BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL NO. 200

and

SAPUTO CHEESE USA, Inc.

Case 6
No. 69352
A-6389

(Discharge Grievance)

Appearances:

Sara J. Greenen, Attorney, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, WI 53212, appeared on behalf of Teamsters Local No. 200 and Grievant Miguel Valazquez-Cruz.

Lawrence T. Lynch, Attorney, Foley & Lardner, 777 East Wisconsin Avenue, Suite 3800, Milwaukee, WI 53202-5367, appeared on behalf of Saputo Cheese USA, Inc.

ARBITRATION AWARD

The Teamsters Local No. 200, herein the Teamsters or the Union, and Saputo Cheese USA, Inc., herein Saputo or the Employer, are parties to a collective bargaining agreement 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 concerning the discharge from employment of one of its members, Miguel Velazquez-Cruz, herein Velazquez-Cruz or Grievant. From a panel the parties selected Commissioner Paul Gordon to serve as arbitrator. Hearing in the matter was held on January 22, 2010 in Fond du Lac, Wisconsin. No transcript was prepared. A briefing schedule was set. The parties filed written briefs and the record was closed on February 23, 2010.

ISSUES

The parties stipulated to a statement of the issues as:

Did the Company have just cause to discharge Grievant?

If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISONS

ARTICLE 7: GRIEVANCE PROCEDURE

A. The parties agree that all grievances which involve construction, interpretation, or application of the provisions of this Agreement should be expedited as soon as possible, utilizing the following procedures:

* * *

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. Such written notice shall be forwarded by the Company, by registered or certified mail, to the employees and a copy thereof to the Union. In lieu of such mailing to the employees, the Company may deliver such notice personally to the employees.

* * *

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 insure the rights and safety of all Saputo Cheese USA, Fond du Lac-Scott Street Plant employees.

	1st Offense	2nd Offense	3rd Offense	4th Offense
* * *				
21. Refusal to carry out a reasonable order	Warning Letter	1 week Suspension	Up to and Including Discharge	
* * *				

43. Attendance Program:

Regular attendance of all employees is essential to our ability to meet customer commitments and assure that an unfair burden is not placed on fellow employees.

Employees who do not meet the requirements of a normal work schedule are subject to disciplinary action and discharge under Saputo Cheese USA Inc. progressive disciplinary procedures.

Occurrence Accumulation Guidelines

* * *

Progressive discipline will be handled as follows:

* * *

It is understood by the parties that the twelve-(12) month past history review shall be on a continuation basis. For example, if an employee's record showed three-(3) absences twelve (12) months back and if reviewed the following month, the three (3) previous absences will no longer be part of an employee's record for purposes of this rule.

* * *

BACKGROUND AND FACTS

Grievant was employed by Saputo for approximately four years before he was discharged for insubordination, 3rd offense, for an incident that occurred on October 8, 2009. He is in the bargaining unit and worked in the cheese making plant as a sanitation employee responsible for cleaning and sanitizing cheese tables and related parts, among other things.

On October 8, 2009 there were some mechanical difficulties in the cheese making plant and production was behind by several hours. This included the use of the cheese tables that Grievant was responsible to clean. He works third shift. When he arrived at his work station around 9:00 p.m. for his shift, there was still some cheese being moved on the tables but, some tables were empty. Normally there is no cheese on the tables when Grievant cleans them. Only parts of Grievant's cleaning duties could be done while cheese was on the table, and forks, screens and other parts can be taken off the tables to be ready to clean. In the meantime, partially processed cheese that could not be finished due to the delay had been loaded into two large stainless steel totes, or tubs on wheels, which needed to be moved from the room where the cheese tables were to a different part of the building for weighing, tagging and placement in a cooler. The totes each contained about 1500 pounds of cheese, and are moved by employees pushing them by hand. They needed to be moved across the room and onto a small open elevator and then pushed further to the other part of the plant. One of Grievant's coworkers, Auggie, had been asked by a supervisor to push the totes to the other part of the building and was pushing one when Grievant arrived.

Grievant was beginning to take some large, heavy fork parts off a cheese table to be cleaned when he was approached by supervisor Bobby Hernandez, who worked primarily on the preceding shift. Grievant knew that Hernandez was a supervisor. Hernandez had seen that

it was hard for Auggie to push the tote of cheese by himself, and wanted Grievant to help push the totes to the other part of the building. Hernandez asked Grievant to help Auggie push the tote. Grievant told Hernandez no, that he had his own job to do. Hernandez then told Grievant no, you need to help Auggie because you can't start your job now because they're still working on the tables. Grievant responded no, you guys should have done it before. Hernandez told him we didn't have time and that's why we are behind. Grievant then went back to the cheese tables without helping to push the tote.

