BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and its LOCAL 578, UAW

and

OSHKOSH TRUCK CORPORATION of Oshkosh, Wisconsin

Case 18
No. 69918
A-6415

Appearances:

George F. Graf, Gillick, Wicht, Gillick & Graf, Attorneys at Law, 12725 Cardinal Crest Drive, Brookfield, Wisconsin 53005, for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and its Local 578, UAW, which is referred to below as the Union.

Robert H. Duffy and **Courtney R. Heeren**, Quarles & Brady, LLP, Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4497, for Oshkosh Truck Corporation of Oshkosh, Wisconsin, which is referred to below as the Company or as the Employer.

ARBITRATION AWARD

The Union and the Company are parties to a collective bargaining agreement that provides for final and binding arbitration. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to resolve Grievance 28-3-10, filed on behalf of Timothy Michael. Hearing on the matter was held on November 10, 2010, in Oshkosh, Wisconsin. Jody L. Tyley filed a transcript of the hearing with the Commission on December 1, 2010. The parties filed briefs and reply briefs by March 3, 2011.

ISSUES

The parties did not stipulate the issues for decision. The Union states the issues thus:

Was the discharge of Timothy Michael for just cause?

If not, what is the appropriate remedy?

The Company states the issues thus:

Did Oshkosh violate the parties' collective bargaining agreement when it discharged Michael?

If so, what is the appropriate remedy?

I adopt the Company's statement of the issues.

RELEVANT CONTRACT PROVISIONS

ARTICLE 5 - GRIEVANCE PROCEDURE

Grievance as used in this Agreement is a complaint by the Union or any employee(s) that an express provision of the Agreement or a Memorandum of Agreement has been violated by the Company.

The following procedure may be utilized if an employee has a complaint which is not a grievance, but in no event shall such an unresolved complaint be arbitrable.

. . .

Step E: . . . The arbitrator shall have the authority to interpret and apply this Agreement to the extent necessary to adjudicate the grievance but shall not have the authority to add to, deduct from, or alter the provisions of this Agreement. The decision of the arbitrator, if within the scope of his/her authority, shall be final and binding on the parties . . .

ARTICLE 8 – SENIORITY

. . .

Section 2: An employee shall forfeit all of his/her seniority rights for anyone of the following reasons:

. . .

b. When he/she is discharged for just cause. . . .

ARTICLE 13 - TERMINATION OF SERVICE

Section 1:

a. The Company may discharge or otherwise discipline an employee, without prior warnings, for willful or negligent misconduct of a serious nature. In all other disciplinary cases, before the Company discharges or gives a disciplinary layoff to the employee, the employee shall be given at least two (2) written warning notices for similar offenses (absence and tardiness are expressly included as examples of similar offenses) or three (3) written warning notices where there may be different types of offenses. Warning notices which are more than one (1) year old may not be used as one (1) of the two (2) or one of the three (3) warning notices required above, but are part of the employee's record and appropriately considered in the exercise of discretion in determining discipline. They may not be used as a step in the progressive discipline process. . . .

. . .

ARTICLE 22 - MANAGEMENT RIGHTS

Section 1: It is agreed that the management of the Employer and its business and the direction of its working forces is vested exclusively in the Employer, and that this includes but is not limited to the following: to . . . discipline or discharge employees for cause . . . and to make, modify and enforce reasonable rules and regulations . . .

SAFETY RULES

Oshkosh Truck Corporation, with the cooperation of its employees, is responsible for providing a safe and healthy work environment. Making Oshkosh Truck Corporation a safe place to work is every employee's responsibility.

As employees, we accept this responsibility by following safe work practices which include . . .

5. Personal protection equipment must be worn when such equipment is necessary . . . This includes the use of hearing protection . . .

CODE OF CONDUCT
OSHKOSH TRUCK CORPORATION

. . .

SPECIFIC REQUIREMENTS

The following specific conduct is required of all employees. Each employee must:

1. Adhere to safety rules.
2. Demonstrate a good work ethic, efficient use of time, and continuous improvement of productivity and quality.
3. Behave toward fellow employees in a way which preserves their dignity. Profanity, indecent language, intimidation and abuse are prohibited. . . .

PROGRESSIVE DISCIPLINE

Adherence to the behavior standards is required of all employees as a condition of employment. In case of violation, progressive discipline will be used to provide the employee with the opportunity to correct behavior. For similar or dissimilar code violations within a 12-month period (excluding attendance), the following procedures will be used:

1. Acknowledged verbal warning;
2. First written warning;
3. Second written warning;
4. Final written warning (which may, but is not required to, include suspension) places the employee on disciplinary probation for the remainder of the 12-month period.
5. Discharge:
   a. Any violation of the code of conduct during disciplinary probation will result in discharge.
   b. If an employee is on disciplinary probation, the 9th or higher unexcused absence will result in discharge**. . . .**

SERIOUS BEHAVIOR VIOLATIONS

There are certain codes of behavior violations of which are so serious that progressive discipline will be superseded and immediate discharge is required. The following are examples of conduct which are so serious that they are strictly forbidden and violation will result in immediate discharge. (The Company may suspend at its discretion.)

. . .

3. Directing or engaging in insubordination, failure or refusal to carry out specific instructions, or intentional restriction of production.

. . .

5. Discrimination against, harassment of, or creating an intimidating work environment for other employees because of their sex . . . or other improper reasons are strictly prohibited. . . .

BACKGROUND

Grievance 28-3-10, filed on January 18, 2010, challenges Michael's discharge. The Company hired him on August 22, 2005. He worked at the Company's Harrison Street facility from his date of hire through August of 2009, (references to dates are to 2009, unless otherwise noted) when he transferred to the Company's South Plant. But for a brief period of time around the transfer, he served as Union Steward from October of 2006 until his discharge.

Katie Hess, then a Company Human Resources Generalist, was responsible for the discharge decision, summarizing it thus in a January 8, 2010 letter:

> On December 22, a meeting was held to review and discuss your current suspension. . . .
>
> Back on December 11, 2009, you were put on one year probation for violating your previous disciplinary probation. The terms of your probation outlined that "any violation of the Labor Agreement resulting in formal discipline will be cause for immediate termination".
>
> You received a final written warning for three (3) separate situations in accordance with the Labor agreement for violating the code of conduct and serious behavior violations (#5 - Creating an intimidating work environment), which is a violation of your disciplinary probation and should result in your immediate termination.
>
> On 12/15, when entering the building, you used inappropriate language with the security guard. When asked to see your badge, you were not cooperative and it took you several minutes before you would show your badge to the guard. Also on 12/15, you acted very disrespectful when engaged in a heated discussion with a team coordinator. Then on 12/17, you approached the guard from 12/15 and threatened him by stating, "You shouldn't have done what you did. I'm going to get at it anyway I can".

> After the break, I explained as a result of violating your probation your employment with the company will be terminated, effective immediately, in accordance with the· Labor Agreement. . . .

Hess summarized the December 11 meeting, at which the Company imposed the one-year probation, in a letter to Michael dated December 21, which states:

> . . . Back on June 9, 2009, you were placed on disciplinary probation for six months for serious behavior violations. The terms of your probation outlined that "any violation of the Labor Agreement resulting in formal discipline will be cause for your termination". On November 24, 2009, you received a written warning for not wearing hearing protection during working hours. This written warning is a violation of your probation and should result in your termination.
>
> After the break, I explained that in lieu of termination, we would give you one last chance. You will, however, be on a disciplinary probation for one year ending December 11, 2010. Any violation of the Labor Agreement resulting in formal discipline during this timeframe will be cause for immediate termination.
>
> You, the union, and the company agreed to this non-precedent setting decision and that no grievance would be filed.

The parties' processing of the grievance draws from this correspondence.

The parties processed the grievance through the steps of the grievance procedure between late January and late March of 2010. The Union's Step D submission focuses on conduct highlighted in the discharge letter:

> The three separate situations that are described by the Company are greatly exaggerated . . .
>
> 1. On 12-15-09 Timothy went past the guard to go to work. As he did he pulled his badge out and showed it to the guard. There was some discussion as to where Tim was parked but at no time did Timothy swear at the guard or was inappropriate language used.
>
> 2. On 12-15-09 . . . Rhonda Callies had the return to work restrictions changed for another employee. Timothy represented the Union and had a discussion with Rhonda. At no time did the discussion get out of hand.
>
> 3. . . . 12-17-09 the statement written in the termination letter "You shouldn't have done what you did. I'm going to get at it any way I can." Is grossly misquoted and incorrect. . . .

The Company's Step D response, dated March 29, 2010, expands the focus to conduct underlying the June and December probation periods:

> The grievant was given multiple opportunities to improve his conduct, but continued a pattern of poor conduct & violations of the labor agreement. This was a clear violation of his probation. . . .

