

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**SAPUTO CHEESE USA, INC.**

and

**TEAMSTERS “GENERAL” LOCAL UNION NO. 200**

Case 7

No. 69387

A-6392

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**Appearances:**

**Lawrence T. Lynch**, Foley & Lardner, LLP, 777 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-5306, appeared on behalf of the Employer.

**Yingtao Ho**, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Milwaukee, Wisconsin 53212, appeared on behalf of the Union.

**ARBITRATION AWARD**

Teamsters “General” Local Union No. 200, herein referred to as the “Union,” and Saputo Cheese USA, Inc., herein referred to as the “Employer,” jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Fond du Lac, Wisconsin, on February 3, 2010. Each party filed a post-hearing brief, the last of which was received March 9, 2010.

**ISSUES**<sup>1</sup>

The statement of the issues is as follows:

1. Was there just cause for the discharge of Grievant Rhoades?
2. If not, what is the appropriate remedy?

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<sup>1</sup> The Employer challenged the timeliness of the appeal of this matter to arbitration, but subsequently withdrew that challenge. The parties now agree that the matter is properly before me.

**RELEVANT AGREEMENT PROVISIONS**

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**ARTICLE 8: DISCHARGE**

A. No employee shall be discharged or suspended except for just cause. At least one (1) warning notice shall be given, in writing, to the Union and to the employee before discharge can be made, except as otherwise provided in the Work Rules found in Schedule B of this Agreement. Warning notices shall be effective for the period stated in the written notice, which period shall not exceed nine (9) months from the date of mailing or delivery to the employee. . . .

. . .

**ARTICLE 14: CLOTHING REQUIRED FOR PROTECTION**

A. Where the Company determines uniforms or aprons for the employees are needed, the Company will furnish sufficient uniforms to satisfy the needs of the employee. The employees receiving uniforms or equipment shall receipt and account for the same. . . . .

. . .

**SCHEDULE B  
WORK RULES**

These Work Rules have been established for your benefit and protection. They are not intended to restrict or impose on the privileges of anyone. They are installed to insure the rights and safety of all Saputo Cheese USA, Fond du Lac-Scott Street Plant employees.

<b>RULE</b>	<b>1<sup>st</sup> Offense</b>	<b>2<sup>nd</sup> Offense</b>	<b>3<sup>rd</sup> Offense</b>	<b>4<sup>th</sup> Offense</b>
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24. Violating a safety rule or safety practice	Warning Letter	3-day Suspension	Discharge	
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## FACTS

The Employer is a manufacturer of cheese products. It operates a plant on Scott Street in Fond du Lac which produces Mozzarella and Blue Cheese. The Union represents various production and maintenance employees of the Employer. Grievant Chad Rhoades is a member of the bargaining unit represented by the Union. He was hired in April, 2003. Rhoades was discharged on September 25, 2009, for having conducted the foaming process described below on September 23, 2009, without wearing a required face shield.

One of the Employer's departments is the Blue Cheese Department. This is a production department which operates 20 hours per production day. Cleanliness is an essential element of food production. The Employer is required by law to sanitize the production area daily. If sanitation work is not completed from the night before, production must be delayed until it is completed. Sanitation is conducted during the four hour period when production stops.

In this regard, the Employer operates a Sanitation Department which performs the required sanitization of the production lines. When Rhoades started work in April, 2003, he worked in the Sanitation Department sanitizing the Blue Cheese production line until he bid into a production job in the Blue Cheese Department in September, 2006.

The third shift for the Sanitation Department is 9:00 p.m. until 5:00 a.m. The sanitation work for the Blue Cheese Department is done on that shift. Rhoades cleaned in at least two areas, the Blue Cheese production room and the Blue Cheese tote room using essentially the same processes. The process begins with the employee removing excess cheese or other debris. Then the employee stands on a cat walk above the production machinery and sprays it with a foam cleaning agent. At least in the Tote room, the foaming process creates a cloud of "steam" which obscures the employee while he or she is doing the foaming. After the foaming operation is complete, the foam is allowed to stand for a period of time. The employee cleans the equipment with the foam on it and then the employee rinses off the foam with a hose. It is unclear if that is a high or low pressure process. The employee then cleans the surfaces again using a chlorine sanitizer. The cleaning process is normally scheduled to end at 4:00 a.m. Employees who do Sanitation are required to wear Personal Protective Equipment (herein "PPE") described below.

