

IN THE MATTER OF ARBITRATION BETWEEN

POLAR TANK TRAILER, LLC.
(Employer)

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
DISTRICT LODGE NO. 165, AFL-CIO
(Union)

DECISION
(Discharge Grievance)
FMCS Case No. 08-53811-3

ARBITRATOR: Frank E. Kapsch, Jr.

DATE AND PLACE OF HEARING: April 24, 2008, at the Holiday Inn Hotel &
Suites located in St. Cloud, MN.

RECEIPT OF POST-HEARING BRIEFS: Both Parties submitted timely briefs as
of May 23, 2008.

APPEARANCES

FOR THE EMPLOYER:

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FOR THE UNION:

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JURISDICTION

The Parties stipulated that this Arbitrator has been properly selected in
accordance with the provisions of Article 7 of the current labor agreement and
possesses the responsibilities and authorities set forth therein to decide and
determine this dispute. The Parties also stipulated that this Arbitrator may
formulate the Statement of the Issue.

THE ISSUE

Did the Employer violate the current labor agreement when it terminated the
employment of Jesse Harlander? If so, what shall the remedy be?

THE EMPLOYER

Polar Tank Trailer, LLC is North America's second largest manufacturer of over-the-road tank trailers for the transport of dry and liquid commodities. Polar has been in business since about 1939. It currently operates three state-of-the-art manufacturing facilities in the United States, including a facility located in Holdingford, MN (a/k/a Opole Plant), which is involved in this matter.

THE UNION

The International Association of Machinists and Aerospace Workers (IAMAW) traces its roots as a labor organization back to the late 1880's. The International Union is currently headquartered in Maryland and comprises some 730,000 total members. Its District Lodge No. 165 has its principal office and place of business located in St. Cloud MN. District 165 represents some 3500 members in various industries throughout Minnesota and Wisconsin, including certain employees at the Polar Tank Trailer facility in Holdingford MN.

COLLECTIVE BARGAINING HISTORY

The Union is the certified collective bargaining representative for the following unit of employees employed by Polar at its Holdingford MN facility:

“All classifications in the production department, tool rooms, machine shops, maintenance departments, tool cribs and plant, truck drivers and inspection, but excluding office, plant restroom and lunchroom cleaning janitors, children of supervisors, all office employees, guards and supervisors as defined in the National Labor Relations Act, as amended...”

The Union and the Employer have been parties to a successive series of negotiated collective bargaining agreements over the years. The current labor agreement was effective December 1, 2005 and is scheduled to expire November 30, 2008.

BACKGROUND

As noted, the Employer's facility at Holdingford MN is engaged in the fabrication and manufacture of over-the-road tank trailers which are used to transport bulk quantities of liquid or dry products and commodities. The trailers are typically fabricated out of various metals such as aluminum, steel or stainless steel. The fabricated parts are then assembled and welded together to form the vehicle frame and tank. Wheels and other necessary accessories are added and the ultimate result is a completed trailer, ready for the road.

The Grievant and subject of this matter is a 22-year-old male by the name of Jesse Harlander. He commenced employment at the Holdingford facility on about August 10, 2004. He was discharged by the Employer on January 31, 2008. During his tenure as an employee, he generally worked as an Assembler in the Assembly Department. The Employer contends that during his tenure of employment with the Company, Harlander has been the subject of a continuing series of complaints, problems and disciplinary actions with respect to his interactions with both supervisors and co-workers.

On 9/28/05 Assembly Department Leadmen, Kevin Solarz and Mike Rohde approached Gene Waldvogel, the Employer's Director of Operations. They were upset and advised him that Harlander was difficult to work with most every day. They complained that he argued and disagreed with them, wouldn't follow instructions, questioned their instructions and, for the most part routinely, refused to follow their instructions. As an example, the Leadmen pointed out that he had recently refused to wrap up his welder at the end of his shift. It was pointed out to him that he had installed a fifth wheel plate incorrectly and he was instructed to change the plate and install it correctly. He refused to reinstall the plate and left the problem for the employees on the next shift to deal with.

Solarz and Rohde informed Waldvogel that they no longer wished to work with or around Harlander and wanted him moved to another department or at least to another part of the final assembly area.

Waldvogel subsequently informed Union Steward Jim Storlie of the complaints from Solarz and Rohde and a meeting was set up to investigate and review the situation. The meeting was held later that same day. Present were Solarz, Rohde, Waldvogel, Storlie and Harlander. Also present were Jim Bell, the Director of Human Resources, and Dave Neisinger an Assembly Department supervisor. Solarz and Rohde explained their position with respect to Harlander. For his part, Harlander agreed that he would try to work more harmoniously with his co-workers. It was also arranged that Harlander would subsequently work with Phil Bautch, Master Leadman, who specialized in training new employees in the Assembly Department. At the conclusion of the meeting Harlander was issued a verbal warning for the situation and the discipline was not grieved or otherwise challenged.