Apart from the grievance, the discharge prompted the filing of a Charge against the Company with the NLRB (Case 30-CA-15580). In a letter dated March 3, 2010, the NLRB deferred further proceedings on the charge to the grievance arbitration process.

Discipline Preceding The June Probation

In a letter dated April 20, Michael received a First Written Warning, which states:

> You have been cited four parking violations, but continue to violate the parking policy. You have also made remarks to a security guard that could create an intimidating work environment. This type of behavior is not tolerated. The Code of Conduct states the Basic Expectations for all employees. . . .

During meetings with Hess, Michael never contested the parking violations. She was not directly involved in the issuance of the warning, and did not know if the Union grieved it. Michael testified that parking was difficult at the Harrison Plant with one shift leaving while another was attempting to report. He testified he was not aware of parking violations being a source of progressive discipline; was aware that the security guard was a female; but was not informed by any Company representative what he said to intimidate the security guard. The Union filed a grievance on the matter, and Michael believes it is still active.

Michael received the June suspension/probation during a June 9 meeting. Leon Nett, a Senior Human Resource Representative, summarized the meeting in a June 16 letter to Michael, which states:

> During the meeting we discussed the reason for your suspension was as a result of creating an intimidating work environment and sexual harassment. On June 1, 2009 you shouted out at a female coworker "where did you get the hooker, I'm next" as she and another employee rode past your work area on a materials cart. When we discussed this situation during the meeting, you would not admit to making this exact comment; however, we confirmed you made the statement in front of another employee. Creating an intimidating work environment and sexually harassing a coworker are serious behavior violations and in accordance with the Labor Agreement should result in immediate discharge.

> After the break, I explained that in lieu of termination, your time spent on suspension on Friday, June 5, 2009 and on Monday, June 8, 2009 will be unpaid and you will be placed on disciplinary probation ending December 16, 2009. Any violation of the Labor Agreement resulting in formal discipline during this timeframe will be cause for termination. You were instructed to return to work on June 9, 2009.
>
> This decision is non-precedent setting.

Hess did not play a role in issuing the suspension/probation period. Michael testified that he called the employee, whom he knew, a "looker". He denied saying, "I'm next" (Tr. at 172). He agreed to the probation period, "Under protest" (Tr. at 172), but acknowledged that he did not file a grievance to challenge it. The Union did file a policy grievance, dated July 27, challenging the suspension and the probation. That grievance was in the grievance process at Step D as late as June of 2010, including a challenge to its timeliness. Andrew Schaller, the Union's Vice-President, testified that the policy grievance was not timely filed, but that it was part of pending contractual and legal issues posed regarding Company compliance with grievance timelines.

Discipline Following the June Probation

In a letter dated August 18, John Walgenbach, Michael's Team Coordinator, issued an Acknowledged Verbal Warning which asserts Michael violated Item 2 of the "Specific Requirements" section as well as Item 3 of the "Serious Behavior Requirements" section of the Code of Conduct (the Code). The letter describes the conduct thus:

> On August 10, 2009 from 14:40 to 16:51 (Two hours and eleven minutes) you were . . . on NPL-68 (Non-production labor - Team activity). When I questioned you on August 11, 2009 at the beginning of the shift and again at 3:45 pm with David Vondrachek why you were punched on NPL you stated you had no carts to tear down axle carriers and no other work was performed during this time frame.
>
> In addition, you failed to inform me of the situation to allow management to find productive work for you. It has been brought up several times with the team the expectation to notify management of these types of issues.
>
> I urge you to be more mindful to keep busy while here at work. Any reoccurrence of this infraction will result in further disciplinary action, possibly up to and including termination.

Hess was directly involved in the issuance of this discipline. She became involved because Walgenbach sought Michael's discharge. Company representatives, including Hess, met with Michael sometime between August 10 and 18 to discuss whether the August 10 incident could

support suspension or termination. After those discussions, the Company agreed that the original discipline issued against Michael would be rescinded and that Walgenbach would issue the August 18 Acknowledged Verbal Warning. Hess put it thus, "In lieu of termination, we felt a warning was most appropriate based on the situation at hand" (Tr. at 94).

Michael testified that the August 10 incident reflected ongoing problems with production backups. He informed Walgenbach prior to the August 10 shift that he had no work he could do, and had previously advised Walgenbach as well as Walgenbach's supervisor, David Vondrachek, that backups prevented him from doing his production work. He cleaned his work area and watched production progress on August 10, but was not able to join in ongoing production until well into his shift. Hess noted that Company policy permits employees to clean their work area during production backups, but that employees must notify their Team Coordinator if NPL lasts an appreciable length of time. Schaller testified that production backups were common on Michael's worksite and "the whole team identified it as being an everyday problem" (Tr. at 262). He acknowledged that delays due to such backups were typically of a shorter duration than that involved on August 10.

Vondrachek issued Walgenbach a memo dated August 27, which notes:

> On Monday August 10, 2009 there were two instances of poor management of the workforce in areas under your direction.
>
> The first instance involved two employees in the axle area, Tim Michael and Don Flowers. Tim and Don were on NPL 86 for the first 2:21 of their shift and you were unaware of their situation. Upon investigating the situation it appears you are not giving clear direction at the start of the shift and did not follow up to areas of need on the production floor. . . .
>
> Effective use of the workforce is key to the success of the operation; please submit an improvement plan to me by 8-31-09 detailing how you will better handle situations similar to this in the future. Failure to improve your performance in these situations may lead to further disciplinary action.

Michael grieved the August 10 incident and the grievance is active.

In a letter dated December 1, Dave Mayr, Michael's Team Coordinator, issued Michael a 2nd Written Warning for Item 1 of the Code's Specific Requirements section. The letter describes the conduct thus, "On Tuesday, November 24, 2009 at 8:40 pm you were witnessed in the T-Case sub assembly area during working hours not wearing hearing protection." Mayr placed Michael on suspension as of December 1, which prompted the December 11 meeting.

Hess did not play a direct role in Mayr's imposition of discipline. She and Jacob Radish, the Company's Area Manager, represented the Company at the meeting, and James Tofari represented the Union as Michael's Steward. Hess understood Michael's position to be

that Mayr saw him without ear protection immediately after a break period ended. Hess understood Mayr's position to be that "it was at least 10 to 15 minutes into his shift after a break" (Tr. at 35). In her view, the difference had no disciplinary significance. Michael acknowledged that Mayr came over to his work station to warn him about the absence of hearing protection, and Michael responded, "you came all the way over here to bust my chops for that?" (Tr. at 217).

Michael initially testified the warning was subject to an active grievance, but also stated that he and the Union accepted the one-year probation offer. The Company, at some point, discharged Mayr.

Discipline Following The December Probation

A December 17 letter from Radish to Michael states a Final Written Warning. The letter cites violations of Item 3 of the Code's Specific Requirements section as well as Item 5 of the Code's Serious Behavior Violations section. The letter states:

> On Tuesday, December 15th, 2009 there were two separate incidents that occurred:
>
> 1. While entering through the security guard shack at gate 8, the guard was informing you of where South Plant employees should be parking as a result of the recent changes. At that point you became angry and told the guard, "You don't fucking tell me where to park." When asked for your badge you were not immediately cooperative, taking several minutes before you showed your badge to the guard.
>
> 2. Additionally, you engaged in a heated discussion with a coordinator during your shift regarding another employee. You stated, "You have no right changing the doctor's order and that this is why no one respects you because you do not treat employees with respect."
>
> On Thursday, December 17th, 2009, prior to the start of your shift, you followed up with the guard from 12/15/09. You had requested to get their name and badge number. The guard very specifically stated that you needed to talk to your supervisor regarding the information you were requesting. At the end of the conversation you stated, "You shouldn't have done what you did, I'm going to get at it anyway I can."
>
> Tim, your behavior in all situations mentioned above were inappropriate, disrespectful and creates an intimidating work environment. Oshkosh does not tolerate this type of behavior toward others.

The events summarized in this letter prompted the December 22 meeting.

The December 15 Guard House Incident

The December 15 and 17 Guard House Incidents occurred against the backdrop of a significant construction project. To fulfill a new government contract for a family of medium technical vehicles (FMTV) for use by troops in overseas combat areas, the Company constructed a 150,000 square foot manufacturing facility. The facility housed a new E-coat painting application to be used in the construction of the FMTVs. The Company sited the E-coat facility on a parking lot adjacent to its South Plant. Between the east wall of the South Plant and the west edge of the parking lot runs a roadway granting access to various fabrication areas. Entering this roadway requires passing through Gate 8, which is controlled by a guard house, referred to below as the Old Guard House. Prior to the construction of the E-coat facility, the Old Guard House was the main gate for employee access to the South Plant.