After Rhoades successfully bid on the production position in early, 2006, he was occasionally temporarily assigned to do the work he used to do in Sanitation. In 2007, he worked a total of one week in Sanitation. In 2008, he worked in Sanitation for a total of eight weeks and in 2009, he worked in Sanitation for a total of one week in March and six weeks starting in August and continuing until his September discharge.

PPE was required while Rhoades did his sanitation work, including foaming. This job required rubber boots, a protective apron, gloves, safety glasses and a face shield. The face shield requirement was first added in late 2006, after Rhoades had left his regular sanitation position.

Rhoades participated in the Employer's routine annual PPE training ordinarily conducted in late June of each year, on June 28, 2007 and June 25, 2008. The program details the selection and proper use of the PPE, including, but not limited to, face shields, and identifies in general terms the type of situations in which PPE is required. It notes, in part, that eye protection is necessary when working with "liquid chemicals." This program is given to all who might require PPE. No part of the program was designed to specify exactly the correct PPE for Sanitation Department work. Thus, for example, it did not specifically state that face shields must be worn while doing sanitation work involving the application of foam, cleaning with foam, and removing foam. Employees are told that they must don their PPE before they start work with chemicals or the other hazards delineated in training. The Employer states that it is its policy that it would not discipline for refusing to perform work without required PPE. There is no evidence that employees were ever given that blanket assurance.

Supervisors have access to a locked storage room where the Employer's PPE is kept. Additionally, the Employer maintains supplies of various forms of PPE at 16 PPE stations scattered around the plant. Of these, approximately three are close by the area where the disputed sanitation took place. Employees who regularly use PPE often keep their current personal PPE equipment in their lockers or at their work station. It is disputed as to whether other employees may take that PPE and use it. Face shields are durable, but disposable PPE. It appears from the record that face shields tend to last about three weeks or longer.

As much as one week prior to the September 23, 2009, discharge incident another significant event occurred. Chad Abrahamson is classified as a Cheesemaker. He sometimes acts as a fill-in supervisor. He was filling in for vacationing Supervisor Brian Anderson in the Sanitation Department at the time of this incident. He had been filling in as a supervisor on a few occasions starting in 2009. As of the time of this incident he had been supervising Rhoades in the Sanitation Department for about three weeks. He testified to the incident as follows. Rhoades was performing sanitation work on the Blue Cheese line. Rhoades approached him and said he needed a face shield. Rhoades was wearing all required PPE equipment except a face shield. He knew that, as of a few days earlier, face shields were on back-order. He went upstairs to the storage room to which only supervisors have access and found that there still were no face shields. He then went back to Rhoades who was apparently still working and told him that he needed to see if there were any at the PPE stations or, if none, to borrow one from someone else. He did not know if Rhoades found one, but assumed that he did.

Abrahamson testified that he thought it was unbelievable that Rhoades ever worked for a prolonged period (weeks) without a face shield. He never discussed this matter with the Employer after that incident or in the course of the investigation.

Brian Kelley is the Sanitation Supervisor on third shift. He returned to work on September 23, 2009, the day of the discharge incident. He was unaware of the incident with Supervisor Abrahamson. On September 23, 2009, he came into the Blue Cheese Department and saw Rhoades applying foam to the Blue Cheese machinery. Rhoades was wearing all required PPE equipment except the face shield. This included safety shoes, safety glasses, gloves and a protective apron. He permitted Rhoades to continue putting foam on the machinery even though he did not have a face shield. Kelley went upstairs to the PPE supply locker and obtained a face shield for Rhoades. The locker is under lock and key. Only supervisors have keys and Rhoades did not have any direct access. There was a significant supply of face shields in the locker at the time. Kelley returned and gave one to Rhoades without any discussion.

Kelley did not inquire of Rhoades as to why he did not have a face shield. The Employer's disciplinary procedures require that Kelley report disciplinary situations to the Human Resources Department which determine if discipline will be imposed and at what level. He reported this incident to HR. HR concluded discipline was appropriate under Rule 24 and that discharge was the appropriate penalty in light of the prior discipline specified below. No one on the Employer's behalf ever asked Rhoades why he did not have a face shield at that time. Rhoades has never denied that he did not have one at that time. The Employer met with Rhoades and his Union representatives the following day before the start of the shift and terminated Rhoades.

Rhoades had prior relevant disciplinary actions. On October 1, 2008, the Employer issued a written warning to Rhoades for violating Rule 24, the rule relating to violating a safety rule or practice. No grievance was filed with respect to that warning. The warning did not state how long it would be in effect. It stated:

As a result of this violation and in accordance with the Collective Bargaining Agreement, you are being issued this **Written Warning**. Please be advised that your next violation of this work rule will result in the next step in the progressive disciplinary process.