Four months later, on January 27, 2006, Harlander received a second verbal warning. This action came in response to ongoing complaints from co-workers to management to the effect that they did not wish to work with Harlander. Among the specific complaints were allegations that he used abusive language with co-workers, refused to follow instructions and orders and got easily frustrated and threw things around.

Harlander was informed that if he failed to heed this disciplinary warning and address the situation in a satisfactory manner, future action by the company will result in his discharge. The disciplinary action was not grieved or challenged.

In spite of the two previous disciplinary warnings, on December 22, 2006, Harlander was accused of throwing a snowball at Ed Linn, a co-worker, while Linn was operating a forklift. Harlander admitted throwing a snowball at Linn, but contended that the throw missed Linn. Another witness acknowledged that Harlander's snowball missed Linn, but hit a crossbar on the forklift and spattered snow fragments on Linn. As a result of the incident, Harlander was given a disciplinary suspension for part of the day on December 22 and was advised, in writing, that he was on probation. He was advised that if he was subsequently involved in any further horseplay or throwing things, including snowballs, he would be immediately terminated. The disciplinary action was not grieved or challenged.

During the investigation of the snowball incident on December 22, Waldvogel, the Operations Director, also learned from Dave Neisinger, Harlander's immediate supervisor, that Harlander had been accused of throwing tape balls at co-worker Scott Lease, on two separate occasions back in September, 2006. Harlander had denied any wrongdoing in each incident, but based on the circumstantial evidence, Neisinger had issued a verbal warning to Harlander about throwing things.

On February 5, 2007, during a routine walkthrough of the plant, Waldvogel observed that Harlander; who wears prescription glasses, was not wearing eyeglass side shields as required by existing plant safety policy. He reminded Harlander of the policy and cautioned him that if he were caught again not wearing the required eye shields, he would be issued a written warning. As Waldvogel continued his walkthrough he encountered at least a dozen other employees who were not wearing the required side shields and, like Harlander, he gave them verbal admonitions that if they were caught again not wearing the required side shields, they would be given a formal written warning.

The next day, February 6, 2007, Supervisor Dave Neisinger was walking through his area of the shop on a check for employee compliance with the eye glass safety requirements. He observed numerous employees who were not in compliance and warned them accordingly. At one point, he encountered Harlander and noted that while he was wearing the required eyeglass side shields, he had them installed backwards on his glasses, thereby leaving his eyes unprotected. When Neisinger stopped and told Harlander to install the side shields properly on his glasses, Harlander said he didn't know what that meant. Neisinger pointed to the shields on his own glasses and told him to turn them with the cupped side toward his face and to slide them up to the front of the ear pieces so that the shields properly protected the eyes from any objects or debris coming at the eye from the side. Neisinger advised Harlander this was a verbal warning and that if he was observed again wearing his side shields improperly, he would be issued a written warning.

On February 7, 2007 Director of Operations, Waldvogel, and Director of Human Resources, Jim Bell, issued a Memo to all Shop employees reminding them of the long-standing safety policy that requires all Shop employees to wear approved safety glasses and side shields while on the work floor. The Memo also reminded employees that the labor agreement provided reimbursement for the purchase of approved prescription safety glasses and side shields for those employees needing prescription glasses. The Memo noted that the company had been recently re-emphasizing the eye glass safety issue in an effort to decrease the number of eye injuries in the plant. Finally, the Memo noted that supervisors have been verbally warning first-time offenders and that repeat offenders of the policy would be subject to progressive discipline.

On February 8, 2007, supervisor Neisinger was again walking through the work area. He noticed that Harlander was again wearing his eye glass side shields incorrectly. He approached Harlander and instructed him to adjust his side shields to the front of his glasses so that they properly provided the required protection. Harlander said he couldn't adjust the shields to the front of his glasses, as Neisinger was requesting. Neisinger asked to look at Harlander's glasses and then slid the side shields into the proper position on the ear pieces and handed the glasses back to him. He also reminded Harlander that he had verbally warned him on 2/6/07 about wearing his side shields incorrectly and would be back shortly with a written warning for the current offense. Later that same day, Neisinger did present Harlander with a written warning for not properly wearing his eye glass side shields while working on the shop floor. Harlander refused to sign the document.

Harlander subsequently submitted a written protest to the warning arguing that; 1) he had never been properly instructed on how to wear the side shields on his glasses and 2) that the disciplinary action constituted "discrimination" and harassment in violation of Article 5 of the labor agreement.

On February 9, 2007 Waldvogel and Bell provided Harlander with a Memo in response to his complaints of 2/8/07. In the Memo, it was pointed out that over the preceding months, Harlander had been issued many pairs of side shields because he had reported that the shields had been lost, misplaced or he didn't know what happened to them. It was pointed out that the packaging for the shields contain clear instructions as to how to install them on glasses and also point out that if the employee is having any installation difficulties, s/he should consult their supervisor for assistance. With respect to Harlander's allegations of discrimination and harassment with respect to the safety glasses situation, Waldvogel and Bell pointed out that the enforcement of protective equipment policies by management does not violate Article 5 of the labor agreement and that enforcement of those policies applies to both union and non-union employees.

No formal grievance or other challenge was filed in connection with the 2/8/07 Written Warning to Harlander.