Robert Murkley is the Company's South Plant Manager. He issued memos to South Plant employees dated December 2 and December 9, which detail the impact of the construction on employee access to the South Plant. Each memo included detailed maps to clarify where employees could park. The December 2 memo states that on December 14 "all parking of South Plant employees will be moved to West Plant parking lot and the previous GTC lot", and that the Company would open a New Guard House "for employees entering and exiting South Plant." The memos sought to direct incoming/outgoing South Plant employees from the Old Guard House to the new one, leaving Gate 8 as access for semis delivering material to the South Plant. The December 9 memo underscored that the New Guard House would be open December 14 and that portion of the South Plant parking area underlying the E-coat facility "is closed."

Security guards are not Company employees and do not have the authority to physically detain Company employees. The Old Guard House is a small, brick structure. The structure has windows, but has an opaque wall that prevents a clear view to the Union Hall, which is located across from the northern end of the eastern border of the South Plant parking lot. A concrete shelf separates the brick wall from a window that the security guard can open to communicate with personnel entering through Gate 8. The guard house is locked and was manned during the December 15 and 17 incidents by a single employee, Corey Stieg. On December 15 and 17, Stieg's shift ran from 7:00 a.m. to 3:00 p.m. Michael worked the second shift, starting at 3:00 p.m. Mike Rhode is Stieg's immediate supervisor. At all times relevant to this matter, standard procedure required Company employees to enter the South Plant facility wearing their safety glasses and clearly displaying their identification badge.

Immediately after the roughly five-minute interaction with Michael at roughly 2:40 p.m., Stieg phoned Rhode. Rhode informed Stieg that Rhode would contact Murkley and that Stieg should write an incident report. Stieg responded by writing the following on an Incident Report form:

> Tim Michael badge #66216 parked at the Union Hall across the street and walked to gate 8. I told him they want all SP employees to park over by the GTC and use the little gate. He became very angry and told me that I don't fucking tell him where to park. I asked for his badge because of the use of his language and the way he was treating me. He was not cooperative. It several minutes to get him to even show his badge. . . .
>
> This report was written because of Tim Michael's use of foul language and attitude when confronted about breaking the rules.

The following day, Jake Radish, a Company Supervisor at the South Plant phoned Stieg to discuss the report. Radish told him to inform Radish if he had further problems with Michael.

The December 15 Michael/Callies Incident

As of the date of the hearing, Callies had worked for the Company for about fifteen months as a South Plant Team Coordinator. She brought about sixteen years of supervisory experience to the Company and has been a supervisor in represented and in non-represented workplaces. Michaels served as a Union Steward for employee members of Callies' team, but Callies was not his supervisor.

Shawn Ewens is a represented member of Callies' team, which works the second shift. He injured his back during the first half of his shift on December 15. He was transported to an emergency room for diagnosis and treatment. Under Company policy, Callies also reported to the emergency room. Ewens met with a physician, and after the meeting concluded, came back to the waiting room where Callies awaited him. Ewens gave Callies paperwork stating work restrictions and an authorization to return to work December 16. Callies reviewed the paperwork, noting the return to work date. She asked Ewens if the physician realized Ewens worked second shift, then approached a nurse and asked whether the physician realized Ewens worked second shift. The nurse took the paperwork from Callies, then left waiting room. When she returned to the waiting room, the nurse gave Callies the paperwork she had taken from Callies. The paperwork was unchanged, except that the return to work date had been changed from December 16 to December 15. Callies noted the change to Ewens, who returned to the South Plant by taxi.

Callies met Ewens at the South Plant and helped him complete required accident/injury documentation. She then discussed his work restrictions and assigned him duties within his restrictions. Ewens worked the balance of the December 15 shift.

Sometime near the end of her shift, Callies received a page from Michael. She recognized his voice on the loudspeaker and phoned him. In response, Michael asked what gave her the right to change a doctor's orders. He repeated this point several times. Callies was taken aback by what Michael said and how he said it. She responded that she did not change a doctor's orders. After some give-and-take, Michael stated, "something to the effect of, this is why people don't respect you, is because you don't show the employees respect"

{Transcript (Tr.) at 292}. He ended his part of the conversation by stating that he was not done with the matter, but was going to investigate it.

After the close of her December 15 shift, Callies reported the incident to Radish, and documented the incident thus:

> On Tuesday 12/15/09 at approximately 11:26pm I was paged. I called back and it was Tim (Thai) Michael. He is a Union Steward on second shift. He asked me what right I had changing the doctor's orders. He said there was an employee tonight who was released from the doctor for tomorrow and I changed it to tonight. I told Thai that I did not change the doctor's orders. I told him that I informed the hospital that we could accommodate the restrictions if the doctor feels the employee could return to work tonight. Which the doctor did change the return to work to the same day instead of the next day. Thai told me I had no right changing the doctor's orders and that is why no one respects me because I do not treat the employees with respect. Thai told me that he was not done with this and he would be investigating it more. He spoke to me in a tone that was not appreciated nor was it respectful to myself I took it as be was trying badger me into admitting that I did something wrong.

Callies estimated the call lasted three to four minutes. She was aware that Michael was Ewens' Steward and assumed that the phone conversation with Michael traced back to Michael and Ewens' discussion of the matter.

Ewens informed Michael of the incident after his return to work on December 15. Michael understood Ewens' concern to be that Callies effectively, and possible illegally, changed the physician's return to work order. The Union grieved the issue.

The December 17 Guard House Incident

Sometime prior to the start of the second shift on December 17, Michael and another Company employee approached Stieg, who was inside the Old Guard House. Michael placed a notebook on the concrete shelf and demanded that Stieg state his name and badge number. Stieg refused to do so, and informed Michael that to obtain that information, he should contact his supervisor and have his supervisor contact Stieg's supervisor. Michael and the other employee then walked away from the Old Guard House. After a brief interval, the two employees again approached Stieg at the Old Guard House. Michael again asked Stieg for his supervisor's name, and Stieg identified Rhode as his supervisor. After a closing comment, Michael and the other employee walked back into the South Plant.

Stieg phoned Rhode immediately after this. Rhode asked Stieg to document the incident, and informed Stieg that Rhode would discuss the matter with Michael's supervisor. Stieg prepared the document sought by Rhode, which states:

> Tim Michael and another employee walked up to my window asking for my name and badge #. I told him to talk to his supervisor and his supervisor could contact my supervisor. He said, so you're refusing to give me your name. He said that's going to help. They walked away and returned to my window a couple of minutes later asking for my supervisor's name and number. I told him Mike Rhode was my supervisor, but I did not give any more information. I told him to talk to his supervisor. He said, OK. . . .

Stieg's memo and testimony reflect that the "exact words" made by Michael as a closing statement were: "You shouldn't have done what you did. I'm going to get at it any way I can" (Tr. at 149).

Rhode came to the Old Guard House and picked up the memo. Sometime after that, Radish phoned Stieg. During this conversation, Stieg informed Radish, "his comments I took as a threat" (Tr. at 126).

The balance of the evidentiary background is best set forth as a brief overview of witness testimony on disputed points.

Katie Hess

Hess' role in Michael's discipline prior to the discharge came at suspension or probation meetings. Her role in the December probation period as well as in the meeting that prompted the August warning required her to review the documentation of Michael's personnel file and to consult with Nett regarding his imposition of the June probation. She was responsible for investigating the conduct underlying the discipline, and for conducting meetings on higher levels of discipline.

At the December 22 meeting, Michael acknowledged that he refused to show his badge to Stieg several times. On December 14, he parked as directed by Murkley's memos, and entered through the New Guard House. On December 15, he parked at the Union Hall and entered through the Old Guard House. He specifically denied "that he was being inappropriate or was defamatory or used any profanity" (Tr. at 53) while speaking to Stieg. He asserted Stieg specifically questioned why Michael had parked in the Union parking lot. Michael specifically denied that he tried to intimidate Stieg, and specifically denied making the closing comment noted in Stieg's December 17 report. He did not mention that Stieg tried to take Michael's badge. Hess did not personally interview Stieg, but did review his reports and did discuss the matter with Radish. She credited Stieg's written reports of the two incidents. She did not interview Stieg, but did conclude that Stieg had no reason to fabricate his account and that his account was honest.

At the December 22 meeting, Michael acknowledged he informed Callies that she was not respected by those she supervised. She understood Michael's concern with Callies to be that she "may have changed some return-to-work instructions" (Tr. at 89).

