activity on the property of the Company in any manner which shall interfere with production, or the continued operation of the Company, or engage in any Bargaining Unit activities on Company time except as otherwise provided for herein.

## **BACKGROUND AND FACTS**

The Corporation is a manufacturer of fire fighting ladders. It has a manufacturing and office facility in Oshkosh, Wisconsin, where Grievant is employed in the shipping department.

The Company has for many years had an employee handbook which Grievant was familiar with. The handbook contains a number of provisions on a number of subjects, including:

### **H. Parking:**

While there is limited space on Company property for parking, there is more than ample room on the streets around the property and an open lot on 10<sup>th</sup> Street warehouse property also. Parking is on a first come basis in all undesignated areas.

### **Company Rules**

The following violations of Company Rules will be sufficient grounds for disciplinary action.

\* \* \*

7. Horseplay, scuffling, running, pushing or throwing things on Company premises.

9. Threatening, intimidating, coercing or otherwise interfering with other employees on Company premises at any time, including lunch or rest periods.

11. Use of profane, obscene, vile, or abusive language to, or in the presence of, other employees.

13. Distracting attention of others from work. Distracting the attention of others or causing confusion by such conduct as unnecessary shouting catcalls, or demonstrations; inappropriate dress or appearance, aiding, abetting, inciting, or participating in any assembly of an unlawful or disturbing character.

### Discipline

When there is sufficient grounds for disciplinary action, the following procedure shall be used except that the first or subsequent serious violations may result in discharge:

- 1<sup>st</sup> Offense** - Written Warning
- 2<sup>nd</sup> Offense** - Written Warning
- 3<sup>rd</sup> Offense** - Suspension without pay or discharge
- 4<sup>th</sup> Offense** - Discharge

Copies of written warnings will be furnished to the employee and the Union. When any standing written discipline had become twelve (12) months old, and no other unrecinded disciplinary action of a similar offense has occurred during this period, the discipline will no longer be applicable in determining any further discipline.

Shortly before the start of work hours on the morning of March 27, 2009 as employees were coming into the Company building for work, there was a verbal exchange or confrontation between Grievant and another employee, Barb Aubry. Some work was being done on the windows of the building that day and employees were not parking in their usual parking places. There are no assigned or reserved parking places for employees, but they do tend to park in the same place over time. On this occasion due to the window work being done, the Grievant parked in a place that Aubry normally parked in and then entered the building. He spoke briefly with another employee, Brent Strange. Grievant said to Strange something to the effect that Aubry would probably be upset or mad because he parked where she normally parked. Grievant spoke briefly with another employee, Randy Duley, who is a supervisor, and was walking back towards Strange. Aubry then entered the building and went towards the time clock. She was holding some earphones or earmuffs in her right hand which was raised half way up and her left hand was holding a soda at her side.

Grievant testified at the hearing that as Aubry walked towards the time clock she flipped him both middle fingers. She was 30 to 40 feet from Grievant at the time. Aubry did

not testify at the hearing. Strange saw her put her hands up as she was walking as if doing that, but did not actually see her use her middle fingers. Strange did ask Grievant if he saw that. No other witnesses saw her direct her middle fingers towards Grievant.

At that point Grievant yelled to Aubry that: "You know where you can stick those fingers, where the sun don't shine." Aubry responded to him by yelling: "Ya, up you ass". Grievant asked Duley if he had heard what she said and that Duley should do something about that. Duley then heard Grievant yell to Aubry that he would park in her spot from now on. Aubry replied that she could care less where he parked his car. During these exchanges both Grievant and Aubry used a loud tone of voice. Grievant and Aubry then went their separate ways and began working.

Shortly later that morning Grievant complained to management that Aubry should be disciplined under the handbook policies for violating rules 11 and 12. The Company then investigated the matter and about two hours later issued discipline to both Grievant and Aubry, suspending each of them for the balance of that day.

The disciplinary action was recorded with a form document called Employee Warning Notice. The discipline for Grievant was check marked as a 1<sup>st</sup> Notice. The Nature of Violation was check marked as conduct and attitude. It contained a written Remarks portion which states: "Suspension without pay balance of day 3/27/09 for violation of Rule #9. If this problem continues further discipline will be taken." This was the only discipline of record Grievant has received in his nine years of service at the Company.

The Discipline for Aubry was check marked as a 2<sup>nd</sup> Notice. The Nature of Violation was check marked as conduct and attitude. The Remarks portion stated: "Suspension without pay balance of day 3/27/09 for violation of rule #9. If this problem continues further disciplinary action will be taken." Aubry had also received discipline on January 22, 2009 over a matter that involved a physical altercation where Aubry pushed another employee and threatened to hit him. That Employee Warning Notice form was check marked as a 1<sup>st</sup> Notice. The Nature of Violation was check marked conduct and attitude. The Remarks stated: "Suspension without pay balance of day 1-22-09 for violation of rules #9, #13. If this problem continues further disciplinary action will be taken."