Hernandez then went to an office area and used a pager to call another supervisor, Brian Kelly about it and asked Kelly to come and tell Grievant to help push the totes. Kelly was then in a different part of the building waiting to meet with some chemical representatives, and left there to respond to Hernandez's request. Before Kelly arrived at that location Hernandez told another coworker, Chon, to help Auggie push the totes and he did. When Kelly got there he asked Grievant if he had been told to help Auggie push the tote to the cooler area and Grievant said that he had. Grievant knew that Kelly was his immediate supervisor. Kelly told him that when a supervisor asks him to do something he needs to do it. Grievant replied that it should have been done on the earlier shift. Kelly told him that they were broke down and that is why they did not have time, and that Grievant needed to help them. Grievant then walked towards the cooler area to help, but the totes had already been pushed near there. In the meantime Hernandez and another worker had pushed a tote part of the way and Auggie and Chon pushed it almost the rest of the way.

Towards the end of Grievant's shift or perhaps on overtime the following morning he told another supervisor, production manager Jeff Welnetz, that Hernandez would be mad at him (Grievant), because he had asked him to help Auggie with a tub of cheese that needed to be put into a cooler and he had told Hernandez no, that it was not his job and Hernandez was not his supervisor. Welnetz told Grievant that Hernandez is a supervisor and if any supervisor asks you to do something you should do it, and if he did not agree he could go to his own immediate supervisor but needed to do what a supervisor asks him to do. Grievant told Welnetz that the cheese should not even have been there for him to take away. Welnetz said he agreed only if there was time for the stick guys to do it, but that they were two hours behind and were trying to get the machine back up and get product out.

Grievant testified at the hearing in this matter. According to Grievant, he had talked to Auggie at the start of the shift and that Auggie was mad because of the way Hernandez had told him to move the cheese totes. Auggie was in the table room putting plastic over a tote of cheese. Grievant knew Hernandez was a supervisor. While at a cheese table, Hernandez told Grievant to help Auggie move the totes. Grievant had the forks in his hand and said that he had work to, and put the forks down. Hernandez got mad and started talking to him loud. Grievant asked him why they did not start moving the cheese before they came down; that it was the second shift's job to do that. Hernandez said it was because they were behind. Hernandez then walked away. Grievant understood Hernandez wanted him to help Auggie move the cheese to the cooler area. Grievant did his cleaning job. He did not say no when asked to help move the totes. He did not say yes, and did not go to help Auggie when Hernandez asked him to. Grievant saw Auggie leaving the area with the cheese and no one was

helping Auggie. Chon then started pushing the other tote by himself. When Kelly came to the table area he asked Grievant if Hernandez had asked him to move the cheese, and Kelly asked Grievant to help move the cheese. Grievant said that Hernandez had not let him do his job because there were three empty tables, that Hernendez should talk to people more nicely, and asked Kelly why the cheese was still there because the other shift should have gotten it out of there. This upset Grievant, as on a previous break down occasion the other shift workers moved the cheese out before shift change. Grievant then went to help move the cheese tote. He helped Chon push a tote to the corner by packaging. He then returned to the factory to his job. There was still cheese on one of the four cheese tables. Kelly is Grievant's direct supervisor and has told Grievant that he is his supervisor and he is to listen to him, even if there is a problem with the work group. If a different supervisor gives a different order than Kelly, Grievant is to go to Kelly. That was not this situation. Grievant does not work with Hernandez often, and sees him five to ten minutes per day. Grievant knew he had gotten previous disciplines for not following orders, one of those times involving a supervisor who was not his immediate supervisor. Grievant further testified that the reason he did not help move the cheese when Hernandez asked him to was because of the way he asked him. He ordered, but did not ask if he had time to do it. Hernandez never asked nicely, like Kelly does, and did not let Grievant explain to him why he did not help with the cheese. He knew Hernandez was mad, but didn't help move the cheese and went back to his own job because Hernandez made him mad because of the way he talked to him. Grievant then spoke briefly with a coworker. Then Kelly came and asked him to move the cheese. Grievant had talked to Auggie, who was also mad at the way Hernandez's talked to him (Auggie). Grievant then thought he might be in trouble.

Grievant has had previous disciplines. On July 16, 2008 he received a written warning for violating Rule 21 Refusal to carry out a reasonable order. On March 27, 2009 he had a one week suspension for violating Rule 21 Refusal to carry out a reasonable order. Both the July 16, 2008 written warning and the March 27, 2009 suspension letter contained the statement: "Please be advised that your next violation of this work rule will result in the next step in the progressive disciplinary process." Neither of these disciplines were grieved. Additionally, on February 23, 2009 Kelly had had a verbal discussion with Grievant about what is expected of him, including if he is asked by a supervisor to do something that he cannot refuse to do it unless he has a legitimate reason why he cannot get it done, which Grievant then indicated he understood. He was also told then by Kelly that failure to do any of these things will result in disciplinary action up to and including discharge.

By letter of October 19, 2009 Saputo terminated Grievant's employment for the October 8, 2009 incident. The termination letter read in pertinent part:

> After a full and thorough investigation it is our conclusion that on Thursday, October 8, 2009, you were given direction by the Supervisor, Bobby Hernandez, to assist another employee in pushing the totes of cheese to the cooler. You refused to carry out the Supervisor's direction stating you had your own job to do and then stated you guys should have done it before.