Corey Stieg

Stieg has worked for Allied Barton for five and one-half years, and recognized Michael as an employee who once worked at the Harrison Street Plant. Prior to December 15, he and Michael had not interacted in any way. Stieg understood Company policy, as of that date, to bar employees from parking in the South Plant lot and to enter through Gate 8.

On December 15, four employees, including Michael, approached Gate 8. They were walking together, as if in a group. He informed them that they could not enter through the gate, should not park in the South lot, and should enter through the New Guard House. Three of the four turned away and left. Stieg described what then happened thus:

> Mr. Michael refused to turn back. He didn't want to walk that far back. I informed him, too, that he was not allowed to enter through this gate, and they would like people to park over in the Global Technology Center and then go in through the other gate, and his exact words were, you don't fucking tell me where to park. Tr. at 114

As Michael spoke with Stieg, he "was very angry, very intimidating" (Tr. at 115). Stieg responded, "After the foul language, I asked Mr. Michael for his identification badge" (Tr. at 115). He did so to take Michael's name and badge number "because of the aggressiveness and manner in which he was using foul language directed toward me" (Tr. at 115). Stieg "asked for his badge several times, probably four or five times". (Tr. at 115). Michael finally relented, "After several minutes, he finally put his badge down so that I could see the information to write down the information and then his badge was handed back to him" (Tr. at 115). After Stieg had the information he wanted, "I gave his badge back" (Tr. at 116). Michael, contrary to Stieg's instructions, entered the South Plant through Gate 8.

Stieg described Michael as very angry December 17, adding that he pointed his finger at Stieg as he walked back into the plant, making the closing comment as he walked away. Stieg did not know the employee who accompanied Michael.

Timothy Michael

Michael stated he had filed perhaps one hundred grievances while a Steward. This included informal discussions with supervisors as well as written forms. He thought he was "very successful in the beginning" (Tr. at 169) in their processing.

After parking at the Union Hall on December 15, he approached the Old Guard House alone. He had entered the South Plant through the New Guard House on December 14. He walked by Stieg, displaying his badge. Stieg stopped him, noting he could not enter through Gate 8. Michael responded that he thought the only restriction regarding Gate 8 concerned parking. Stieg said he would allow Michael to enter and as Michael proceeded, Stieg added that Michael should not park at the Union Hall. Michael had not mentioned where he was

parking. Michael responded, "you can't fucking tell me where to park" (Tr. at 165), adding that he had permission to use the Union Hall. Stieg responded, "You can't use that language with me, I want your badge" (Tr. at 185). Michael refused to surrender the badge, but displayed it for Stieg. He denied ever giving it to Stieg. After the encounter, Michael reported the incident to his Chief Steward, asking why a guard would want to take a badge. The Steward told Michael to get the guard's name so that the matter could be discussed at a labor/management meeting. He also advised Michael to "bring a witness, stay calm" (Tr. at 194).

Michael entered the worksite on December 16 through Gate 8, without incident. He parked in the South Plant parking lot, because another employee had told him others were doing it. After he punched in, he reported to a pre-shift meeting with Murkley and other team members. At that meeting, Murkley advised employees who worked at the west end of the South Plant that they could use those portions of the South Plant parking lot that were not part of the construction site. Murkley also advised Michael that he was aware of the December 15 incident at the Old Guard House and did not think Michael had done anything wrong.

On December 17, he and Bob Ginke parked in the South Plant parking lot and entered past the Old Guard House. Stieg stopped them, instructing them not to enter through Gate 8. Ginke told Stieg that Murkley had approved use of the South Plant parking lot. Ginke suggested that Stieg contact Murkley. Stieg phoned his own supervisor and informed Ginke that they knew of no such approval. Michael responded by asking for Stieg's name and badge number. Stieg declined, telling Michael to contact his supervisor. Michael and Ginke then headed into the plant. Michael realized he had not asked Stieg to identify his supervisor, and then returned to the Old Guard House. Stieg told Michael that Rhode was his supervisor. Michael asked for Rhode's phone number, but Stieg declined to offer it. Michael responded with the closing comment noted on Stieg's report. At no point on December 15 or 17 did Michael get angry or threaten Stieg.

Michael testified that the Callies' conversation took place on December 17. Ewens told Michael that Callies had altered the return-to-work form and should not have done so. Michael is his Steward and told him that Michael would call Callies. When Callies responded to the page, Michael told her he needed to speak with her. Callies asked if it regarded Ewens, and Michael responded in the affirmative. They discussed the matter, essentially as recorded in Callies' statement.

Michael acknowledged that at the December 22 meeting, he denied using "fucking" during the December 15 incident. He lied, "Trying to protect myself, I guess" (Tr. at 203). He felt the charges against him were, "Absolutely bogus" (Tr. at 203).

Robert Ginke

In December, Ginke worked at the South Plant. Michael was not his Steward. On December 16, at a pre-shift meeting with South Plant employees, Murkley discussed parking,

and specifically told employees in the "T-case, large subs and hydraulic subs" (Tr. at 231) units at the South Plant could use the South Plant parking lot and enter through Gate 8. Murkley noted this affected only employees who worked in the area closest to Gate 8. At some point in that meeting, Murkley acknowledged the December 15 incident, indicating that Michael was not in trouble for it.

On December 17, after parking in the South Plant parking lot, he and Michael proceeded through Gate 8. That they entered the plant together was coincidental. After they passed the window of the Old Guard House, Stieg told them that they should not park where they did, and Ginke responded that Murkley had authorized it. Stieg made a phone call, and after some discussion, told Ginke and Michael to go through Gate 8. Michael at some point in that discussion asked for Stieg's name and badge number. Stieg declined each time Michael made the request. Ginke and Michael then left to go into the plant. After a few minutes, they decided to return to ask for Stieg's supervisor's phone extension. Ginke did not hear Michael threaten Stieg or make the closing comment recorded in Stieg's report of the incident. Regarding that comment, Ginke noted, "I'm not saying it didn't happen . . . I just don't recall it" (Tr. at 235). Ginke parked in the South Plant parking lot the entire week of December 14, and this was the only incident regarding his use of the lot or Gate 8.

Robert Murkley

Murkley has worked for the Company for twenty years, and is responsible for the oversight of over one thousand employees. The December 16 meeting was a Safety Stand Down for employees in the Transfer Case Department. Such meetings typically take fifteen minutes. At some point after the safety meeting, Michael and perhaps some other employees approached Murkley to discuss the December 15 incident and his problem entering through Gate 8. Murkley understood Michael's account to be that Michael had parked at the Union Hall or a lot near Gate 8, then attempted to enter through Gate 8, only to be stopped by Stieg, who ultimately allowed Michael to enter through Gate 8. Murkley advised Michael that he would work with security to assure that employees who worked in the portion of the South Plant closest to Gate 8 could park in the South Plant parking lot. He did not address any potential issue of discipline, but may have indicated he might assist Michael in dealing with the guard. At the time any such comment was made, Murkley had heard nothing beyond Michael's account of the incident. Murkley supported the discharge decision because, "We can't have employees treating other employees like that" (Tr. at 278).

Rhonda Callies

Michael's voice was raised constantly throughout the December 16 conversation. She found the conversation "disrespectful", and felt "like he was badgering me, trying to get me to admit I did something wrong" (Tr. at 293). She further detailed her feelings thus:

Q Did he make any threats?
A He didn't threaten me directly . . . (Tr. at 300)

A I didn't say I considered that a threat.
Q You don't, do you?
A No. (Tr. at 301)

Michael's tone of voice and what he said made the conversation improper.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Company's Brief

The Company prefaces its review of the evidence by noting, "This is a classic progressive discipline case." A detailed review of the evidence establishes that Michael "received no less than five formal disciplinary actions" spanning "the course of less than nine months." Against this background, the grievance must be denied.

Article 13 of the labor agreement makes discharge appropriate "if, following three formal written warnings in a 12-month period, the employee engages in any other conduct for which he is disciplined." The fifth of Michael's formal warnings came in December of 2009, and, "Under the contract Oshkosh was well within its rights to discharge" him. The November warning for failing to wear hearing protection could have prompted discharge, but the Company "exercised leniency and on December 11 offered Michael a last chance agreement and one-year probation, which offer he accepted." Arbitral precedent would support discharge for the "disrespectful, insubordinate" conduct he engaged in within a week of his last chance agreement even if "there were no aggravating factors, such as probation or a last chance agreement".

Arbitral authority recognizes that "last chance agreements are intended to benefit the employee by allowing a final opportunity to correct conduct and to benefit the employer by allowing it to avoid the trouble and expense of discharging and replacing the employee." Under this authority, "arbitrators do not apply the same due process considerations or procedural protections as under a normal discharge". To substitute an arbitrator's judgment for that of the parties would exceed contractual limits on an arbitrator's authority and undermine the purposes and use of last chance agreements. Review of the record shows clear, mutual agreement on the last chance agreement as well as clear violation of the agreement on December 15 and 17. By "disrespectful and insulting" behavior on those dates, Michael "as much as discharged himself."