Aubry no longer works for the Company.

The Union grieved the discipline of Grievant, contending that Grievant did not violate rule #9 that prohibits threatening, intimidating, coercing or otherwise interfering with other employees. The grievance also contended the Company discriminated against Grievant because on March 19th another employee violated rules #7 and #11 and no action was taken. The Company denied the grievance, contending the suspension was appropriate and consistent with what the Company has done before. It had looking into the grievance allegation of discrimination based on the rule 7 and rule 11 matter and there were no witnesses from

management, and those type of violations may not warrant the same penalty as a rule 9 violation. The Company also contended that Grievant and Aubry were approximately equally at fault and both were given equal treatment. This arbitration followed.

Further facts appear as are in the discussion.

## POSITIONS OF THE PARTIES

### The Union

In summary, the Union argues that arbitral authority and the parties' collective bargaining agreement supports a determination that the arbitrator has jurisdiction to provide the remedy being sought by the Bargaining Unit and Grievant. The agreement is silent on the issue of discipline, but the Company has an employee handbook as part of its management rights. This allows the arbitrator to determine if the employee has been properly disciplined.

The Union argues that the Corporation has the burden to prove that a work rule was violated and to prove the reasonableness of the penalty imposed. The Union maintains that the company was required to submit evidence to prove why the penalty, not just discipline in general, was warranted.

The Union further argues that the Corporation violated the collective bargaining agreement by issuing discipline to Grievant since he did not commit a rule 9 violation. The vast majority of facts are not in dispute. Grievant's conduct was not threatening, intimidating or coercive, and did not interfere with any other employee, by definition. His actions were limited to brief, fleeting comments.

The Union also argues that at a minimum the arbitrator must reduce the penalty imposed because it was excessive and in violation of the Employer's own work rules. For non-serious violations the work rules call for a written warning for a first offense. And the parties were not treated equally, because this was Aubry's 2<sup>nd</sup> notice, whereas it was Grievant's 1<sup>st</sup> notice. Aubry's 1<sup>st</sup> notice was more serious because she assaulted and threatened another employee. Grievant's actions were not a serious violation. It would be unfair to allow the Company to change the penalties from the handbook without advance notice.

The Union argues the remedy should be to rescind the discipline or, if a rule 9 violation did occur, to reduce the penalty to a written warning and reimburse Grievant the lost wages.

### The Company

The Company did not file a written brief or argument, but its position can be determined from its reasons in denying the grievance and in the arguments made at the hearing. In summary, the Company argues that the suspension was appropriate and consistent

with what it has done before. It had looked into the grievance allegation of discrimination based on the rule 7 and rule 11 matter of March 19<sup>th</sup>, and there were no witnesses from management to pursue that. And those types of violations may not warrant the same penalty as a rule 9 violation. Grievant was not discriminated against. The Company also contended that Grievant and Aubry were approximately equally at fault and both were given equal treatment.

The Company argues that the issues pursued at the arbitration hearing are more detailed than what was discussed during the grievance process. The agreement does not contain the language the Union alleges was violated. The agreement was not violated and the Company followed the rules.

The Company argues that Grievant did violate rule 9. His conduct was intimidating. It was a violation of conduct and attitude expectations, and was a serious violation. Other instances of employees confronting or arguing with each other did not happen in front of other employees.

The Company requests that the grievance be denied.

### **DISCUSSION**

This is a discipline case which involves the alleged violation of a Company work rule. In arbitration cases it is the Employer who traditionally bears the burden of proving that the discipline was properly imposed. In this case the parties' collective bargaining agreement does not contain a just cause provision for imposing discipline, or any other disciplinary language. It does contain in the recognition Article, Article I, Section 2 a management rights clause that retains in the Company the right to manage its properties and direct all working forces as necessary to maintain the efficient and profitable operation of the plant. The Company has thus established the policies and rules that are set out in its employee handbook. There is a grievance procedure in Article X of the collective bargaining agreement which establishes a grievance process to resolve any dispute between the Company and the Bargaining Unit or employees concerning the effect, interpretation, application, claim of breach or violation of the agreement. The application of the rules and policies in the employee handbook is an exercise of a management right recognized in the agreement. It follows that a dispute between the Company and the bargaining unit as to how that management right is exercised through the application of the rules, policies and procedures in the employee handbook is amenable to the grievance process. The Company does not argue otherwise, and has willingly participated in the grievance and arbitration process in this discipline case.

The collective bargaining agreement does not contain an agreed upon standard against which to apply a discipline decision. However, the employee hand book does have a Discipline section which is predicated on their being sufficient grounds for disciplinary action, and then sets out a generally progressive discipline policy as to severity of offense, number of offenses and severity of penalty. This is the essence of a just cause analysis for discipline.