> This is a violation of work rule #21, which states the following:
>
> #21. Refusal to carry out a reasonable order.
>
> You received the following previous warnings for similar violations:
>
> - Written Warning on 7/16/08
> - Verbal Consultation on 2/23/09
> - 1 week Suspension on 3/27/09
>
> As a result of this violation on 10/8/09 your employment with Saputo Cheese is being terminated.

Saputo did not consider the 2/23/09 verbal consultation a disciplinary event for purposes of the termination decision. The parties do not have any dispute over that.

The Union filed a grievance over the discharge, alleging the contract articles violated were W/R #21, Article 8 warning letters progression of discipline, and any other articles in the contract. The grievance detailed that:

> Did not refuse a work order from Bobby Hernandez (Supervisor) & protesting company's view of progression of discipline after warning letter drop off after 9 months per the CBA.

The remedy requested was the job back and to be made whole. Saputo denied the grievance, leading to this arbitration.

At the hearing in this matter neither party presented specific examples of where the nine month warning letter limit was used (Union position) or not used (Company position) in ascertaining progressive discipline steps where the written warning was more than nine months prior to a third violation but there was an intervening violation within nine months of both the first and third violations. However, there was some testimony on the point. The Human Resources officer for the Fond du Lac plant, Kelly Drazkowski, testified that in applying the disciplinary progression schedule Saputo looks back to the most recent discipline within 9 months and it doesn't matter if a prior discipline dropped off previously as more than 9 months old. The Union gets copies each month of disciplines that occur each month. She reviewed company records since 2006 and did not find any examples of the Union theory being used, but did find some examples of the Company theory being used. The Union Business Representative, Steven Nelson, testified that he reviewed prior disciplines given to the Union since late 2007 and found no incidents where the progression of discipline was based on an incident beyond the 9 month window. The 9 month provision in Article 8 has been in the collective bargaining agreements (between the Union and Saputo or Saputo's predecessors) since at least 1998. No bargaining notes from the ensuing bargains address the matter of what the 9 month provision means.

Further facts appear as are in the discussion.

POSITIONS OF THE PARTIES

Union

In summary, the Union argues that the Company violated the collective bargaining agreement when it deviated from the progressive disciplinary action policy. Citing arbitral authorities, the plain language of the bargaining agreement requires that discipline fall-off after 9 months. The language is plainly clear that disciplinary notices are not effective after nine months. Those warnings effectively cease to exist. Allowing a written warning to remain effective for more than 9 months for the purpose of escalating discipline defeats the fact that the parties negotiated an effective period for discipline limited to 9 months at the most. That the attendance policy provides an example of that policy does not defeat the plain language of the work rules. The attendance policy has a different time frame. The language is the same in construct: absences or occurrences under the attendance policy fall off and do not escalate progressive discipline. During this and preceding contracts there was no occasion to apply the language at issue until the Fall of 2009. The Union Business Agent reviewed the disciplines from the Company in the Local 200 files and found no instance where the progression included old discipline more than 9 months old. Nothing in practice conflicts with the plain meaning of the contract language. The Company maintained its internal computer record keeping incorrectly and in contravention of the plain language of the agreement. The Union had no reason to know or believe the Company was improperly applying the language because the disciplinary actions provisions were never invoked. No weight should be given to the 2008 written warnings in evaluation of whether discipline was appropriate in 2009. Since the discharge notice represents Grievant's second effective offense under Work Rule 21 (second offense within 9 months), the Company lacked just cause when it discharged, rather than suspended, Grievant.

The Union argues that the Company bears the burden of proof and burden of persuasion with respect to the Grievant's discharge. Because of the severe penalty of discharge, it is incumbent on the Employer to demonstrate through clear and convincing evidence the Grievant committed the infractions and the discipline was for just cause, citing arbitral authorities. The Union argues the Grievant did not refuse a reasonable order; Hernandez demanded Grievant drop what he was doing – carrying some giant stainless steel cheese forks – to move a cart. At the moment, when Grievant was in the middle of moving heavy equipment, the order was not reasonable. And Grievant did not refuse. He explained he had his own work to do and went to put the forks into a stainless steel tub to be cleaned. When he turned to continue discussing with Hernandez, Hernandez had walked to the supervisor's office. At no point did Grievant refuse Hernandez's order. He never said no. He tried to discuss the matter further. He ultimately complied with Hernandez's request and went to help others move the cheese carts.

The Union further argues that, assuming *arguendo* Grievant violated Work Rule 21, and the Company's interpretation of the Work Rules is the correct interpretation, discharge is too severe a penalty under the circumstances. There is no merit to the notion than an employer can shed its just cause burden by imposing a policy that declares itself to be automatic in application. Management must bear the burden of proof and persuasion of the justness or just

cause for the action, citing arbitral authorities. Here, Schedule B does not require discharge; it

merely permits the Company to take disciplinary action up to and including discharge. The language does not require discharge. The Company must still consider the circumstances. Even if an employee incurs three Rule 21 violations, the offenses do not and cannot equate to automatic discharge if the just case standard is to be met. In this matter, discharge was too severe a penalty under the circumstances. Just cause considers whether the employee received advance warning of the possible disciplinary consequences of conduct and whether the level of discipline is reasonably related to the seriousness of the offense and record of past service. Here, Grievant questioned Hernandez's instruction but did not refuse to comply, attempting to continue to discuss the matter. Grievant ultimately attempted to complete the task. Finally, for the four year duration of his employment he was a good employee and a hard worker. On this shift he worked more than five hours overtime. He was not a bad or troubled worker. He had at worst three minor lapses in a fifteen-month period. He was apologetic about the situation when he spoke with the plant manager, and ultimately complied with Hernandez's request. Discharge is not required or warranted.