The Union has not shown that any employee with a disciplinary history comparable to Michael's has been treated as leniently as the Company treated Michael. Beyond this, the record demonstrates that the Company "consistently enforces its progressive discipline policy." This consistency is particularly significant here, since the Company "does not tolerate inappropriate treatment of security guards." The nature of the Company's work

underscores the "importance of (its) security rules." The evidence demonstrates significant discipline for employee conduct less egregious than Michael's.

Arbitral precedent establishes a number of criteria defining witness credibility. Here, "Michael lied during the Company's investigation, provided other testimony inconsistent with that he gave to the Company, and is clearly biased". In short, Michael is not a credible witness. He acknowledged his lie at hearing, and his "self-interested" testimony contrasts starkly to the credible testimony of Company representatives. Arbitral precedent affirms giving greater weight to "the testimony of a disinterested witness for the employer, where there is no evidence of ill will toward the accused." Michael's direct interest in preserving his employment contrasts to the non-interested testimony of Company representatives and Stieg.

Viewing the record as a whole, the Company concludes that it is difficult to imagine "what else Oshkosh could have done to salvage an employee who repeatedly violated Oshkosh's work rules, the terms of his probation, and even his last chance agreement". The record demonstrates that the Company "had more than just cause to discharge Michael" and thus that "the Arbitrator should issue an award denying the grievance in its entirety."

The Union's Brief

Noting the grievance "is before the Arbitrator via deferral from the NLRB", the Union urges that its analysis must recognize its unique place on the line between contract and law,

> (W)ithin the parameters of the "just cause" provision adopted in this Collective Bargaining Agreement, the Arbitrator can consider all the facts surrounding the employer's actions including the fact the discharged employee was an aggressive steward who had filed many grievances. The Arbitrator should also consider that some of the actions for which Michael was discharged were directly related to his duties as a steward.

Review of the evidence establishes that "Michael was railroaded." The Company "decided to get rid of him and blew a number of trivial incidents all out of proportion to justify its action."

The nature of the Company's actions blurs the line between fact and argument. A review of the incidents underlying the charges against Michael demonstrates a weak basis for discharge. The April 20, 2009 warning for parking violations reflects no more than "congestion in the Company parking lots." The warning is being grieved.

The June 16, 2009 warning for "sexual harassment and intimidation" turns on the difference between calling a friend a "looker" rather than "calling a female employee" a "hooker." It rests on "no direct testimony from the alleged recipient of the alleged improper comment." Michael "under protest, accepted the punishment rather than face discharge."

The August 18, 2009 verbal warning for inappropriate use of NPL rests on no persuasive evidence of misconduct by Michael. In fact, his supervisor "was chastised by his boss for the incident". A grievance on the warning is pending.

The December 19, 2009 written warning for not wearing ear protection came a day after the underlying conduct. It is subject to a pending grievance.

Michael was working under a disciplinary probation, which was "due to expire on December 16, 2009". On December 11, 2009, based on the incidents in June and December, "Michael's probation was again extended." Facing "termination as an alternative" Michael had to agree.

Against this background, the incidents of December 15 and 17 afford little support for discharge, since "it is clear Michael did not make any intimidating or threatening statements." Regarding the incident of December 15, the Company exaggerates the significance of his use of the "F word", which in not unusual in this work setting and was not personally directed to the security guard. Michael's supervisor did not find the parking violation serious. Stripped to its essence, the incident poses no more than "an over-zealous guard asserting his authority." Michael did not refuse to show his badge, but "simply refused to surrender it because this was what he had been instructed."

There is little, if any, conflict between the guard's and Michael's testimony regarding the December 17 incident. Michael's remark that he would "get at it" did not constitute a threat toward the guard, or even an attempt to intimidate him.

Michael's alleged confrontation with Callies on December 15 involved "acting in his capacity as a Union steward." He did not threaten her, and did no more than advocate an employee's interest. There is no conflict in the testimony and no indication that Michael did anything more than question "the actions of a supervisor" and express "an opinion as to why the employees didn't respect her." This is no basis for an employee to lose a job.

To the extent the Company raises a timeliness issue, the issue was "waived . . . as part of the NLRB deferral". There is, in any event, no merit to the issue, because Schaller's testimony "established the Grievance in the case was timely filed."

Viewed as a whole, the record establishes that the Company "trapped Michael into agreeing to probation" and then accused "him of questionable violations of Company rules." Those allegations are subject to pending grievances and the Company has not provided Michael with "his day in court." Viewed as a matter of law or of contract, the alleged work rule violations will not support a finding of just cause. The Company's discipline constitutes "taking trivial situations and exaggerating them to make an aggressive steward toe the line." It follows that, "the Arbitrator should agree with the Union that Union Steward Michael was improperly discharged."

The Company's Reply Brief

The offenses the Union dismisses as trivial are in fact significant instances of misconduct standing alone, ignoring that they came "while he was on probation and under a last chance agreement to retain his job."

The Company's questioning of the timeliness of the grievance at hearing poses no issue for determination, since "for the purposes of this arbitration only, Oshkosh does not dispute that Michael filed his grievance in a timely manner."

The assertion that the Company "railroaded" Michael "misses the mark by a long shot." The record affords nothing other than Michael's self-serving testimony to undercut the Company's position. His testimony is not credible and "is hardly compelling." That Michael called an employee "a looker" rather than "a hooker" simply "makes no sense". Nor does his failure to grieve the incident make sense. The assertion that he followed procedure regarding the August 18 verbal warning "is laughable on its face" and is supported by nothing beyond his testimony. The assertion a day passed prior to his being warned for not wearing ear protection files in the face of the evidence, including Michael's testimony. Beyond this, the evidence shows the Company applies its discipline policy even-handedly. Similarly, the evidence shows a consistent pattern of Company discipline directed toward "an employee's inappropriate behavior toward a security guard." None of the affected employees was a Union Steward, yet "each received formal discipline."

Nor will the evidence support the assertion Michael was tricked into the last chance agreement. The evidence demonstrates he "knowingly and voluntarily entered into his last chance agreement". The Union's assertion that Michael's supervisor condoned his misconduct is "untrue" and cannot "in any way excuse Michael's bad behavior." Murkley did not approve employees to park in violation of Company policy or to enter through Gate 8. Murkley's testimony cannot obscure that Michael never acknowledged the severity of his misconduct toward Stieg. Nor can it explain why Michael complied with Company parking policy and entered through the proper gate on December 14, but not on December 15 and 17.

The record demonstrates that "Michael chose to repeatedly violate Oshkosh work rules and therefore received progressive discipline commensurate with the nature of his offense." Since the Company fully complied with the labor agreement in discharging him, the grievance must be dismissed in its entirety.

The Union's Reply Brief

The Company's brief establishes the persuasive force of the Union's concern that the Company's multiple disciplines rest more on rhetoric than fact. Analysis of the record must focus on turn on three principles. The first is that fact must rest on direct evidence rather than to "adjectives cleverly used to describe the Grievant's conduct." This includes not relying on "secondhand conclusions and/or testimony of company human resources representatives as to

what took place." The second is that "just cause" demands the exercise of "common sense knowledge of factory life". The "coerced probation procedure (not in the Collective Bargaining Agreement)" cannot obscure that much of the underlying conduct is subject to unheard grievances and stands unproven. The third is that "the Grievant's protected activities as a Union Steward were directly involved in several of the incidents and indirectly involved in the Company's overall actions toward him."

Detailed review of the record establishes that the Company has substituted its own judgment in place of proven fact. More specifically, the Company has not proven that Michael was disrespectful to the guard. No direct evidence shows what Michael said to create "an 'intimidating work environment'." No direct proof shows that Michael sat idle for the time listed as NPL. Alleged safety violations lack record support other than Michael's uncontradicted testimony. The Company's version of the guard confrontation "stresses the use of the F word out of context and tries to insinuate the word was 'directed' at the guard." The testimony on the confrontation between Callies and Michael is largely undisputed and cannot, in any event, obscure that he "did nothing wrong." There is no reliable evidence that Michael threatened the guard. Viewed as a whole, the Company's case substitutes "adjectives and misplaced verbs as substitutes for FACT."

On a broader level, the Company should not be able to hide the need for a detailed analysis under just cause behind "a cleverly imposed last chance 'agreement?'." The record as a whole demands that the discharge should be set aside and Michael should be reinstated and made whole.