On March 30, 2009 the Employer issued a three day suspension to Rhoades for again violating Rule 24 by not wearing proper PPE eye protection. The warning was not grieved. The warning did not have an expiration date specified. It did state:

As a result of this violation, along with your Written Warning on October 1, 2008 and in accordance with the Collective Bargaining Agreement, you are being issued this **3 Day Suspension**. . . .

Please be advised that your next violation of this work rule will result in the next step in the progressive disciplinary process.

Rhoades filed a grievance protesting his discharge. The grievance was properly processed through all of the steps of the grievance procedure. More facts are stated in the "Discussion" section below.

### **POSITIONS OF THE PARTIES**

#### **Union:**

The appropriate standard of the burden of persuasion is "clear and convincing" evidence. The Employer has failed to show by clear and convincing evidence that it had just cause to discharge Rhoades. First, the suspension upon which the Employer made the decision to move to the next step in the disciplinary procedure was, in fact, no longer in effect on the date of his discharge. Article 8 provides that disciplinary notices are in effect for the period stated in the warning, but, in any event, no longer than nine months. The warning notice accompanying Rhoades March, 2009, suspension did not specify a date when it would no longer be in effect. Therefore, it was in effect for zero days. The Employer has a responsibility to inform employees as to where they stand and the failure to state an effective date creates uncertainty in the disciplinary process. Similarly, Rhoades October 1, 2008, warning notice did not contain an expiration date and, therefore, it cannot be relied upon by the Employer to sustain the discharge.

The Employer cannot discipline Rhoades for the alleged face shield violation when it never gave him notice of its intent to strictly enforce the rule. Arbitral law is clear that when an employer does not clearly notify its employees that they are required to wear protective equipment while working, it cannot discipline them. The arbitrator should discredit the testimony by Abrahamson that Rhoades had earlier worn a face shield while doing the disputed work. Saputo has otherwise failed to produce any evidence showing that it ever communicated to Rhoades that he was required to wear a face shield while in contact with chemicals or while he was doing the foaming. The fact that it was a fellow employee, Cruz, who informed Rhoades that he needed to wear a face shield on September 21, 2009, cannot remedy the Employer's failure to communicate the face shield rule to Rhoades because no reported decision has ever held that an employee can receive notice of rules from a fellow employee not responsible for directing or training that employee.

Even if Rhoades somehow had notice of the face shield rule, the discipline should not be sustained because the Employer enforced the rule in a lax manner. An Employer may be guilty of lax enforcement when it failed to exercise reasonable diligence in ensuring that its first level supervisors enforced its work rules. In 2009, Rhoades worked in the Sanitation Department without a face shield for approximately three weeks before a fellow employee rather than a supervisor informed him that the Employer required him to wear a face shield while foaming. He also worked in the foaming department in 2007 and 2008, a dozen times

without wearing a face shield and without being told that he needed to wear one. The Employer has failed to diligently enforce the face shield rule.

Rhoades reasonably decided to work without a face shield under the assumption that one was not available. Regardless of whether the notice from Cruz was adequate notice of the face shield requirement, Rhoades took Cruz's statement at face value and asked Abrahamson for a face shield. He was told him that he did not have one available and that Rhoades should look for one from a fellow employee or the shop floor. Rhoades testified without contradiction that he could not find an available face shield on the floor. The possible availability of face shields almost a month later does not demonstrate that there might have been one available almost a month earlier at the time of the incident in dispute. Even if Rhoades could find face shields on the floor, it would be reasonable for him to both assume that they belonged to another and not available to him. In the few days subsequent to September 21, 2009, Rhoades assumed that the Employer did not have a face shield available. Rhoades decision was reasonable under the circumstances.

No supervisor ever communicated to the employees what they should do if they did not have the required protective equipment. In the absence of a clear directive, Rhoades knew that the sanitation/foaming work had to get done by 4 a.m. or production would be delayed.

Rhoades also knew that it was extremely unlikely for him to need protection from the face shield because it was highly unlikely that the foam would jump high enough to reach his face. He performed foaming for many years without a face shield without there being a risk to his face. The policy requiring a face shield for the dispute work was first adopted shortly after he left his sanitation position. Rhoades decision to work without a face shield is made more reasonable by the fact that he learned of the face shield requirement from a co-worker rather than a supervisor. Under those circumstances, he could not be sure that he was required by the Employer to wear a face shield or, in the absence of one, that he would be supported by the Employer in delaying production.