Saputo

In summary, Saputo argues that it is undisputed Grievant violated Rule 21 when he refused to follow Hernandez's repeated orders to help Auggie push the totes. Hernandez asked Grievant twice and Grievant flatly told him no, claimed he had his own job to do and the second shift employees should have taken care of it. Grievant now claims he did not say the word no, but on cross examination he admitted Hernandez gave him the orders and that he refused to follow them and knew he refused to follow them. Whether he said the word no is irrelevant. He admitted he refused to carry out a reasonable order. He admitted his violation to Welnetz the next morning. He compounded his violation when Kelly arrived. He admitted to Kelly that Hernandez had given him an order, and went on to argue with Kelly as to why he should not have to do so. Kelly ordered him to do it, but the job was done. An employee does not cure his refusals to follow reasonable orders by later following the order when it no longer was applicable. It is not his option to choose when to follow orders. He did not have the right to argue with Hernandez and Kelly. The orders were simple, direct and within the Company's right to give.

Saputo argues that Grievant admitted that Kelly said if another supervisor gave him an order that was different than one Kelly gave then he is to follow Kelly's order, but that was not the situation on October 8th. Kelly had not given Grievant an order before Hernandez did. As to Hernandez not being nice and ordering him to do it without asking, there is no requirement in the labor contract or under labor law that requires a supervisor to ask nicely. There is no evidence that Hernandez was abusive to Grievant. Grievant's claim that Hernandez then walked away, which is denied, does not negate the fact that Grievant refused to follow Hernandez's orders. Grievant admitted he went back to his sanitation job after being twice ordered to help Auggie. Whether Hernandez then walked away is irrelevant. It is also irrelevant that Grievant claims Hernandez is not his supervisor. Grievant had been specifically warned and counseled that he needed to follow orders of supervisors other than Kelly. The fact Grievant worked overtime is irrelevant, as his violation was at the beginning of his shift,

and overtime does not excuse his behavior. And it is not true that Grievant had to do his job

first as to why he did not follow Hernandez's orders. There was still cheese on the tables that had to be removed before employees could spray the tables. There was no requirement that Grievant remove the forks immediately, and that was not a legitimate reason why he could not help push totes as ordered. He refused to follow orders and knew the consequences of those refusals from his previous disciplines and counseling regarding the need to follow the directions of supervisors.

Saputo also argues that the Union's argument regarding Article 8A is unsupportable. The problems with the Union's 9 month window arguments are many. It is simply not what Article 8A says. The Union did not produce examples to support its argument despite being asked for some by the Company. The Company research did not produce any such examples, but actually found examples of the Company position that progressive discipline could be issued if the previous discipline was within 9 months of the last discipline even if the first discipline was more than 9 months from the third incident. The Union had no bargaining notes to support its position. Article 8A provides that warning notices shall be effective for the period stated in the warning notice, which period shall not exceed nine (9) months from the date of mailing or delivery to the employee. The suspension was within 9 months of the written warning and the written warning was still effective to support the suspension. Grievant's October 8th refusal occurred within 9 months of his March 27th suspension, so the March 27th discipline was still effective under Article 8 and supported the next step in the progressive discipline process. That is the plain and common sense meaning of Article 8A that warning notices are effective for a period not to exceed 9 months. Finally, the parties clearly established the ability to provide for such drop off of disciplines if they chose to do so. The attendance Work Rule 43 incorporated the drop off concept for attendance violations under that rule and the party's failure to include similar language for violations of any of the other Work Rules underscores the weakness of the Union argument. They knew how to incorporate the drop off concept but they failed to do so under all the other work rules except for 43, which only deals with attendance. The Union's creative argument must be rejected.

Saputo further argues that the Union's reliance on precedent from other arbitration cases is misplaced. Not knowing what cases, if any, the Union might cite in written briefs in this arbitration, during the grievance procedure the Union cited two cases to support its drop off or window theory. Neither case involved these parties or this contract or contact language similar to that in Article 8A. Neither case followed the theory that the Union is advancing here. Neither arbitrator held the language they construed meant that a written warning that had been used as the timely basis for the next step in progressive discipline, but which had since become older than the contractual time provision, undermined the disciplinary status of the second step of progressive discipline, which was still active within the contract's time limitations. Nor did those cases hold that all disciplines must be issued within the time limit or that the employer had to repeat a disciplinary step. The discussions in those cases supports Saputo's position that a discipline that is still active under the contract's time limits can be used as the basis for the next level of progressive discipline. Then, if that next level of progressive discipline is still active, it can be used for the third level of progressive discipline and it does not matter whether the first discipline is still active since the third level of discipline is based

on the active status of the second level.