On August 7, 2007 Director of Operations, Waldvogel, was approached by Bob Suska, a foreman/supervisor. Suska complained that Harlander wasn't following orders and instructions and wasn't wearing the required safety equipment, e.g. side shields on his glasses. Suska told Waldvogel that he had to confront Harlander again about the side shields and finally got him to put them on and correctly. Also, later that same day, Suska instructed Harlander to clean the unusable pipe pieces out of the pipe rack in Bay 19 so that there was room to place some newly arrived pipe in the rack. He also gave the same instruction to Mike Eickhoff, another employee. Subsequently, Suska noticed that Harlander was throwing some usable pipe pieces in the scrap dumpster and told him to stop throwing away usable length pipe. Suska subsequently noted that someone had placed a note near the dumpster stating, "good pipe free for the taking". After concluding that Harlander was not going to pull the usable pipe back out of the dumpster and not wanting to escalate the situation into a possible insubordination situation (Harlander had already told Suska that cleaning out the pipe rack wasn't his job); Suska went ahead and pulled the usable pipe back out of the dumpster himself and placed them back in the rack.

It was also noted that later that same day, one of the employees in Suska's area had to leave work early. This resulted in understaffing in that employee's work Bay. Suska instructed Harlander to move over to the other Bay to help out. Harlander told Suska that he couldn't do that. He said Director of Operations Waldvogel had told him long ago that he could stay in his current Bay and not be moved. When informed of this contention, Waldvogel denied that there was any such agreement and he didn't recall making any such oral statement to Harlander.

Waldvogel subsequently met with Union Stewards Jim Storlie and Ray Puchulla and briefed them on the problems that supervisor Suska was being forced to deal with respect to Harlander. Steward Storlie agreed to once again talk to Harlander to try to resolve the situation. Storlie had previously agreed to talk to Harlander when supervisor Neisinger was having similar problems with him. In the meeting with the stewards, Waldvogel advised them that either Harlander had to decide that he will work with his supervisors and co-workers in a harmonious manner or the situation will get out of control and lead to further reprimanding.

Supervisor Suska was approached on November 29, 2007 by Jerry Hienz, the Leadman in Harlander's assigned work Bay. Hienz informed Suska that he wanted Harlander out of his Bay. Suska asked why? Hienz said that Harlander doesn't follow instructions and won't tell him what he is doing or working on when Hienz asks him. As an example, Hienz said earlier that day he had repeatedly asked Harlander exactly what he was working on? He said Harlander's response

was that he didn't need to tell him anything and that Hienz should mind his own work and leave him alone. Following that confrontation, Hienz said that Harlander started arguing about the station that Hienz was playing on the radio. Harlander said he didn't like the holiday music that was playing and that if Hienz didn't change the station, he would shut the radio off or cut the cord. At one point, Harlander called Hienz a "fucking asshole".

Hienz told Suska that he didn't wish to work with Harlander any longer. He said he was tired of dealing with his constant arguing and other behavior issues.

Following the conversation with Hienz, Suska briefed Waldvogel on the situation. They noted that, at that point in time, 13 of the 14 leadmen in final assembly were refusing to work with Harlander and had been refusing to do so for months. Suska and Waldvogel jointly agreed that they were running out of options as to where they could place Harlander in the shop and concluded that the past history of progressive discipline did not seem to be having any significant impact on his undesirable behaviors. Suska also noted that earlier that day he had again encountered Harlander not wearing side shields on his glasses. When he instructed Harlander to put them on, Harlander replied that "this is not the issue". Suska told him, yes, it is, get them on!

Following their discussion, Waldvogel and Suska prepared a joint Memo to be placed in Harlander's file and presented it to him. The Memo advised Harlander that because of his continuing behavior problems, he would be serving a one-day suspension, without pay, on December 5, 2007.

On December 4, 2007, Waldvogel and Suska met with Harlander to present the 11/29/07 Memo. Also in attendance were Jim Bell, the Director of Human Resources and Union Stewards Storlie and Puchulla. Waldvogel handed out copies of the 11/29/07 Memo and then read the Memo out loud to all present.

Following the reading of the Memo, Harlander asked Suska if he didn't always put his side shields on whenever Suska asked him? Suska said, yes, that was true, but pointed out that he only did so after questioning why he had to wear them, why him and generally complaining and arguing each time. Harlander asked Suska how many times in the past six months he had to ask him to put his side shields on? Suska said once, but after the meeting reviewed his notes and found that it had actually been twice. Harlander said he frequently asks Suska when he will get leadman pay, but Suska never gives him an answer. With regard to Leadman Hienz, Harlander said that Hienz's Bay is always behind on its work schedule and said that was because Hienz doesn't build the trailer correctly and works in an unsafe manner. He said Hienz always takes the easy jobs in the Bay and gives the tough jobs to him. He said Hienz is continually asking him what he's doing and why. Harlander said he just got tired of the questions and doesn't answer Hienz's questions anymore. Harlander did admit

that he threatened to unplug the radio or cut the cord when Hienz wouldn't agree to change the radio station.