The Union notes that part of its case is that foam can be sprayed safely without a face shield. The Union argues that the rule in question is unreasonable when applied to this circumstance because it is not reasonably related to safety. As Rhoades and Immel testified and Sanitation Supervisor Kelley confirmed, foam cannot reach the level of an employee's face or eyes when the employee is spraying foam at a target that is at, or below, the level of his feet.

The Employer's failure to interview Rhoades prior to deciding to discharge him furnishes a separate basis to set aside the discharge. Rhoades did not know he had an active suspension in his file. He never received official notice from the Employer that he was required to wear a face shield while foaming, and none was available to him at the time. He continued working without a face shield because he knew it was his responsibility on pain of discipline to get the foaming work done without interfering with production. One of the fundamental due process rights of an employee is a full and fair investigation. At a minimum

the Employer should have interviewed him before deciding to discharge him. In this case, the failure to interview denied the employee an opportunity to have his side of the story investigated. The Union asks that the grievance be sustained and that Rhoades be ordered reinstated and made whole for all lost wages and benefits.

**Employer:**

The Employer had just cause to terminate Rhoades employment for violating rule 24 by performing Sanitation work without requiring the required face shield. It is further undisputed that all Sanitation employees are required to wear face shields while handling chemicals, including the foaming chemicals involved in this situation. Rhoades received training on the proper use of PPE, including the use of a face shield. Rhoades understood that the failure to wear the required PPE was a violation of Rule 24. While Rhoades professed ignorance on almost everything else that happened to him in this case, he could not claim that he did not realize that the failure to wear proper PPE was a violation of Rule 24, since he had previously received a three day suspension for violating that same rule by his failure in March, 2009, to wear proper eye PPE while working in Sanitation.

The Union argued at hearing that work rule 24 as applied to this fact situation was not reasonable. The Union presented no evidence in support of this. The Union's argument that Grievant could not have been splashed with any hazardous chemicals is pure speculation. It is the Employer's right and obligation to decide which operations require PPE. Rhoades had no right to pick and choose which rules he wanted to follow.

The Union argued that Rhoades did not know of the specific requirement that a face shield be worn while foaming in the Blue Cheese area until a fellow employee, Cruz told him on Monday, September 21, 2009. Rhoades portrayed this as a surprise to himself. Rhoades claimed that at no time prior to then had he worn a face shield while foaming in Blue Cheese. Rhoades wants to create the impression that he has limited intelligence and that he was so clueless that he was supposed to wear a face shield. However, the Union then advanced defenses which were logically based upon Rhoades having known that a face shield was required. These are that:

1. The violation was the Employer's fault.
2. Rhoades would have been disciplined had he not completed his sanitation work by 4:00 a.m.
3. A face mask was not easily available.
4. He could not take someone else's face shield without permission.
5. He felt safe working without one.

As to his claim that a face shield was unavailable, Rhoades claimed that the day before the incident in dispute, he went to Abrahamson and asked for a face shield and described in detail the events that followed that request. All of this would assume that he knew that he was required to have a face mask.



Rhoades' credibility is undermined by his story of what had occurred between him and Kelley on September 23, 2009. Rhoades' story during the grievance procedure is that Kelley had asked him if he needed a face shield and then took two hours to find one. Kelley credibly testified that he saw Rhoades foaming without a face shield and went and got him one. The process took only a few minutes.

Rhoades' claim that he had been working six weeks without a face mask was contradicted by supervisors Kelley and Abrahamson. Neither saw him working without a face shield except on September 23, 2009. Abrahamson testified that it was "implausible" for him to have worked that long without having been observed without one. Moreover, even if Rhoades did work a significant period of time without a face shield that does not establish either that one was not required or that he was ignorant of the requirement. At the very least Rhoades was put on notice the week before on September 23, 2009, in the incident with Kelley that a face shield was required since Rhoades' story is that Torres told him it was a requirement and that he then went to Abrahamson to ask for one. Since Rhoades' truthfulness is highly suspect, his testimony on this issue, as well as his general professed ignorance of the basic requirement to wear a face shield, must be disregarded.

Rhoades' truthfulness is further called into question by his attempt to claim that second Shift Supervisor Engebregtsen had seen him working without a face shield. Engebregtsen testified that it was impossible to see who was working the foam area due to the fog created by the foaming operation.