DISCUSSION

I have adopted the Company's statement of the issues. The Union's focuses on the just cause standard set by Articles 8 and 22. Article 22 refers to "cause" while Article 8, Section 2 refers to "just cause". The agreement uses the terms interchangeably. This is unremarkable, as underscored by *Management Rights*, Hill & Sinicropi, (BNA, 1986) at 99: "The term 'just cause' is generally held to be synonymous with 'cause,' 'proper cause,' or 'reasonable cause.'" There is no reason to create conflict between Articles 8 and 22 and neither party seeks to.

The Company's statement of the issue makes unmistakable that Article 5 grounds arbitral authority. This clarifies that application of just cause does not necessarily bring federal labor law with it. As discussed at hearing, I do not address external law unless the parties stipulate to it or the agreement requires it. Their arguments do not put federal law at issue. The Union argues that a common sense application of just cause must cover Michael's role as Steward. This highlights that the issues are contractual. I have adopted the Company's statement because, even if less focused than the Union's, it makes the contractual basis of the grievance unmistakable.

This only prefaces analysis of the record. The Company bases the discharge on two strands. One asserts a "classic" case where an employee fails to amend improper behavior after the proper administration of progressive discipline. The other asserts egregious behavior

demanding immediate discharge. The Code recognizes each strand in its "Progressive Discipline" and "Serious Behavior Violations" sections. More fundamentally, the first two sentences of Subsection 1a of Article 13 ground these strands.

The June and December probation periods blur the line between these strands of argument. However, Hess' December 21 letter highlights that the Company does not inflexibly apply its authority under a probation period, as implied by Section 5a of the Code's Progressive Discipline section. This has solid roots in Article 13, which expressly refers to the Company's "exercise of discretion in determining discipline." This makes just cause analysis a review of the specific disciplinary discretion exercised by the Company.

In the absence of stipulation, I view the cause analysis to consist of two elements. The first is that the Employer must establish employee conduct in which it has a disciplinary interest. The second is that the Employer must establish that the discipline imposed reasonably reflects its disciplinary interest. This states a skeletal outline that the parties' arguments flesh out.

Their arguments trace to Hess' January 8, 2010 letter, which focuses on the course of Michael's conduct from December 15 to 17. Michael's December 15 interaction with Callies is a discrete event, which does not pose the difficulty of finding fact that the guard house incidents pose. Analysis of the record starts, then, with December 15.

Review of the record regarding the December 15 conversation highlights strength in each party's position. Company arguments pose issues regarding whether Michael committed "Serious Behavior Violations" under Items 3 and 5 of the Code. Union arguments pose considerable issues regarding whether Company allegations have a solid factual basis.

The December 15 conversation does not pose significant credibility issues. Michael placed the conversation on December 17. There is no reliable evidence to support him. This does not pose a significant issue because he was not insistent on the accuracy of his recall and there is no dispute on the conversation's date. That Callies was a credible witness underscores the significance of the common factual basis to her and Michael's testimony.

The common factual basis establishes no more than a dubiously effective advocacy effort on Michael's part. This falls short of an Item 3 or 5 Serious Behavior Violation. The asserted insubordination/intimidation points to Michael's tone of voice as well as to the content and context of the conversation.

The context of the conversation reflects less than intimidation. Michael is a large man, whose testimony showed abrupt speech patterns. He paged Callies, thus prompting a phone conversation. This undermines the assertion he sought to intimidate her. A phone conversation precluded use of his size or physical gestures and limited the effect of his strong voice. The significance of this should not be overstated, but underscores that he did no more than promptly page Callies on a newly raised issue.

The conversation's content does not show intimidation. Callies did not feel threatened, and Michael never made a threat. That Michael told her that he was not done with it and would investigate is, apart from his tone of voice, no more than advocacy. At most, Callies felt Michael was trying to badger her into acknowledging misconduct where she saw none. As a matter of speech content, this stands as advocacy. Whether it was effective advocacy has limited bearing on the disciplinary issue.

The more subtle point raised by Callies points to Item 3 of the Code's Serious Behavior Violations. It turns on whether Michael's tone of voice coupled with his assertion that she lacked the respect of her team crossed a line between advocacy and disciplinable behavior. Callies' credibility as a witness and evidence of prior incidents of unsatisfactory communication between Michael and supervisors indicate that he uses an aggressive tone of voice. His tone of voice, coupled with his assertion that she lacked the respect of her team is troublesome. However, standing alone, it does not establish conduct in which the Company has a disciplinary interest. It is dubious advocacy because whether she changed the return to work date could be resolved with a bit of investigation. Michael's aggressive approach heightened the dispute into a personality conflict. There is, however, no evidence that he made the statement in bad faith.

Beyond this, turning Michael's advocacy into a disciplinary interest ignores that Ewens was upset and believed Callies played an improper role in the change of dates. What prompted Ewens' contact with Michael cannot be held against Michael without subverting his role as Ewens' Steward. Callies testified she explained the change to Ewens, but it is clear that her effort did not go well.

Callies' credibility as a witness cannot obscure that the change in dates involved a sensitive matter regarding a patient's relationship with his physician. Callies' and Ewens' perspectives on that issue can reasonably be expected to be different, and the evidence establishes that Michael understood Ewens to believe Callies played too active a role. The sense of her testimony on cross is difficult to incorporate into this decision, but it was evident she understood the sensitivity of the point. Even from the transcript, it can be seen that her testimony grows in detail. By the end of her testimony, it is evident that she conveyed more to the nurse than a simple question on whether the physician realized that Ewens worked second shift. Her report, unlike her initial testimony, highlights a more active role in the change of dates: "I told him that I informed the hospital that we could accommodate the restrictions if the doctor feels the employee could return to work tonight." This does not make her testimony incredible. Rather, it indicates her direct testimony understates how active her role in the change was. This does not necessarily make her conduct improper, but highlights how large a gap could have existed between Ewens' and Callies' perception of the same events. More to the point, it indicates Ewens' had a more objective basis for concern that the Company acknowledges. This underscores that Michael's advocacy has a demonstrated basis in fact.

Against this background, the December 15 conversation does not, standing alone, establish a Company disciplinary interest in Michael's conduct. The evidence shows Michael used an aggressive tone of voice. This falls short of establishing an independent basis to

discipline him. The evidence shows that Callies was upset by the conversation and reported the matter immediately to Radish. Because of the swirl of events surrounding the events of December 15 and 17, there is no evidence Radish or any other member of Company management attempted to assess the factual basis of the dispute beyond concluding Callies should be defended. This is not improper. However, if her work performance matches her witness performance, she requires little defense. More to the point, the factual basis of the dispute is more sensitive than whether the Company should defend a supervisor or the Union should defend a steward. The issue on the first element of the cause analysis is not the quality of her work or Michael's advocacy. Rather, the issue is whether the evidence establishes conduct on Michael's part in which the Company has a disciplinary interest. The evidence will not support a disciplinary interest in the December 15 conversation standing alone.

This brings the analysis to Michael's course of conduct in the guard house incidents. The December 17 warning specifies conduct which is "inappropriate, disrespectful and creates an intimidating work environment." The discharge letter characterizes the conduct as a violation of Item 5 of the Code's Serious Behavior Violations. The evidence establishes a Company disciplinary interest in the course of conduct that falls short of an Item 5 violation.

A considerable part of the Company's disciplinary interest is rooted in undisputed behavior. Michael was profane and lied about it. This establishes "inappropriate" or "disrespectful" conduct. The issue is thornier regarding intimidation.

The alleged intimidation is that Michael, without provocation, refused to display his badge to Stieg and then swore at him. Stieg's testimony was even-tempered. This cannot obscure that his testimony, standing alone, will not support this view of the December 15 events.

Stieg's testimony and documentation shows the confrontation occurred within a longer conversation that became a confrontation as a result of both participants' conduct. Stieg's initial description of the incident has Michael acting aggressively and profanely without reason. Confronted with this conduct, Stieg only asked Michael to display his badge.

His account affords no clarity on why Michael became aggressive. There is evidence that Michael can behave aggressively, but no reliable evidence he does so without provocation. Callies may not have provoked Michael's tone of voice, but Michael understood himself to be conveying Ewens' concern about supervisory misconduct. Even assuming no such misconduct occurred cannot obscure that Michael's raised tone of voice had a cause. Stieg's initial testimony affords no clue on what provoked Michael.