With respect to the issue of 13 of the 14 Lead men not wanting to work with him, Harlander said he had talked to all the lead men and they had all told him that they wouldn't have a problem working with him. However, they also told him they were concerned about what would happen to their current work partners and where they would go if they agreed to work with Harlander. Harlander said that the major reason he confronts and yells at Suska is because of the problems that he has with Hienz.

At one point Jim Storlie, the Steward, asked Suska how many confrontations he has had with Harlander over the past six (6) months? Suska said about once every month. Storlie and Bell also checked Harlander's eye glasses and discovered that they were not actually approved safety glasses.

Harlander indicated that he felt that a one-day suspension without pay was too much and he knows that Waldvogel and Suska think he asks too many questions. Bell, the Director of HR, told Harlander that he has the right to ask questions, but needs to use the chain-of-command when questioning established rules, instructions, policies and procedures.

Storlie said that from what Harlander was saying about Hienz; perhaps management should take a close look at Hienz's performance and work habits.

Finally, Storlie said that, in his view, the one-day disciplinary suspension being proposed by management wasn't justified. As an alternative, he suggested that Harlander be placed on six (6) months probation and that if Harlander has any more issues that management feels involves behavior, attitude or safety, then the one-day suspension would be imposed and the Union wouldn't grieve it. Management said they would consider the Union's alternative proposal.

On December 5, 2007 Waldvogel, Suska and Bell issued a Memo to Union Stewards Storlie and Puchulla and Harlander declining the Union's alternative proposal and stating that they were proceeding with the one-day suspension.

On December 11, 2007, the Union filed a written grievance with respect to management's decision to impose a one-day suspension on Harlander. In substance the Union alleged that the suspension violated Article 23, sections 01 and 04 of the labor agreement and was, "...*unjust and without sufficient cause in regard to his action to Jerry Hienz.*" The Union requested that Harlander be made whole for any loss he suffered as a result of the suspension and that the record of the suspension be removed from his personnel file. The also requested that the company hold off on the imposition of the suspension until the situation could be resolved "*in-house or thru arbitration*". There is no record evidence that this grievance actually proceeded toward actual arbitration in any manner.

On December 13, 2007 Harlander was called in and presented with the formal disciplinary write-up advising him that he was to serve his one-day suspension on 12/18/07. Harlander refused to sign the document, but Storlie signed it.

On December 14, 2007 Waldvogel and Bell sent a Memo to the Union responding to the Union's grievance of 12/11/07 re: Harlander's suspension. In substance, the Company said that, contrary to the Union's grievance assertion, it indeed had good and sufficient cause, per Article 23, Section 01 to warrant and support the suspension. The Memo noted the previous discussions with Harlander about his unacceptable behaviors on 12/22/06 and 8/7/07. It also noted that Harlander had received a previous partial day suspension as a result of a disciplinary action on 12/22/06.

The Memo further stated that Harlander would serve the one-day suspension on 12/18/07 and noted that if his behavior toward his co-workers, leadmen, managers, etc., doesn't improve immediately and continue into the future, that he will have terminated his employment with the company.

On 12/18/07 Harlander served the one-day suspension without pay.

On January 29, 2008, Mike Sobieck, a foreman/supervisor in the Assembly Department, overheard a conversation between assembly employee Doug Schlangen and some co-workers wherein Schlangen told them that Harlander had thrown some nuts and bolts at him. Sobieck subsequently approached Schlangen and asked what had happened? Schlangen said that on the previous day, 1/28/07, Harlander had thrown some nuts and bolts at him on the work floor. Sobieck told Schlangen that he should report the incident to supervisor Bob Suska. Sobieck also subsequently informed Suska as to what he had heard Schlangen.

Suska subsequently met with Schlangen and asked him what had happened? Schlangen told Suska that he had been welding on a trailer in his Bay on 1/28/07. Harlander was working on another trailer in the adjacent Bay. A co-worker, Mike Strand, was working on top of the trailer that Harlander was working on. At one point Schlangen said that something hit him on his welding helmet and the back of his head. After being hit again at least two more times, Schlangen turned in the direction from where the objects were coming and saw Harlander underneath the trailer he was working on. Schlangen picked up a couple of the objects that had been thrown at him and threw them in Harlander's direction and told Harlander to "knock it off". Schlangen turned back to his welding and then felt more pieces hit him in the back. He then walked over to Harlander and had a heated exchange of words about what Harlander was doing and why. Schlangen said Harlander just laughed.

After receiving a preliminary report about the Schlangen-Harlander incident from Suska, Director of Operations Waldvogel convened an investigatory meeting on 1/30/08. Present were Waldvogel, Suska, Bell, Harlander and Storlie. Also present were Schlangen, foreman Sobieck and employee Mike Strand.

Prior to the formal meeting, Waldvogel met with Storlie and briefed him on the alleged incident between Schlangen and Harlander. Storlie asked to meet

privately with the three employees allegedly involved, Harlander, Schlangen and Strand. Waldvogel agreed.