Rhoades' claim that face shields were not available at the PPE stations is based upon his testimony that he looked at three PPE stations after Abrahamson told him that there were none in the store room and upon Immel's testimony that he did the same after a grievance meeting and could not find face shields. Rhoades' half-hearted attempt to find a face shield after Abrahamson told him to find one does not establish face shields were not available. His failure to go beyond the limited number of PPE stations underscores his conscious decision not to wear a face mask. It does not establish that they were not available. Neither of their stories justifies Rhoades going back to work without a face shield or blaming the Employer for his failure to do so.

The Union also claimed that Rhoades had no idea how long his warnings were in effect. Rhoades admitted that he did not even read them. If he had, he would have seen that next violation would result in further discipline. If he had read the agreement, he would have known how long they were in effect or if he had talked to the Union he would have known how long they would be in effect.

In short, his story does not hang together. His basic claim is that he was completely ignorant of the requirement to wear a face shield while working in sanitation until Kelley gave him one in September, 2009. Yet, all his excuses assume he was aware of the requirement. Moreover, based on the March, 2009, 3-day suspension, Rhoades knew or should have known

that failing to wear proper safety equipment would lead to his discharge. The Union's attempts to blame the Employer for this violation are meritless.

Rhoades received adequate due process. The purpose of interviewing an employee prior to imposing discipline is to get his version of the events. Since it is undisputed that he knew about the rule and that he should have known of the consequences, the failure to interview him is irrelevant. Rhoades should have known that the next violation would lead to his discharge. Welnetz met with Rhoades when he discharged him and did inquire if he had been working without a face shield and whether he knew one was required. Rhoades admitted both points. Any minimal due process issues were resolved in the grievance procedure when he was able to state his story. The Union's argument is an attempt to exalt form over substance and to distract the arbitrator from the true situation.

The Union's interpretation of Section 8A is unsupportable. Prior to this case, the Union had taken a different view of the "nine months" provision of Section 8A. Previously, the Union had argued that the next discipline need be issued within nine months of the previous discipline. The new theory is that the discipline is not effective unless it specifies a date on which it expires. This was not raised in the grievance procedure and it is an unreasonable, novel theory. The Union has offered no evidence that the parties ever followed this theory. It did not grieve Rhoades' March 30, 2009, discipline even though Rhoades' October 1, 2008, warning did not specify an expiration date. The Employer requests that the grievance be denied.

### **DISCUSSION**

Safety is everyone's responsibility. The Employer's safety procedures, training and ultimately disciplinary procedures are designed to insure that safety procedures are always properly implemented by it and followed by its employees. Employees are responsible to follow the Employer's safety procedures and to notify their employer if there are problems. The Employer must insure that it meets its responsibilities to establish workable procedures, to train employees, to provide equipment, and to empower them to take the steps necessary to comply with those procedures. When an employee commits a safety violation such that discipline at any level is necessary, it ought to be viewed by the Employer as a serious matter requiring a review of both the employee's conduct and the Employer's procedures to identify appropriate corrective action for both.

As to discipline, under the just cause doctrine, the Employer is required to demonstrate that the employee committed the violation alleged and that discharge is the appropriate sanction. Some arbitrators also require that an employer demonstrate that its disciplinary procedures provide adequate "due process" to an employee. While arbitrators don't often talk about legal concepts such as the burden to produce evidence and the burden to persuade, this arbitrator requires that an Employer produce evidence of the misconduct and demonstrate by a clear and satisfactory preponderance of the evidence of all of the elements necessary to sustain the discharge.

One of the Union's arguments is that the requirement that employees wear a face shield while applying foam is unreasonable in that the foam is sprayed downward from a cat walk above the machinery at such a distance that any splashing of the face by the foam is impossible. The establishment and changing of safety requirements is the primary responsibility of the Employer. There is no dispute that wearing a face shield while foaming is not a significant physical imposition on the employee and there is no evidence that wearing the face shield creates a risk in itself. The work in question was performed in relative safety for a long time until the rule requiring face shields was implemented in 2006. Employees wear both eye protection and a face shield while foaming such that it is believable that the eyes are protected with eye protection alone. After employees foam, they physically clean the machinery with the foam on it. It appears undisputed that this function does present a chemical risk to the face. Finally, the assumption of the Union is that during normal operation the foaming process does not present a serious risk to the face. There isn't any expert evidence to support this assertion. The foaming equipment does malfunction in ways not described in the record. It is reasonable to conclude that when things go wrong, the employee's face is at considerable risk from the chemicals. There is sufficient evidence to conclude that the rule is reasonable.