DISCUSSION

The issues in the case concern whether there was just cause for Saputo to terminate Grievant's employment, and include whether Grievant violated Work Rule 21 by refusal to carry out a reasonable order third offense, whether a 9 month effectiveness provision for a written warning in Article 8A applies, and the level of discipline if there was a violation with or without the 9 month provision. There is also a fact issue to resolve.

The fact issue is whether Grievant said "no" to supervisor Hernandez when Hernandez asked him to help another employee push totes of cheese to another part of the plant. Grievant contends he did not say that. Hernandez and production manager Welnetz say he did. The undersigned is persuaded that Grievant did tell Hernandez "no" when Hernandez asked him to push the totes. Hernandez's testimony was not successfully impeached. Welnetz testified credibly that Grievant told him the next morning that he said no. Grievant did not promptly obey supervisor Kelly's order to push totes. Both Hernandez and Welnetz wrote statements shortly after the incidents which are consistent with their testimony and with each other and indicate Grievant said no. Grievant's statement to Welnetz is in the form of an admission. Hernandez and Welnetz are much less interested in the outcome of the case than is Grievant. Grievant testified that he was mad at Hernandez at the time because of the way Hernandez asked him – in the nature of an order rather than asking nicely. It is more likely than not that Grievant did say "no" when asked by Hernandez to push the totes. Having made this factual determination it is noted that whether Grievant said no or not is not a significant fact. The Work Rule alleged to have been violated is refusal to carry out a reasonable order. It is such a refusal, not the mere making of a statement of "no" which is the basis of an alleged violation of the rule, as argued by Saputo. Therefore, even though Grievant did say "no" when told to help push the totes, whether he actually violated the Work Rule still needs to be determined.

Article 8A of the collective bargaining agreement requires that there be just cause for discharge or suspension. Just cause itself is not defined in the agreement, but there are some contractual parameters in how just cause is to be applied or implemented. These include the requirement of a written warning and 9 month limitation on the effectiveness of a written warning that is necessary before there is a discharge, and a progressive discipline schedule of offenses in the Work Rules contained in Schedule B of the parties' agreement. Article 8A states:

> 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 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. Such written notice shall be forwarded by the Company, by registered or certified mail, to the employees and a copy thereof to the Union. In lieu of such mailing to the employees, the Company may deliver such notice personally to

the employees.

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, 6th Ed., 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, e.g., MILWAUKEE COUNTY, MA-13866 (GORDON, NOV. 2008). That is the definition of just cause that will be used here subject to the provisions in Article 8A and Schedule B of the parties' agreement.

The first prong of the just cause analysis is whether the employer has established conduct in which it has a disciplinary interest. Saputo alleged Grievant violated a Work Rule. Grievant contends he did not. The Company has a disciplinary interest in promulgating and enforcing reasonable work rules. The collective bargaining agreement itself contains Schedule B with a number of Work Rules. Work Rule 21 is simple, and states: "21. Refusal to carry out a reasonable order." Here there was an order of a supervisor to help push totes of cheese. Hernandez framed the order in terms of asking Grievant to help push the totes. Clearly he was telling Grievant to help push the totes. Grievant knew Hernandez was a supervisor and that he was to obey the directives of supervisors and do what they say. Grievant's own testimony was that Hernandez ordered him to do it. Hernandez, like all supervisors in the plant, had the authority to give such orders. There is no question that an order was given to Grievant.

The Work Rule is written in terms of a "reasonable" order. Here, there were two totes of cheese weighing about 1500 pounds each that needed to be pushed to a different part of the building. Part of the route was to use a small, open elevator to lift the totes to a different level of the building. The cheese in the totes needed to be weighed, tagged and placed in a cooler to preserve it during the mechanical breakdown. This is certainly a reasonable and work related reason to push the totes. Hernandez saw that it was hard for Auggie to push a tote alone. To have help moving these totes is reasonable. Auggie obeyed the order. Chong obeyed the order. Hernandez himself pushed a tote. Kelly gave Grievant the same order. And Grievant knew that he was to obey the orders of supervisors, even those not his immediate supervisor. He had been disciplined once already for not carrying out the reasonable order of a different supervisor (one other than his immediate supervisor, Kelly). Kelly had previously counseled him that if he is asked by a supervisor to do something he cannot refuse to do it unless he has a legitimate reason. He had not been told differently by Kelly before Hernandez gave him the order. And Grievant admitted that this was not a situation where another supervisor was telling him to do something different than his own immediate supervisor. The task ordered to be done was reasonable and the supervisor had the authority to give the order. The order was reasonable.