Following his meeting with the three employees, Storlie said that, based on his interviews, neither Schlangen nor Strand actually saw Harlander throw anything. But, said both Schlangen and Strand were certain that it was Harlander who threw the objects, because there were no other persons in the area. According to Storlie, Harlander admitted that he had thrown some washers at a garbage can located near Schlangen.

The formal investigatory meeting was then convened. Schlangen and Strand were questioned as to their recollections of the incident.

Schlangen reiterated the statements that he had previously given to Suska regarding the incident. Strand said that from his position on top of the trailer that Harlander was working under, he saw the washers flying and saw and heard them hit Schlangen's welding helmet. Strand said he heard Schlangen tell Harlander to knock it off, because Schlangen appeared to be very upset and yelled loudly. As soon as Schlangen turned and returned to work, the washers flew again and he heard them again hit Schlangen's helmet. Schlangen then stopped working, turned and walked over to where Harlander was working under his trailer. Strand said he didn't hear exactly what Schlangen said to Harlander during that portion of the incident.

Then Harlander was asked why he was throwing washers (these were metal washers measuring 1 and 3/8 inches in diameter and weighing about one-half ounce) and why he continued throwing them after Schlangen told him to knock it off? Harlander said he didn't hear Schlangen say that because he was busy working on his trailer. He said he had been removing the washers from some parts he was installing on his trailer and that he was then throwing them at the garbage can; which apparently was near Schlangen. He said he didn't realize that he was actually hitting Schlangen with the washers until Schlangen walked over and confronted him.

Harlander was questioned again as to whether he heard Schlangen yell at him to "knock it off!"? Strand, of course, had stated that he heard Schlangen very loud and clear from his position on top of the trailer. Finally, Harlander admitted he had heard Schlangen yell, "knock it off", but said he didn't think Schlangen was talking to him.

Following the joint meeting on January 30, 2008, management held another meeting on January 31, 2008. Following a review of the results of the meeting on the previous day and the investigatory findings it was concluded that Harlander had indeed caused another confrontation with a co-worker via inappropriate behavior and conduct e.g. throwing things. It was further concluded that this conduct clearly violated the company's admonition to Harlander back in December, 2007 in connection with the one-day suspension, that any further

misbehaviors on his part with co-workers, leadmen, supervisors, managers, etc. would result in his termination. It was decided that Harlander would be discharged, effective that day.

On January 31, 2008, Jessie Harlander was discharged by the Employer.

THE GRIEVANCE

On January 31, 2008, immediately following the discharge of Harlander, the Union filed a grievance in protest of the discharge. The grievance cited violation of Article 18, Section 08B (Seniority) and “*all applicable clauses*” as the basis for the grievance. The grievance stated that “*I request my job back with all lost pay and benefits due to this unjust termination*”.

NOTE: Article 18.08(B) states “*Seniority shall be lost for the following reasons only – Discharge for just cause.*”

On or about February 12, 2008 the Employer reaffirmed its Harlander discharge decision and denied the Union’s grievance of 1/31/08. The Union subsequently requested that the grievance proceed to arbitration. Ergo, here we are.

RELEVANT CONTRACT LANGUAGE

Article 1, Section 1.03, Recognition:

The Union recognizes that the Company continues to exercise every legal power, right and privilege which it had before signing this Agreement unless specifically abridged or changed by the provisions of this Agreement. The Company and the Union both agree that it is the proper responsibility and the full and unlimited prerogative of the Company to manage its plant; to determine the schedules of work; to determine the size of the working force; to select and hire employees; to assign work; to promote or demote employees; to direct the work of the employees; to determine the methods of work and the products to be produced; to make reasonable rules and regulations not inconsistent with this Agreement; to administer discipline, including suspension or discharge for violation of such rules or for other proper and just cause. (emphasis added)

Article 23, Discharge and Discipline:

23.01 No employee shall be discharged, demoted or otherwise disciplined without good and sufficient cause. Any employee who has been discharged will be offered an interview with his Union Steward before he is required to leave the plant.

- 23.02 *In all cases of discharge, demotion, suspension or written warnings, the Union Steward shall be notified of the action immediately.*
- 23.03 *Should there be any dispute between the Company and the Union concerning the existence of good and sufficient cause for discharge, demotion or discipline such dispute shall be adjusted in accordance with the Grievance and Arbitration provisions of the Agreement, with the exception of probationary employees.”*
- 23.04 *In the event it is found that an employee has been discharged without good and sufficient cause, such employee shall be reinstated to his former position and compensated for all time lost at his average hourly earnings. In no way shall the period of unjust discharge affect the employee’s seniority rights or his rights to other benefits agreed to herein.*

THE SHOP EMPLOYEE MANUAL

As part of their employment orientation, all newly hired employees are issued copies of the Company’s Shop Employee Manual outlining the Company’s Policies and Procedures; including Safety and General Work Rules. Each employee is required to sign a receipt acknowledging that s/he has received and read the Manual. Jessie Harlander signed such a receipt on his first day of employment with the Company, August 10, 2004.