Of the many other arguments made by the Union, three areas are determinative. First is that Rhoades was not specifically told by management that a face shield was required for the foaming operation. Second is that a face shield was not reasonably available. Third is that Rhoades was not sufficiently empowered to delay production to the extent necessary to obtain a face shield.

I first address Rhoades' credibility as a witness. As to the incidents in dispute, Rhoades testified as follows. When he was hired by the Employer in September of 2003, he was first assigned to Sanitation and worked doing sanitation on the Blue Cheese line. In late 2006, he successfully posted for another job, but on occasions he was temporarily assigned back to do his old job. He did this infrequently in 2007, about six times in 2008, significantly in March of 2009, and again for the three weeks starting in late August, 2009, until the disputed incident. The job always required PPE consisting of rubber boots, safety glasses, protective gloves, and a protective apron. Prior to the time he transferred out, the job never required a face shield and he never used one. No one told him when he was temporarily assigned that the job requirements had been changed to require a face shield until a fellow employee, Cruz, told him as described in the next paragraph. He, therefore, had not previously looked for a face shield.

He recalls that two days before the discharge incident, he was working under the direction of temporary supervisor Abrahamson who was then supervising the Sanitation Department. Fellow employee Tamara Cruz told him he needed a face shield to do his work. This was the first he had heard of it. He then went to Abrahamson and asked for a face shield. He stated that Abrahamson left to go to the supply locker under his control and returned and said that he did not have one. He continued working while Abrahamson was looking for a face shield. He instructed Rhoades to look for one in the "chemical cage," and if he could not find

one to borrow one from someone else. Rhoades said that he asked Cruz to borrow her face shield but she was then using it. He looked around nearby. He then went to the “chemical locker” and there were none. He then went to the PPE station in packaging and could not find one there. He then went back to work. Abrahamson never checked back with him or provided him with a face shield. It is unclear whether he continued foaming, but he did do the scrubbing and rinsing without a face shield. He came back the next day and worked without a face shield. He did not look for one. Abrahamson continued as his temporary supervisor that day. Abrahamson did not talk to him about a face shield and did not give him one.

On September 23, the regular supervisor for the Sanitation division returned, Kelley. Rhoades came in that day and did not look for a face shield. He started working without one. While he was foaming, Kelley approached him and gave him a face shield. Kelley did not ask him why he did not have one or discuss the matter further.

The next day he was called into the office and met with his union steward and management people. He denied being asked whether he knew that a face shield was required. He was discharged at that meeting.

Rhoades testimony is difficult to evaluate for three reasons. First, it appears that he is in the habit of avoiding problems in life by “playing ignorant.” Second, he is very suggestible: people can put words in his mouth. Third, his recollection about facts is not very accurate.

The Employer has argued that it is simply incredible that Rhoades did not know he needed a face shield. The available evidence indicates that Rhoades did attend PPE training in 2007 and again in 2008. The training is general. There is no evidence that anyone ever discussed how it directly applied to Sanitation and there is no evidence that Rhoades was specifically ever told in that training that a face shield was required for his sanitation work. Kelley testified that he regularly conducted safety meetings with the Sanitation crew in which the requirement for face shields was discussed. Rhoades was not a regular part of the Sanitation crew and would not normally be included in those meetings. There is no evidence of a safety procedure or practice to regularly update the safety training of employees temporarily transferred into the department. One of the strong points of the Employer’s safety program is that employees and supervisors alike regularly point out safety irregularities to fellow employees wherever and whenever they see them. It is unlikely that Rhoades could work in the department for any length of time without a supervisor or fellow employee telling him that he needed a face shield for this job. He had been disciplined before for working without eye protection.<sup>2</sup> It is likely that he knew about and was using a face shield considerably earlier than the incidents which are the subject of this dispute.

The Employer has heavily relied upon the fact that Rhoades gave incorrect testimony about his knowledge of the face shield requirement to suggest that I should infer that he was

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<sup>2</sup> The specifics of what occurred in that discipline were not available.

just blithely ignoring the rule. However, I am not willing to do so. I conclude that Rhoades was “caught up” in his own habit of playing ignorant, but that he was otherwise trying to tell the truth. I note that although it was easy for the examining attorneys to get Rhoades to follow their suggested theories, on the important subjects he strongly resisted efforts to lead him and did try to recall events accurately. This strongly suggests that he was trying to tell the truth about the situations in dispute as Rhoades understood those facts.