The Union argues that Grievant was busy moving heavy equipment at the time Hernandez told him to help push totes so that he could not do it immediately, that he had his own work to do which could be done at that time, and that he did eventually go and push a tote, so therefore he did not refuse to carry out a reasonable order. However, Grievant himself

testified that the reason he did not do what Hernandez told him to was because he was mad at

the way Hernandez said it, not for any other reason. Being mad at a supervisor is not a legitimate reason to refuse to carry out a reasonable order, even if he was not asked nicely. Grievant did say he had his own work to do and that the other shift should have moved the cheese. This is being argumentative, not explaining why there may be a legitimate reason not to carry out the order. Grievant argues that he was handling heavy machine forks at the time. But he could have put them down, which is what he was actually doing anyway in order to prepare to clean them. There was still cheese on at least one table. Whether he could have started spraying other parts of the tables or continued to take apart the table parts does not mean that he could not have helped push the totes when he was told. The plant production was behind and operations were delayed. Cheese still needed to be taken off the table before the entire area could be sprayed and cleaned. There is no evidence that any cleaning or pre-cleaning activity of Grievant needed to be done immediately so that he could not have carried out the order. The fact that he had his own work to do does not mean that he can refuse to carry out a reasonable order. Grievant has presented no factual reason why he could not have carried out the order or reasonable, legitimate explanation as to why he could not do it. And he did eventually go to push totes after Kelly told him to, while the same conditions existed. Moreover, there was some time that did elapse between the time Grievant said "no" to Hernandez and the time Kelly got there. Hernandez had to go to the supervisor room area and use the PA system to contact Kelly. Kelly had to come from a different part of the plant to talk to Grievant. During that time Grievant did not go to push totes. He would have had time to set down the forks and go push the totes, but he did not. He made no effort to comply with Hernandez's order. And rather than promptly carry out Kelly's order, Grievant again, as with Hernandez, did not give reasons why he could not do it, but rather stated he had his own job to do and the others should have already moved the cheese. These are not valid reasons why he could not carry out the order.

Grievant argues that he was not given a chance to explain to Hernandez. But he did say why he would not do it. His real reason was that he was mad at Hernandez, not that he did not have a chance to explain. And Hernandez did tell him that production was behind in response to Grievant's statement that others should have already moved the cheese. There was some brief back and forth discussion about moving the cheese and why Grievant should or should not do it. Not only was there nothing to explain, but Grievant did give reasons why he was not going to push the tote, insufficient as those reasons are. Grievant then continued to work at moving the forks and taking parts off the table rather then talk with Hernandez. Hernandez did not prevent Grievant from explaining anything to him. This is not a situation where Grievant was so tied up with something else he needed to do that he could not have carried out Hernandez's order. It is not a situation where he was even going to carry out Hernandez's order, even after Kelly first began talking to him. It was not until Kelly told Grievant that he needed to help that Grievant then went to help push the totes. By then only one tote had to be moved a very short distance. Grievant could have helped much more but for his refusal to help when first told by Hernandez. He completely refused to carry out a reasonable order from Hernandez. His late compliance with Kelly's order, after being argumentative even with Kelly, does not excuse his refusal to Hernandez. His belated effort in following Kelly's order does not mean that he was trying to or eventually would have carried out Hernandez's order, and does not excuse his refusal to carry out Hernandez's order. Grievant refused to carry out a

reasonable order.

Grievant violated Work Rule 21 by his refusal to carry out a reasonable order. Saputo has established conduct in which it has a disciplinary interest.

The second element in just cause is whether the discipline imposed reasonably reflects the employer's disciplinary interest. Here the parties' collective bargaining agreement provides some direction in how this part of just cause is to be administered. There is the provision in Article 8A that at least one written warning notice be given before discharge with that notice not being effective beyond a 9 month period. The other provision is in Schedule B Work Rules which set out progressive discipline steps for violation of Work Rule 21 as a written warning for 1st offense, 1 week suspension for 2nd offense, and up to and including discharge for a 3rd offense. The issue also involves determining what impact the 12 month continuing basis for warnings in the Work Rule 43 attendance Program has on implementing the progressive discipline steps in Work Rule 21. Depending on the result of effectiveness of the written warning period inquiry, the traditional just cause relationship between disciplinary interest and level of discipline may still be at issue in determining if discharge was appropriate given the contractual range in penalty provided for a 3rd offense of violating Work Rule 21.

As already seen, under Article 8A at least one (1) warning notice shall be given in writing before discharge can be made, except as otherwise provided in the Work Rules in Schedule B. This exception does not apply in this case and the parties do not argue that it does. Schedule B contains several different Work Rule violations which provide for discharge on a 1st offense, obviously negating the written warning requirement. Schedule B also contains three Work Rules that allow discharge for a 2nd offense after a 1st offence warning letter. Here, Work Rule 21 has three steps in progressive discipline so the written warning requirement does apply. The issue is the impact of the Article 8A language:

> 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.

Grievant received a written warning for a Work Rule 21 violation on 7/16/2008. The warning stated no effective period for the warning. It did state: "Please be advised that your next violation of this work rule will result in the next step in the progressive disciplinary process." Less than 9 months later Grievant received a 1 week suspension for a Work Rule 21 violation on 3/27/2009. Other than the dates the suspension was to be served and noting the prior written warning on July 16, 2008, the written copy of the discipline stated no other reference to a period of effectiveness. It did state: "Please be advised that your next violation of this work rule will result in the next step in the progressive disciplinary process." Less than 9 months later, but more than 9 months from the July 16, 2008 written warning, Grievant received his written termination for the above Work Rule 21 violation 3rd offense, which occurred on October 8, 2009. The narrow issue is whether the written warning required before discharge was still effective as of October 8, 2009 so as to support the discharge in the Work Rule 21 progressive discipline schedule.