Nor is it necessary to weigh Stieg's demeanor against Michael's to question the accuracy of Stieg's testimony. His December 15 memo starts by locating where Michael parked. His initial testimony ignores this. At a minimum, the memo demonstrates that more than a simple instruction of Company parking policy preceded the confrontation. Stieg's testimony never accounts for how the dialogue became a confrontation, other than by asserting Michael was out of control. At one point, Stieg testified that Michael's profane outburst "was the first words out

of his mouth" (Tr. at 131). Stieg's testimony never explains how or when Michael informed Stieg he had parked at the Union Hall. The anomaly highlights that Stieg's testimony cannot account for how a simple instruction became a dialogue and ended a confrontation.

Nor will Stieg's testimony establish that he asked no more of Michael than to display his badge. His report implies that he fell back to this position from a stronger request by noting it took "several minutes to get him to even show his badge." Standing alone, this statement may indicate Michael failed to display his badge, rather than implying Stieg asked Michael to surrender it. Stieg's testimony fails to clarify this. On direct, Stieg first described the request thus: "I asked Mr. Michael for his identification badge" (Tr. At 115). This statement could indicate he wanted Michael to display the badge, but implies more. Stieg elaborated thus, "I had asked for his badge several times", (*Ibid.*) prompting only a refusal from Michael. At a minimum, these statements imply he wanted not just to see, but to take possession of, the badge. Stieg's account has Michael finally agreeing to lay the badge on the counter, where Stieg could record its contents. Significantly, Stieg thus describes his action after he recorded the information: "I gave his badge back, yes" (Tr. at 116). Without regard to Michael's testimony, Stieg's indicates that Stieg sought and received possession of Michael's badge. Later in his testimony, Stieg denied he sought possession of the badge. This fails to resolve significant internal inconsistencies.

This is not to say Michael's testimony on December 15 is without difficulty. His account unpersuasively portrays the extended dialogue as a relatively laid-back conversation, starting after Stieg allowed him through the gate, and punctuated by a bit of colorful language. He asserts that Stieg, without prior mention from Michael, told Michael not to park at the Union Hall. What would have provoked Stieg's comment is inexplicable. There is no dispute Stieg cannot see the Union Hall from within the Old Guard House.

What appears as a chasm in the two accounts has common elements. Each witness points to the other as the source of conflict within the confrontation, but it is evident each viewed the conflict as significant. Both reported the incident after its occurrence and both involved their supervisor. Each participant's conduct after-the-fact points to a noteworthy confrontation occurring within an extended dialogue. More to the point, their accounts of the underlying confrontation track closely. Each has the confrontation escalating with Michael's profane outburst. Both accounts have Stieg then asking for Michael's badge. Stieg testified thus, "I asked Mr. Michael for his identification badge". Michael testified thus, "he told me he wanted my badge"; further detailing it thus, "You can't use that language with me, I want your badge" (Tr. at 185). Each account then has Stieg unsuccessfully repeating his request for Michael's badge. On direct, each account shares the view that Stieg asked for the badge.

From the swirl of the evidence, fact must be found. In my view, the record reliably establishes that on December 15, Michael and Stieg discussed parking policy at some length. The conversation became animated when Michael took Stieg to be denying him the ability to park at the Union Hall and enter through Gate 8. Michael responded profanely with the comment noted on Stieg's report. Stieg responded to the profanity and to what Stieg perceived as an

aggressive posture on Michael's part. Stieg's response, however, was to seek information displayed on Michael's badge in a manner that Michael perceived to require him to surrender the badge. The confrontation ended when Stieg wrote down Michael's identification information. After this, Michael entered the South Plant through Gate 8. It may not be possible to reconstruct precisely what each participant said, but the evidence establishes that each participant reasonably perceived the other's statements as improper.

Against this background, the course of conduct in the December 15 guard house incident falls short of an Item 5 Serious Behavior Violation. This cannot obscure that Michael's profanity and tone of voice constitute disrespectful conduct. However, the proven conduct of December 15 falls short of the unprovoked aggression alleged in the final warning and the discharge letter.

Akin to the December 15 Callies/Michael conversation, there is no fundamental dispute regarding the events of December 17. Michael's closing comment, taken by Stieg as a threat, is undisputed. Conflicts abound in witness testimony, but there is agreement on its factual core.

It is evident Stieg took the closing comment as a personal threat. The context affords some support for his view. Viewed as speech alone, the "any way I can" reference is troublesome. However, the "get at it" reference is neither personal nor personally directed at Stieg. Like the comment to Callies, Michael's statement indicates less that Michael wanted to bully than that he viewed himself as a standard bearer exposing improper conduct. The context of the remark affords little support for the view that Michael threatened Stieg. None of the witnesses to this conversation testified that Michael sought information beyond Stieg's badge number and name. There is no indication Michael objected to following the chain of command to obtain the information. Stieg's perception cannot account for Michael's returning to the Old Guard House a second time to get Stieg's supervisor's name. This is not behavior reconcilable to the delivery of a personal threat. Nor is it easy to reconcile Michael's eagerness to bring the December 15 incident to Murkley with the view that Michael sought to intimidate Stieg. Murkley's testimony establishes that he responds to facts, not to Michael's version of them.

Nor does the testimony reliably indicate Michael acted menacingly. Stieg placed Michael and Ginke a few feet apart, yet testified at one point that he did not think Ginke could have heard his conversation with Michael. Under Stieg's view on direct testimony, Michael gestured and spoke in a "very angry" (Tr. at 122) tone. This parallels his description of Michael's demeanor on December 15. However, internal inconsistency again appears. On cross examination, Stieg described Michael's voice as "slightly raised" (Tr. at 143).

On balance, the evidence demonstrates that Michael's course of conduct through the December 15 and 17 guard house incidents was profane and disrespectful. It does not, however, demonstrate that Michael acted to intimidate Stieg in violation of Item 5 of the Code's Serious Behavior Violations section.

The analysis thus turns to whether discharge reasonably reflects the Company's disciplinary interest in Michael's conduct. This brings into question the Company's two strands of argument. The Code's "Progressive Discipline" section is the basis of the "classic" case for course-of-conduct discharge. The Code's "Serious Behavior Violations" section is the basis for immediate discharge for egregious misconduct.

The June and December probations complicate this. Further complicating this is the presence of grievances on much of the past discipline. The grievances pose a jurisdictional type of difficulty in reviewing past discipline under the second element. The grievances cannot, however, obscure that the Union did not grieve the December probation period. The policy grievance concerning the imposition of the June probation period appears untimely, and that grievance is not posed here.

Nett's and Hess' documentation of the June and December probation period each note, "Any violation of the Labor Agreement resulting in formal discipline during this timeframe will be cause for termination." The August 10 and November 24 incidents establish that the Company did not apply this sentence by rote under the June probation. Rather, it continued to exercise the discretion established under Article 13.

Against this background, application of the second element is a reasonableness review of the Company's exercise of its Article 13 discretion to implement the December probation. This recognizes the County's discretion not to apply the June probation strictly to the August and November incidents and avoids arguably jurisdictional issues regarding those incidents.

The weakness of the Company's position is that the events of December 15 and 17 fail to establish an Item 3 or Item 5 Serious Behavior Violation as alleged in the discharge documentation. The strength of the Company's position is that the December probation rests on "any violation" of the labor agreement, and the evidence proves Michael lied about his use of profanity and acted disrespectfully with Stieg and Callies. The strength of Company interest in Michael's profanity cannot be ignored, but cannot be accepted uncritically. One of the pending grievances questions whether a supervisor told an employee during a discussion of seniority, "Fuck the union." No reliable fact can be found on that issue, but nothing in the grievance's processing indicates that worksite use of "the F bomb", standing alone, is egregious misconduct. This may not offer great insight into how profanity plays in this workplace, but it highlights the difficulty of determining the severity of Michael's profanity. In any event, whether any part of the December misconduct is egregious standing alone, it reflects a course of conduct traceable to the parking tickets and to the incident prompting the June probation. Even granting the presence of a grievance regarding the April warning, Michael was on notice that intimidating conduct toward women and toward a security guard is significant. The December lapse of judgment thus acquires cumulative weight as "the straw that broke the camel's back."

On balance, the record will not support discharge as a reasonable sanction for the Company's proven disciplinary interest. The assertion that Michael's disciplinary history carries cumulative weight has force, but obscures that the proven December misconduct fits better in the

Progressive Discipline Section of the Code than in the Serious Behavior Violations section. That the December probation period was not grieved does not make the alleged misconduct in December egregious, and the Company applied the June probation period with regard to the severity of the misconduct. The alleged severity of the December misconduct dominates the discharge documentation. To treat the failure of proof of egregious misconduct as irrelevant to the discharge is thus an unpersuasive reading of the evidence. It follows that discharge does not reasonably reflect the Company's disciplinary interest in the December 15 and 17 incidents.