The situation which occurred with fill-in supervisor Abrahamson is very important. His testimony is summarized in the facts above. I conclude that Abrahamson’s testimony honest in most respects. He was much more accurate about events. Abrahamson admitted that the incident about face shields generally described by Rhoades did occur. He placed it as occurring up to a week earlier than September 23, but he was not sure of the date. I conclude the event occurred more than one or two days before the discharge incident. There is a serious question as to why he handled the situation which occurred with Rhoades the way he did. Abrahamson did not stop Rhoades from continuing to work while Abrahamson went to look for a face shield in the locked area. When he could not find one, there is no evidence that he made any effort to check to see if face shields were actually available at the PPE stations or on the work floor. He exhibited some frustration in his testimony as to the way the supply personnel handled the face shield situation. Rhoades is credible on the fact that Abrahamson did not check back with him to see if Rhoades found a face shield. He is not a regular supervisor and he acted in a temporary supervisory capacity. The better view of this evidence is that Abrahamson did not want to have to interfere with production and did not want to know if no face shield was available.

There is a dispute in this record as to whether face shields were available at the crucial times. Article 14 requires that the Employer provide the face shields and it normally does so. Abrahamson admitted that they were not available when Rhoades asked him for one. Abrahamson said that he did go the supply area for which he alone had the key and there were none. He stated that he had a similar problem a few days earlier and had checked with the Employer’s supply people who told them they were on “back order.” They appeared to still be on “back order” at this time.<sup>3</sup> Abrahamson effectively admitted that he told Rhoades to go

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<sup>3</sup> While the parties litigated the issue of the availability of a supply of face shields, this is the only direct testimony about the Employer’s face shield supply process. The assumption underlying the Employer’s case is that even if face shields were on “back order” they were generally plentiful in the plant. The general assumption is against the weight of reason. First, face shields are required equipment. Thus, employees are more likely to “hoard” them if they are in short supply. Second, face shields are consumable in that they do get broken or otherwise unusable with some frequency. The testimony by Abrahamson as to the supply issue strongly suggests that the Employer’s supply system does not consider this a “critical” item. Evidence which would suggest this would be treated as a critical item might include:

1. Telling supervisors in advance that the inventory was low so that they could institute procedures to make sure existing supplies are conserved and shared.
2. Expedited ordering.

scrounge for one. Abrahamson testified that between the time of the incident with him and the return of regular supervisor Kelley, he saw Rhoades wearing a face shield on at least one occasion. I question this testimony as self serving. If Rhoades did have one which was not temporarily borrowed from another worker, it is unlikely, but possible, he would have needed another one by the time Kelley returned to work. If Rhoades did not have one, Rhoades testimony that he looked for one at nearby PPE stations and did not find one is true.

Kelley testified in this proceeding. He was truthful. Kelley returned from vacation on the day in question, September 23. I conclude that no one told him about the incident with Abrahamson or that face shields had been in short supply within a week before. He believably testified that he saw Rhoades foaming with all of his other PPE in place except a face shield. Because this occurred while Rhoades was foaming it was likely to have occurred in the beginning of the shift. Kelley did not talk to Rhoades. Therefore, Rhoades did not have the chance to ask for a face shield.<sup>4</sup> Kelley also did not interfere with production but allowed Rhoades to continue foaming without a face shield while Kelley took a few minutes to go upstairs and get one from the locked supply area. This was admittedly unsafe. There is a serious question as to how available face shields were in the areas to which Rhoades had access. Were they available from fellow employees? Were they available at nearby PPE stations? Were they available at distant PPE stations in other areas in the plant?

Kelley testified that after he gave Rhoades the face shield, he reported the violation to HR. Neither Kelley, nor anyone in management ever asked Rhoades on September 23 or at any time prior to the discharge meeting why he wasn't wearing a face shield.

This turns me to the "due process" issue. The main part of the due process theory which applies here is the concept that employees ought to be given a chance to explain their side of the story before management decides to discipline them. Arbitrators disagree whether discipline ought to be set aside merely on the basis that the employee was not asked his side of the story before management made the decision to discharge. Doing so does avoid errors in imposing discipline. The tenor of the testimony in this case is that making such inquiries of employees is not the practice here. Be that as it may, it makes sense that whenever a safety situation occurs for the Employer to make careful inquiries as to what occurred. This would enable the Employer to change procedures and otherwise improve plant safety. Because this wasn't done, accurate evidence as to the availability of face shields was not preserved.