The following are relevant excerpts from the Shop Employee Manual:

GENERAL SAFETY RULES:

There are a few general Corporate and Plant Safety Rules, which have been established for the well being of employees and their fellow workers. The following rules will be strictly enforced and any violation will be grounds for discipline and possible termination. This list does not limit the Company’s right to discipline or discharge employees for violating other rules of conduct not specifically listed below.

- 8. Horseplay, throwing things and running on the premises are dangerous and will not be permitted.*
- 13. Wear all protective equipment required at your location and job, such as: safety shoes, safety glasses with side shields, hard hats, safety shields, respirators, etc.*
- 16. If you see someone working carelessly and endangering himself/herself and those around him/her, warn that person directly or contact your supervisor and inform him/her of the situation.*

GENERAL WORK RULES – DISCIPLINARY PROCEDURE

Violation of the following basic rules of conduct will be considered just cause for discipline or discharge. This does not limit the Company’s right

to discipline or discharge for violation of other commonly accepted rules of conduct not specifically listed:

- 6. Loafing or sleeping on the job, inefficient performance of duties, incompetence, failure or refusal to perform work as directed, or other neglect of duty.*
- 8. Inability or unwillingness to work in harmony with other employees. Discourtesy to the Company's customers or other persons doing business with the Company.*
- 9. Fighting, gambling, or using profane, obscene or abusive language on the Company's premises or while on Company business.*

The normal guidelines for disciplinary procedure for violation of Company rules is a three step process as follows:

- 1. FIRST VIOLATION – VERBAL WARNING*
- 2. SECOND VIOLATION – WRITTEN WARNING*
- 3. THIRD VIOLATION – DISCHARGE*

The disciplinary procedure may be initiated at any step and does not limit the Company's right to terminate for the first offense, depending upon the seriousness of the violation. Examples of violations, which would result in discharge for the first offense includes: stealing, willful destruction of Company property, or fighting.

SUMMARIES OF PARTIES' MAJOR ARGUMENTS

The Employer:

Article 1.03 of the labor agreement recognizes the Company's right to make reasonable safety and work rules that do not otherwise conflict with the Agreement and that violation of those rules may result in discipline and discharge. The Shop Employee Manual, which specifies the applicable safety and work rules, does not conflict with the Agreement.

The rules clearly note that employees are required to wear all required safety equipment and gear, as required for their work area and job. The rules clearly prohibit throwing anything while at work. The rules also require employees to follow directions while performing their job and prohibits the use of profane, obscene or abusive language while on the Company's premises.

The Company had just cause to terminate Mr. Harlander. Just Cause for discipline exists only when an employee has failed to meet his/her obligations under the fundamental understanding of the employment relationship. The employee's general obligation is to provide satisfactory work. Satisfactory work has four components: 1) regular attendance, 2) obedience to reasonable work rules, 3) reasonable quality and quantity of work and 4) avoidance of conduct, either at or away from work, which would interfere with the employer's ability to

carry on the business effectively. *Toward a Theory of "Just Cause" in Employee Discipline Cases*, Abrams and Nolan, Duke Law Journal 1985, 594, 611-612.

For there to be Just Cause, the discipline must further one or more of management's three legitimate interests: 1) rehabilitation of a potentially satisfactory employee; 2) deterrence of similar conduct, either by the disciplined employee or by other employees, 3) protection of the employer's ability to operate the business successfully. *Id.* at 612.

The concept of Just Cause includes certain employee protections that reflect the union's interest in guaranteeing fairness in disciplinary situations. The employee is entitled to "industrial due process". This includes: 1) actual or constructive notice of expected standards of conduct and penalties for wrongful conduct, 2) a decision based on facts, determined after an investigation that provides the employee an opportunity to state his case, with union assistance if he desires it, 3) the imposition of discipline in gradually increasing degrees, except in cases involving the most extreme breaches of the fundamental understanding. In particular, discharge may be imposed only when less severe penalties will not protect legitimate management interests, for one of the following reasons: i) the employee's past record shows that the unsatisfactory conduct will continue, ii) the most stringent form of discipline is needed to protect the system of work rules, or iii) continued employment would inevitably interfere with the operation of the business, and iv) proof by management that Just Cause exists. *Id.*

The employee is also entitled to "industrial equal protection", which requires like treatment in like cases. But, related is the requirement that an employee is entitled to "individualized treatment", which looks at distinctive facts in the employee's record or regarding the reason for discipline and must be given appropriate weight. *Id.*

Jessie Harlander did not provide satisfactory work as he failed to follow reasonable work rules and he repeatedly engaged in conduct which interfered with the company's ability to carry on its business effectively. General Safety Rule #8 in the Shop Employee Manual clearly states that "throwing things" will be grounds for discipline and possible termination. The Rule obviously exists to protect the safety of employees from potential injury and for which the Company could be potentially held liable. In September, 2006 foreman Dave Neisinger issued a verbal warning to Harlander after a co-worker reported being hit by tape balls allegedly thrown by Harlander. In December, 2006 Harlander received a disciplinary suspension for admittedly throwing a snowball at a co-worker who was operating a forklift. Harlander was also concurrently warned that if he engaged in any future "horseplay" or "throwing things", he would be immediately terminated.