Before addressing the issue of remedy, it is appropriate to tie this conclusion more tightly to the parties' arguments. The grievance was hard fought and well argued. Evidence regarding Company application of its disciplinary discretion to other employees during a probation period or regarding conduct to security guards offers little guidance. Some of the discipline is grieved. In any event, evidence of consistent or disparate discipline of other employees affords no insight into the fundamental difficulty posed by this grievance, which is to pull reliable fact from the evidence regarding the December incidents.

The grievance does not pose broad issues of witness credibility. That Michael lied to the Company impacts the issue of remedy. Regarding the cause analysis, the impact is less direct. Witness credibility bears on the determination of fact where proof of a fact is in doubt. Significantly in this grievance, the core of fact crucial to the December 15 conversation with Callies and the December 17 interaction at the Old Guard House is not in dispute. Stieg's and Michael's interaction on December 15 poses issues of fact. However, broad credibility conclusions play a limited role in finding fact. Stieg's demeanor was more low-key than Michael's. Stieg was more articulate. The difficulty in the determination of fact is that Stieg's testimony was less internally consistent than Michael's. The most difficult part of the determination of fact is that a conclusion that one or the other was "lying" affords little assistance. They became embroiled in a confrontation, and each account suffers from the absence of reliable detail that inevitably accompanies emotional confrontation. Branding Michael a liar cannot explain how Stieg came to know that Michael parked in the Union Parking Lot. Branding Stieg a liar cannot explain why he accurately recounted Michael's closing comment on December 17. The difficulty of finding fact is exemplified by the consequences of these two points. Stieg's account cannot explain what caused Michael to become upset and Michael's account cannot explain why Stieg felt threatened.

Michael's account benefits from consistency with fact outside of his own testimony. No witness testimony other than Stieg's indicates parking problems in the South lot were ever fully resolved during the week of December 14, or that employee access through Gate 8 was ever fully stopped. Ginke's and Murkley's accounts of the safety stand down meeting track closely, including the subunits involved in the meeting. Whether Michael's discussion with Murkley regarding the December 15 incident occurred at or after the December 16 meeting is inconsequential. It is evident that Murkley focused on safety and regarded anything else as a non-meeting event. The fact of significance to this determination is that Michael's description to Murkley of the December 15 events tracks his hearing testimony well. Because Murkley relied on the accuracy of Michael's description, his testimony does not corroborate Michael's account.

However, there was no reason for Michael to fabricate his account to Murkley on December 16, as the events that provoked discipline had yet to develop momentum. There was no reason for Michael to create a defense. Murkley's testimony and demeanor establish that he was not predisposed to view his relationship to Michael as more important than events on the worksite. This consistency contrasts favorably to the inconsistencies in Stieg's account.

Ginke's testimony corroborates, without fully affirming, Michael's. Michael's testimony indicates a Chief Steward told him to get a witness and stay calm if he sought the guard's identification information. Ginke denied being used as a witness and stopped short of affirming or denying Michael's closing comment. This offers no support for a view that Michael fabricated a defense for a course of intimidation. The statement he attributes to his steward accurately highlights the fundamental difficulty in his advocacy efforts, which was remaining calm. That does nothing to advance a predesigned defense.

In sum, the evidence affords little reason to generally credit either Stieg's or Michael's account. Rather, the evidence shows two accounts that obscure a confrontation between active participants. Specific fact is difficult to extract from the confrontation. The conduct of each witness after the confrontation confirms that it involved extended dialogue. The core of fact that can reliably be drawn from the confrontation will not support the conclusion that Michael sought to intimidate Stieg. Rather, the evidence shows that the factual basis underlying Stieg's account was never objectively assessed by the Company, but became part of a swirl of events by which the Company concluded Michael was guilty of a course of intimidating behavior.

Employee self-interest offers little guidance. Assuming Michael's account should be rejected because he has an interest in preserving his job ignores that the bulk of the alleged misconduct rests on an undisputed core of fact. That portion of fact which is disputed turns on testimony of two active participants who are each an employee. If Michael has a self interest in making Stieg responsible for their confrontation, Stieg has no less interest in placing the focus on Michael. This restates rather than resolves the difficulty in finding fact.

This poses the issue of remedy, which, like each aspect of this grievance, is problematic. Viewed generally, remedy is always problematic in the sense that the labor agreement does not typically provide specific guidance. Make whole relief typically involves putting a grievant in the position he would have been but for the discharge, see, e.g. *Labor and Employment Arbitration*, Bornstein et. al., (Matthew Bender, 2009) at 39-18. There is, however, considerable latitude inherent in this determination, including reinstatement with full, some or no back pay, see, e.g. *Remedies In Arbitration*, Hill & Sinicropi, (BNA, 1991) at Chapter 8.

Here, the Union seeks that Michael be made whole. The issue is problematic on this record because the issue on its merits is whether the Company's discharge of Michael violated the agreement. Application of the cause standard addresses that point, but its application establishes that the Company had a disciplinary interest in Michael's misconduct, but not one that reasonably supports discharge. This makes what remedy is "appropriate" problematic. Arguably, the Company has an interest that could reasonably be reflected by lesser discipline.

In any event, an arbitrator's duty under Article 5 is to "apply this Agreement" to evidence generated through the grievance process. This does not require an attempt to substitute my judgment for the Company's on what discipline could appropriately be applied to Michael. This is complicated by the Company's and by Michael's conduct, as well as by the ungrieved probation period. Company review of Michael's conduct was largely restricted to its management team regarding the December incidents. The Company did not rigorously test the factual basis of Stieg's or Michael's accounts of the guard house incidents. The Company accepted Callies' sense that Michael's advocacy strayed into insubordination or intimidation, without testing its factual basis. Michael contributed less than that to the determination of fact by lying to the Company. As a result, rigorous testing of the factual basis of the discipline did not occur until the arbitration hearing.

These circumstances indicate that Michael would be made more than whole by an order granting reinstatement with full back pay. His lying to the Company is conduct in which the Company has a disciplinary interest. However, the lie does not establish fact sufficient to warrant discharge. The basis of make whole relief is Company violation of the agreement by imposing discharge based on facts insufficient to support it. Those facts were not made plain until the arbitration hearing. Michael's misrepresentation of fact in December seriously compromised Company fact finding. Against this background, the date from which to measure the back pay liability is November 10, 2010, the date of the arbitration hearing. This reflects that Michael's misrepresentation seriously undermined the Company's ability to determine fact until hearing, when he acknowledged the misrepresentation. Here, only two individuals had direct access to crucial facts, and Michael's lack of candor shielded information from the Company.

Dating the back pay from the date of hearing can be viewed as a lengthy suspension. The Union has argued that his lie reflects the impossible position he was put into as a result of two probation periods. Whatever force this has reflects the backlog and adversarial tone of the grievance process. That force can neither excuse a deliberate fabrication nor obscure that his misrepresentation made a significant contribution to the adversarial tone. The date of the back pay liability is not an attempt to impose a suspension; to make an unpalatable result more palatable; or to hedge the risk of error in finding fact. Rather, it is a function of the make whole remedy and is rooted in the evidence.

It does not follow from this that reinstatement without back pay is persuasive. It would not reflect the evidence. It ignores that the alleged Serious Behavior Violations are unproven. It also ignores that the Company has exercised its discretion to discipline with care for underlying fact. This is precisely what Articles 8, 13 and 22 authorize. Hess' willingness to rescind Walgenbach's disciplinary excess regarding the events of August 10 demonstrates this point. Her action regarding the August discipline was based on her team's willingness to rigorously review fact. The absence of such rigor regarding the December misconduct warrants the make whole relief awarded below, without forcing the Company to subsidize Michael's dishonesty prior to hearing. This has the effect of making delay within the grievance process, from time of filing through the hearing, weigh heavily on Michael. The record was not made to address the backlog in the grievance procedure, and no reliable conclusions can be made regarding what caused it. In

the absence of the December misrepresentation, the back pay liability would extend from the effective date of discharge.

The Award entered below provides general make whole relief. The parties have not raised remedial issues and the retention of jurisdiction should not be read to imply their existence. Rather, it opens the arbitration forum as a means to address issues on remedy.

AWARD

Oshkosh did violate the parties' collective bargaining agreement when it discharged Michael.

As the remedy appropriate to its violation of Articles 8, 13 and 22, the Company shall reinstate Michael to the position he would occupy but for his discharge and shall expunge any reference to his discharge from his personnel file(s). The Company shall also make Michael whole by compensating him for the wages and benefits he lost due to the discharge, but not to include the period between December 22, 2009 and November 10, 2010.

To address any issue regarding the implementation of remedy under this Award, I will retain jurisdiction over the grievance for not less than thirty days from the date of this Award.

Dated at Madison, Wisconsin, this 25th day of March, 2011.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
7711