The evidence concerning the availability of face shields comes from the fact that Kelley was able to get one in the locked storage area,<sup>5</sup> an area not accessible to Rhoades. Because they were in short supply prior to that, it is unclear whether PPE stations were restocked by that time. The available evidence suggests that those involved in the supply chain were not highly concerned about the shortage and, therefore, it is questionable as to whether they had

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<sup>4</sup> Rhoades essentially testified that he asked Abrahamson for one and assumed Abrahamson would recognize that Rhoades was still without one and get one for him when they came in. It is unclear whether when Kelley returned Rhoades would have approached him for a face shield.

<sup>5</sup> He stated that there was an ample supply of them in the locked area.

been restocked. Second shift Union Steward David Immel testified that as a result of discussions in the grievance procedure occurring at least two weeks after this incident, he went and looked for face shields during that evening at a time when Rhoades would have been working. He did this by looking for face shields at the PPE stations nearby where Rhoades works or otherwise reasonably available by scrounging. There weren't any then. Supervisor Jeff Welnetz looked through the plant the next morning and found 15 face shields in the plant, at least 2 in the areas where Rhoades would normally work. I believe both witnesses. I conclude that there are times that it is hard to find face shields. The evidence is insufficient to conclude that face shields were reasonably readily available on September 23 or the few days before.

I turn again to Rhoades testimony. He was forthcoming about the fact that he made some efforts, possibly half-hearted, to find face a face shield and then just waited for a supervisor to give him one. If, as Abrahamson testified he saw Rhoades wearing one some time after Abrahamson couldn't find him one, the question is whether Rhoades testimony about not finding a face shield when he looked for one is an entire fabrication. That is not likely. What would be likely is that he went looking a second time and this conduct occurred close to the September 23 incident with Kelley. If, as Rhoades testified he never found one after Abrahamson told him to scrounge for one, Rhoades' effort to look for a face shield occurred that evening with Abrahamson and Abrahamson accepted him working without a face shield.

Under these circumstances the essence of the Employer's position is that it was unreasonable for Rhoades to continue to work night after night until Abrahamson brought him a face shield. Under other circumstances, the Employer would have a strong point. However, from Rhoades viewpoint, if they were in short supply when he looked, it is most likely that the first place face shields were likely to appear was in the locked supply cabinet where Abrahamson would be the only person to be able to get them and Abrahamson, if he were watching Rhoades, would have seen that he still needed one. The only other approach would be for Rhoades to delay his work and go look for a face shield throughout the plant, possibly repeating it each night until one was found. At the very least, there was substantial miscommunication going on between Rhoades and Abrahamson. Abrahamson had to know that Rhoades was a person he had to watch.

Assuming that Rhoades was expected to keep scrounging, the next question was whether he was empowered by the Employer to stop production and go looking for a face shield in the distant parts of the plant. Employer witnesses testified that he would not have been disciplined for refusing to work without a face shield. There is no evidence that anyone ever told Rhoades that he could substantially delay his work if he could not find a face shield or could not find a supervisor right away. A review of the PPE slides does not show any evidence of any training to empower the employee to refuse to work. One bullet point on one slide says: "put on before exposure to hazard." Neither Abrahamson nor Kelley ever demonstrated by their conduct that work should be stopped until a face shield is found. Rhoades was told that he could find a face shield at a PPE station or he could ask a supervisor. He did ask a supervisor. In any event, the circumstances would have called for Rhoades to

assertively stop work possibly repeatedly and wander through the plant looking for face shields. This would have been so highly unusual that any employee would seriously question whether he had the authority to do so. I don't believe that Mr. Rhoades was sufficiently empowered to take the actions which would have been required for him to have a face shield on September 23 before Kelley gave him one.

Accordingly, the Employer has failed to show that it had just cause to discharge Rhoades. Irrespective of Rhoades lackadaisical attitude, the Employer has failed to show that it met its responsibility to have face shields reasonably available at the disputed times. Rhoades was effectively authorized to work by Abrahamson without a face shield because they were in short supply. Rhoades was not sufficiently empowered to stop productive work to make an extreme effort to find a face shield.

The appropriate remedy in this case is to sustain the grievance and to order that Rhoades be reinstated and made whole for all lost pay and benefits. I reserve jurisdiction over the specification of remedy as agreed to by the parties.

#### **AWARD**

The grievance is sustained. The Employer shall reinstate Rhoades to his former or substantially equivalent position and make him whole for all lost wages and benefits. I reserve jurisdiction over the specification of remedy if either party requests in writing, copy to opposing party, that I do so within sixty (60) days of the date of this award.

Dated at Madison, Wisconsin, this 29<sup>th</sup> day of April, 2010.

Stanley H. Michelstetter II /s/

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Stanley H. Michelstetter II, Arbitrator