Both parties contend the clear and plain language of the agreement supports their position. Saputo argues that the written warning was within 9 months of the 1 week suspension and thus supports the next level of progressive discipline, including discharge, which was within 9 months of the suspension. The Union and Grievant argue that the written warning required for discharge dropped off and was not effective after 9 months from its issue, therefore there cannot be a discharge and the greatest discipline can only be a suspension. "Since the discharge notice represents only [Grievant's] second effective offense under Work Rule 21 (i.e. second effective offense within the relevant nine-month period), the Company lacked just cause when it discharged, rather than suspended, [Grievant]." Grievant's theory presents a dilemma. A 2nd offense provides for a 1 week suspension. The quandary is how can there even be suspension under this theory if the warning dropped off after 9 months and still follow the progressive discipline schedule? If the warning dropped off after 9 months then it is not "effective" and the progressive discipline schedule would not allow for a suspension unless there was a prior written warning. So, the Union's argument for suspension implies that the written warning would still be effective. By arguing for suspension on the schedule there is an implicit acknowledgment that the previous written warning is still effective for purposes of progression on the discipline schedule, which is what the company is also arguing. And, this further implies that the 1 week suspension in March could serve as a written warning in order for there to be a suspension for the October 8th violation. (The 1 week suspension letter did state that "your next violation of this work rule will result in the next step in the progressive disciplinary process.") In order for there to be a suspension there must first be a written warning. If that is so, then the March 1 week suspension is also effective as a written warning, and that was given within 9 months of the discharge. The Union's theory is conflicting and not persuasive.

Following Saputo's theory, the written warning supported the 1 week suspension because that incident occurred within 9 months of the written warning. At that point Grievant is at the second offense level. The next offense allows for discharge, and that is what happened within 9 months of the second offense. The Union argues that it must retain the value of what it bargained for in Article 8A. That is true. When Article 8A and Schedule B Rule 21 are read together, as they must, the 9 month effectiveness period in Article 8A retains meaning under Saputo's approach. For a Work Rule 21 violation to support a discharge there must first be a 1 week suspension. That suspension cannot occur unless there is first a written warning effective for no more than 9 months. That is what happened here. The written warning was in effect when the 1 week suspension moved Grievant into the 2nd offense status. After that he committed a 3rd offense and the contractual discipline in Schedule B then includes discharge.

Both parties also claim the Work Rule 43 Attendance Policy's rolling 12 month period for counting absences supports their position. The language in Work Rule 43 sets out a progressive discipline schedule whereby certain increasing numbers of occurrences merit 1st, 2nd, and 3rd written warnings and then additional discipline up to and including discharge. The pertinent language states:

> It is understood by the parties that the twelve-(12) month past history review shall be on a continuation basis. For example, if an employee's record showed three-(3) absences twelve (12) months back and if reviewed the following month, the three (3) previous absences will no longer be part of an employee's record for purposes of this rule.

The Union argues that it is an example of how the same construct as in Work Rule 21 and Article 8A is to be applied. Saputo argues that the parties knew how to negotiate such a rolling or continuation basis into their agreement by putting it in the Work Rule 43 Attendance Policy, and by not putting it in Article 8A or the other Work Rules shows the intent and understanding that Article 8A is not to be read that way. Saputo's argument is the better one, particularly in view of the language the parties used in the Work Rule 43 example itself. The last phrase is "for purposes of this rule." That is a limitation of the example to Work Rule 43. It indicates the intent that, because of that limitation, it was not to be used for the other Work Rules. Thus, the October 8, 2009 Work Rule 21 violation is Grievant's third offense and Article 8A does not prevent that offense from resulting in a discharge.

Although both parties argue the contract language is clear and unambiguous, they both have argued that the manner that Saputo has applied Article 8A and Schedule B shows an application of Article 8A in their respective favors. Essentially, this is a past practice argument. While a past practice may be used to determine what meaning parties may have put on contract language, the undersigned is not persuaded that this record reflects a binding past practice. The time periods that each party reviewed were different and that may allow for different results. The Union only reviewed disciplines from late 2007 on and found no examples of discipline following the Company theory. The Company reviewed disciplines starting in 2006 and found some that support its theory and none supporting the Union. There is a time gap here between the two approaching two years, which might account for the differences in findings. No specific cases or examples were presented as evidence. In order for a past practice to become binding as part of a collective bargaining agreement, such practice must be well established. As set out in *Elkouri & Elkouri*, How Arbitration Works, (6TH Ed.) pp. 605 – 609, a past practice, to be binding, must be unequivocal, clearly enunciated and acted on, readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. See, e.g., PROFESSIONAL TRANSIT MANAGEMENT OF RACINE, INC., A-6280 (GORDON, JANUARY 2008). The record here has scant, if any, evidence of any of the characteristics of a binding past practice. There is nothing clearly enunciated to each party, the time periods are not very long, and there is little if anything to show acceptance by both parties. The undersigned is not persuaded that there has been demonstrated a binding past practice, let alone what that might be. For the same reasons, the scant evidence of how discipline has been applied in other cases is not helpful here in altering the above result.