Generally, just cause involves proof of wrongdoing and, assuming guilt of wrongdoing is established and that the arbitrator is empowered to modify penalties, whether the punishment assessed by management should be upheld or modified. See, *Elkouri & Elkouri*, *HOW ARBITRATION WORKS*, Sixth Edition, p. 948. In essence, two elements define just cause. The first is that the employer must establish conduct by the Grievant in which it had a disciplinary interest. The second is that the employer must establish that the discipline imposed reasonably reflects its disciplinary interest. See, *AMERIGAS PROPANE*, A-6129 (Gordon, April, 2006). Although the agreement here does not specifically provide for modification of penalties, the finding of a just cause standard includes the ability to consider the level of discipline, if any, for which there is just cause to impose. See also, *BIG BUCK BUILDING CENTER*, A-6354 (Gordon, July, 2007). That will be the standard applied here.

Before applying the just cause standard there are two factual issues that need to be addressed. The first is whether Aubry gave Grievant the double finger as she was walking to the time clock. Grievant testified that he saw her do that. Strange saw her put both hands up as if to do that. Neither Strange's nor Duley's testimony exclude the possibility that she did that or shows that she could not have done that, even though she held objects in both hands. Nothing impeached Grievant's credibility on this point, and both his and Aubry's comments to each other about where to put those fingers is consistent with her having done it. The evidence is sufficient to find that she did it. Whether there is any significant to that is discussed below.

The other factual question is whether Grievant and Aubry had the second verbal exchange wherein Grievant is alleged to have yelled to her that he would park in her parking place from now on, or words to that effect, and Aubry's reply that she could care less where he parked his car, or words to that effect. Grievant testified that he did not make that statement. However, Duley did testify to hearing them say those things. Duley was in a position to be able to hear this, as he was in between them at that time. He is a disinterested witness and has nothing to gain or lose from this case. There is nothing that impeaches his credibility on this point. It is also consistent with his written summary of what he observed. On the other hand, Grievant was in something of an excited condition, having yelled his first comment to Aubry, heard her response, and then wanted Duley to do something about that right away. The undersigned is persuaded that Duley's testimony is the more accurate, and that Grievant and Aubry did both yell their second statements to each other.

Turning to the first element of just cause, the question is whether the Company has established conduct of Grievant in which it had a disciplinary interest. As explained above, the Company has a management right to direct its employees and manage its properties. It has the right to establish the work rules that are in the employee handbook. It has an interest in managing how employees behave towards each other on the worksite. The Union does not argue otherwise. The work rules are clear that violations of company rules will be sufficient grounds for disciplinary action. Work rule 9 prohibits:

Threatening, intimidating, coercing or otherwise interfering with other employees on Company premises at any time, including lunch or rest periods.



It is clear that the Company has a disciplinary interest in the type of conduct prohibited by rule 9.

The Union and Grievant contend that the actions of Grievant do not amount to a violation of work rule 9. The Company contends they do. The Union argues that the incident was initiated by Aubry by her giving the finger to Grievant. The record established she did this. This is insulting conduct on her part. But that does not give Grievant license to violate the rules himself. Grievant did not have to make his comment to her about her knowing where she could put those fingers. And he did not have to yell it to her. But instead, he yelled a derogatory statement to her. It was an insulting comment. A trade of insults was underway. Further, from his comment to Strange about having parked in her spot and that she would probably be mad, he either knew or should have known that a negative reaction from her could be expected. That is exactly what happened when she, too, yelled back at Grievant about up his ass. That upset Grievant himself enough to want Duley to do something about it right then. Then after her reply, he yelled the other statement about from now on parking in her place, prompting her to yell at him again. Whether she felt threatened, intimidated, coerced or interfered with is not the point. The Union contends Grievant did nothing indicative of imminent or impending danger or evil, nothing that forces, deters, or discourages by fear, used force or forms of compulsion, or hampered action or procedure so as to violate rule 9. Despite the Union's arguments to the contrary, Grievant's conduct in yelling a derogatory statement and following that with where he was going to park serves no other purpose than to threaten, intimidate or interfere, whether Aubry actually was or not. At least one witness felt the yelling of these statements was intimidating. Grievant certainly threatened to use her parking place, something which he himself had felt would make her mad that very morning, even though there are no assigned spots. This certainly interferes with the good working environment that the Company has an interest in having and which rule 9 is designed to maintain. The Company has established that Grievant's conduct violated rule 9. It has established conduct of Grievant in which it had a disciplinary interest and sufficient grounds for disciplinary action.

Aubry's conduct appears to support a finding of a rule violation. But that does not justify Grievant also violating the same rule.