The Shop Employee Manual, General Work Rules, Rule #9 provides that the inability or unwillingness to work in harmony with other employees will be

considered just cause for discipline or discharge. This is a reasonable rule as it promotes efficient and cohesive operations throughout the plant. Harlander has a long history of engaging in conduct which is counterproductive to the efficiency of the Company's business operations – he refused to work in harmony with other employees. In September of 2005, Leadmen Solarz and Rohde informed Director of Operations Waldvogel that they no longer wished to work with Harlander because of his constant arguing, personal threats and failure to follow instructions. Again, in January, 2006, Waldvogel received another complaint that co-workers were refusing to work with him because of abusive language, refusing to follow instructions, throwing things and not getting along with co-workers. In February, 2007, Harlander endangered himself by failing to properly wear side shields on his eye glasses, in compliance with common sense and a plant safety rule that had been in place since the 1980's. In August, 2007 he again failed to follow the directions of his foreman and failed to wear the required eye glass safety shields. In November, 2007, he was again disciplined for confrontations with his leadman, using abusive language to Jerry Hienz, over holiday music playing on a radio and refusing to follow installation instructions for certain parts on a trailer. At that same point in time, 13 of the 14 leadmen in the Assembly Department were reportedly refusing to work with him. It is clear that Harlander could not work in harmony with his co-workers and was disrupting the company's ability to operate its business in an efficient and effective manner. Accordingly, Harlander was not fulfilling his general obligation to provide satisfactory work to the Company.

The Company had Just Cause to terminate Harlander because that action was furthering its legitimate interests. Over the past two and one-half years, the Company has utilized its progressive discipline system in a futile effort to rehabilitate Harlander and correct his errant and unacceptable work behaviors. During that period, he received three verbal warnings, three written warnings, two disciplinary suspensions, probation and three specific warnings that future violations would result in termination. Those efforts at rehabilitation fell on deaf ears. Harlander continued his defiant, confrontational behavior and refused to work in harmony with his co-workers. His record of continued disciplinary actions for inability to work in harmony with others shows that he was not deterred from his unacceptable behaviors. By December, 2007 he was clearly aware that any further problems would result in his discharge. In January, 2008, over a two-day investigation (1/29-1/30) during which Harlander fully presented his position and response, with full Union representation, manager Waldvogel and foreman Suska concluded that Harlander had lied about hearing co-worker Schlangen tell him to "knock it off", with respect to Harlander throwing metal washers. On top of the many previous disciplinary actions and suspensions, that was the final straw. The Company had Just Cause to terminate Harlander because it was protecting its ability to operate its business successfully. In order to efficiently manufacture tank trailers, it must have employees who can work in harmony with each other.

Harlander did receive “industrial due process”. At the outset of his employment with the Company he received and read the Company’s Shop Employee Manual and, therefore, was fully aware of and reasonably should have been aware of the fact that throwing things and failing to work in harmony with other employees would be Just Cause for discipline or discharge. During his tenure of employment with the Company he accumulated a total of six (6) disciplinary actions, including suspensions and probation, clearly advising him that he needed to work in harmony with his co-workers and adhere to other shop work rules. In at least three (3) of those disciplinary actions he was clearly warned that any further problems would result in his termination. Obviously, there were no surprises.

The Company conducted a two-day investigation of the facts of the January 28, 2008 washer incident. On January 30, 2008, Harlander was given the opportunity to state his case in full. He did. He had Union assistance and representation at every disciplinary situation, including the January 30 investigatory meeting. The Company’s subsequent discharge decision was based upon its review of the facts and its assessment of Harlander’s lack of candor about not hearing Schlangen yell at him to stop throwing washers.

Over the course of his employment with the Company, Harlander was accorded progressive discipline. He received three verbal warnings, three written warnings, two disciplinary suspensions, probation and three distinct warnings that he would be terminated if he did not correct his behavior. The Company tried many times to remedy his inability to work in harmony with other employees. Those efforts involving less severe disciplinary action were not effective. He continued to have confrontations and conflict with co-workers, leadmen and supervisors. He disputed established production processes claiming that he knew better. He refused to take responsibility for his own actions. It was always someone else’s fault. If allowed to continue his employment with the Company, there was a great likelihood of manufacturing errors, which would result in defective tank trailers and potential liability to the Company. Harlander clearly violated policies about throwing things and working in harmony with other employees and the company had Just Cause to terminate him.

Harlander clearly received “industrial equal protection” in this situation. During the arbitration, the Union offered no evidence of any other employees that committed similar offenses, with similar disciplinary records, who were treated differently than Harlander. In fact, there were no similarly situated employees. There are no positive, distinctive facts in his employment record. Faced with Harlander’s initial denial that he hadn’t heard Schlangen yell at him to “knock it off”, the fact that co-worker Strand (who was farther from Schlangen than Harlander) did hear Schlangen yell and then Harlander’s subsequent admission that he did hear Schlangen; the company made a credibility determination that Harlander had lied about a material fact in the investigation. Harlander’s lack of

veracity must be given substantial weight. He did receive “industrial equal protection” in this situation.