Similarly, there is no evidence of bargaining history on the language in Article 8A or the progressive discipline in Schedule B. Bargaining history does not show any intent that Article 8A and Schedule B are to be applied any differently than as determined above.

There remains the issue, under the just cause analysis, if the discharge is reasonably related to Saputo's disciplinary interest. As the Union notes, discharge is the most severe penalty that can be imposed in industrial jurisprudence. The Union points out that in Schedule B for a 3rd offense there is a range of penalty and that discharge is not necessarily required. The Union argues that discharge is too severe, and that the discipline should be reduced to a suspension. Saputo argues that Grievant received progressive discipline in compliance with the meaning of Article 8A and his clear violation of Rule 21 called for his termination as the third step in the progressive discipline process for violation of this rule.

Grievant argues that he did not refuse to comply with the order but Hernandez walked away rather than instruct Grievant to carry out his request. Grievant's refusal to carry out a reasonable order has been decided against him as set out above. Grievant also argues that he ultimately attempted to complete the task. This argument, too, has been rejected as set out above. Finally, Grievant argues that for his four years of employment with the Company he was a good employee and hard worker. He worked more than five hours of overtime on the shift at issue in this case. However, the record of Grievant's employment shows that he committed three offenses in 15 months of his four years of employment. He violated the same Work Rule three separate times. He was also counseled informally specifically about obeying orders of supervisors. Hernandez actually asked him twice to help push totes. There were no conflicting instructions or any other indications that his conduct might be acceptable. The reason he did not carry out Hernandez's order was because Grievant was mad at the way Hernandez gave the order. This is not a long record of being a good employee. The fact that he worked overtime on the evening in question is because the plant equipment had broken and production was behind, not because of any positive attribute of Grievant. It is, perhaps, some consolation that after his refusal he did think he was in trouble, and he did bring up the incident to Welnetz on his own, even though he continued to proffer the same reasons for not carrying out the order. It does show some awareness that his conduct was in violation of the rules and possibly some remorse. It also shows that he did something he knew he should not have.

The parties negotiated a range of penalties that Saputo could impose for a 3rd offense of refusal to carry out a reasonable order. By the terms of the collective bargaining agreement in Schedule B, Saputo has discretion to discipline within the range, which includes discharge. "In circumstances in which the parties have specifically negotiated that discharge is to be the penalty for designated conduct, the arbitrator is bound by the parties' contract and generally cannot deviate from the parties' bargain." *Brand*, Discipline and Discharge in Arbitration, p. 86. While it is true as the Union argues, Saputo does not have to discharge and discharge is not automatic, yet discharge is an option available to Saputo by contract. The parties have agreed that a 3rd offense of Work Rule 21 is just cause for discipline up to and including discharge. This contractual right gives Saputo considerable leeway in determining the level of discipline. The preceding paragraph demonstrates that Grievant's arguments to reduce the discipline are not particularly well founded. On the other hand, the circumstances do provide a reasonable basis for Saputo's discharge decision. Its contract right is supported by the fact that on the evening in question there was a mechanical breakdown putting the production operation behind schedule. Extra work was required. Cheese needed to be moved and put in a cooler. The totes were heavy and the other employee needed help moving them. There was a need for employees to cooperate with each other, not refuse reasonable orders. Grievant had time to do as he was asked because it took time before Kelly got there. The order was not a threat to Grievant's safety or health, but can reasonably be seen as enhancing the safety of the other employee who was pushing a heavy object alone. Hernandez had to push a tote because Grievant refused. This took him from his other duties. Kelly had to leave what he was doing and attend to the matter. Rather than help out in this situation, Grievant was actually aggravating it. There are no legitimate mitigating factors. Although not a basis for discipline,

the added informal counseling that Kelly had given him about obeying orders of any supervisor, along with the prior disciplines for violating the same rule, casts serious doubts on Grievant's ability to correct his behavior and carry out orders in the future. That is especially so here where Grievant's refusal was because he was mad at the way he was given the order. The written warning and 1 week suspension notices additionally warned Grievant that the next violation of the rule will result in the next step in the progressive disciplinary process – a step that includes discharge. Given all of the circumstances, including the bargained for disciplinary range in Schedule B for a 3rd offense, discharge is reasonably related to the disciplinary interest. The undersigned is persuaded that there was just cause for Saputo to reasonably exercise its contractual ability to terminate Grievant's employment, and that by any standard of proof and persuasion Saputo had just case for the discharge in this case.

Saputo had just cause to terminate the employment of the Grievant and in doing so did not violate the collective bargaining agreement. Accordingly, based upon the evidence and arguments in this case, I issue the following

AWARD

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 11th day of May, 2010.

Paul Gordon, Arbitrator

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