The second prong of just cause is to determine if the discipline imposed reasonably reflects the Company's disciplinary interest. This includes taking into account the nature of the violation and the employee's work history with the employer. Principles of due process and fair play are also relevant, such as not administering discipline in a discriminatory manner. In this case the Discipline policy in the employee handbook embraces these concepts. It recognizes a difference between serious and other violations. It has a generalized schedule of notices for levels of discipline, and it has a time period of 12 months within which to consider an employee's work record in factoring the number of Offenses. Notice of what is expected as a due process consideration and fair play make it appropriate that the Discipline policy in the employee handbook be applied here along with the rule from the employee handbook alleged and shown to have been violated. The Discipline policy is a matter of management rights, tied to the collective bargaining agreement and by extension subject to the other terms of the agreement, such as the grievance process.

The severity of the violation needs to be assessed in view of its relation to the level of discipline and in view of the Discipline policy. The Company contends that this was a serious violation which then makes a suspension reasonably related to the conduct and in compliance with the Discipline policy. Under the policy the first or subsequent serious violations may result in discharge. The schedule of notices then allows for suspensions or discharge for a 3<sup>rd</sup> Offense, a 4<sup>th</sup> Offense allowing for discharge. There is some overlap between suspension and discharge, making it reasonable to read the lesser discipline of suspension allowable for a 1<sup>st</sup> serious violation. If a more severe penalty than suspension was envisioned for a 1<sup>st</sup> serious violation, a lesser penalty for 1<sup>st</sup> serious violation is logically included.

The confrontation in this case was essentially a loud and unnecessary trading of insults even though it happened in front of two other employees. The Grievant and Aubry were 30 to 40 feet apart. There was no physical contact between the two, as opposed to Aubry's previous discipline where she pushed and threatened to hit another employee and thereby received a suspension. Here nobody was hurt. No property was sabotaged, damaged or stolen. No reports or records were falsified. There was no interruption of production shown to have occurred. There was no prohibited property on company grounds or any safety practice disregard. Out of the 40 separate rules in the employee handbook there is a fairly wide variety of conduct and seriousness covered. The facts of the rule 9 violation here do not appear to be as serious as some of the other types of conduct prohibited by the rules. The undersigned is persuaded that the facts demonstrate that this loud trading of insults was not a serious violation.

Because this was not a serious violation and because this was Grievant's 1<sup>st</sup> notice or 1<sup>st</sup> Offense, the Discipline policy provides for a written warning as the discipline. Grievant has not been disciplined within the previous 12 months. The record is void of any discipline in his approximately nine years of employment with the Company. Traditional concepts of just cause and progressive discipline are in accordance with the policy of a written warning for a 1<sup>st</sup> non-serious violation. Given the conduct in this case and considering the Company's discipline policy, a suspension for the balance of the day on March 27, 2009 is not reasonably related to the violation. Nothing in the record indicates that Grievant has not followed work rules in the past or will not follow the work rules in the future. For Grievant this violation appears to be an isolated incident. But it is a violation that did occur in front of other employees, justifying a disciplinary written warning.

The Union's argument about Grievant having been discriminated against has two points which are not necessary to resolve in this arbitration. The grievance went to the merits which have been discussed above. The grievance also alleged discriminatory action against Grievant because a March 19, 2009 incident did not result in any discipline. The Union did not pursue that theory in this arbitration and the Company has otherwise demonstrated that it did not have sufficient witnesses to pursue discipline there. That allegation of discrimination has been abandoned and otherwise fails. The Union makes a second, similar argument in that both Grievant and Aubry received a suspension for the balance of the day. It argues that the same discipline was applied to Grievant's 1<sup>st</sup> notice while it was Aubry's 2<sup>nd</sup> notice making that

unfair or discriminatory against him. The Company argues that it treated both Grievant and Aubry equally as they each received a balance of the day suspension for each violating rule 9. Logic would indicate that receiving the same discipline but for a different number of notices might favor the Union's argument. Because of the different disciplinary histories of the two people, they were not similarly situated. But is not necessary to decide this point because the above just cause analysis resolves the discipline matter.

The Company had just cause to issue discipline to Grievant in the form of a written warning in compliance with the collective bargaining agreement. It violated the agreement by issuing the suspension. The appropriate remedy is to reduce the suspension to a written warning. Accordingly, based upon the evidence and arguments in this case I issue the following

**AWARD**

1. The grievance is sustained in part and denied in part.
2. The Discipline will be reduced to a written warning and Grievant's personnel files will have the suspension removed.
3. The Company shall make Grievant whole for his lost wages for March 27, 2009.

Dated at Madison, Wisconsin, this 8<sup>th</sup> day of December, 2009.

Paul Gordon /s/

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Paul Gordon, Arbitrator

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