For all of the foregoing reasons, the Company had just cause to terminate Jesse Harlander’s employment on January 31, 2008. Accordingly, the discharge should be sustained and the grievance dismissed.

The Union:

The following is a Summary of Facts with respect to the circumstances surrounding the Employer’s termination of employee, Jesse Harlander on January 31, 2008:

On January 28, 2008 Jesse Harlander was working underneath a semi-tank trailer removing metal washers. Seeing a garbage can nearby him, he tossed four washers into the garbage can under-hand style. Doug Schlangen, a co-worker, was sitting on the other side of the garbage can. Apparently one or more of these washers may or may not have missed the garbage can and hit Schlangen. At this point Schlangen may or may not have said something that Jesse Harlander did not hear. Harlander then threw another washer at the garbage can and this washer may or may not have struck Schlangen. Schlangen and Harlander continued to work for approximately ten (10) more minutes and then had a brief discussion in back of the tank trailer. Mr. Schlangen asked Jesse why he was throwing washers at him and Jesse told him that he did not throw washers at him. The two men returned to work and worked in harmony the rest of that day and all of the next.

The following day, January 29, 2008, Supervisor Mike Sobieck overheard Schlangen talking to a co-worker about Jesse throwing washers. Mr. Sobieck told Schlangen he should push the issue and then informed Supervisor Bob Suska of the incident. Suska conducted an investigation in which he talked to Schlangen and another worker, Mike Strand, but never talked to Jesse Harlander to get his side of the story.

At about this same time, Union Steward James Storlie found out about the incident and conducted his own investigation. He brought together all the people involved in the incident (Jesse Harlander, Doug Schlangen and Mike Strand) and reenacted the incident and found that Jesse’s story about tossing washers at the garbage can and perhaps one or more of these washers may have missed the can and hit Schlangen seemed practical and that everyone in the room agreed this was what happened.

The next day, January 30, the company held a meeting in which Bob Suska’s less than thorough investigation was used to determine discipline for Harlander. The Company decided to terminate Harlander the next day, January 31, 2008.

The labor agreement requires Company to have Just Cause to justify the termination of an employee. The Company has failed to meet its burden of proof to clearly establish Just Cause in this instance.

During the arbitration hearing, the Company's entire case was based on Harlander's past record and no evidence was introduced to sufficiently prove whether he was guilty of their current allegation that he violated a work rule by intentionally throwing things at co-worker Doug Schlangen. All of the Company's evidence at the arbitration hearing was hearsay evidence, which conveniently prevented the Union from cross-examining their witnesses and their testimony to determine whether these allegations were true. The Arbitrator needs to consider these facts;

1. The company has no proof that Harlander was throwing washers at Schlangen. The Company provided no direct testimony from any witnesses to verify their claim that Harlander was throwing washers at Schlangen. The only direct testimony was from Harlander and his testimony was that he was tossing the washers into the garbage can underhand style.
2. The Company has no proof that Schlangen yelled at Harlander. The company provided no witnesses to verify their claim that Schlangen yelled "knock it off" to Harlander or that Schlangen said anything at all to Harlander for that matter. The only direct testimony in the arbitration hearing came from Harlander and his testimony was that the shop was a very noisy place to work and that he didn't hear Schlangen yell.
3. The Company has no proof that there was a confrontation between Harlander and Schlangen. The Company provided no witnesses to verify their claim that Schlangen was "provoked" into a confrontation with Harlander. The only direct testimony was from Harlander and his testimony was that there was a conversation between himself and Schlangen, but this was some ten (10) minutes after he had finished removing the washers from the trailer and tossed the washers into the garbage can. Jesse testified that after a brief conversation the two employees returned to work and worked in harmony the rest of that day and all of the next.
4. The Company's claim that Schlangen was mad at Jesse is disputed. Company witness Supervisor Mike Sobieck claimed that the next day Schlangen was still mad at Harlander about the washer incident, yet Union Steward Jim Storlie talked to Schlangen on that very same day and claimed that Schlangen wasn't mad at all about the incident.

Equal treatment. Company rules and penalties have been applied in a discriminatory manner.

During the arbitration hearing the Company entered into evidence records that would appear to paint a picture of a long history of Harlander breaking Company rules. However, upon closer inspection, it was pointed out that

all of their evidence concerned three rules violations over a period of three (3) years and that the Company's administration of these rules, as applied to Harlander, has been inconsistent when compared to their application towards other employees.

Consider the disciplinary action in December, 2007 which was in dispute and had in fact been grieved and was awaiting arbitration. This disputed incident was a situation where Harlander was badgered incessantly by a difficult to work with co-worker who was playing his radio loud after Jesse asked him to turn it down and was also pestering Jesse by asking him the same question over and over again. Jesse Harlander was "provoked" into uttering a foul word ("you're acting like an asshole") and Jesse received discipline. Now fast forward to the case being decided in this arbitration. Now it is Doug Schlangen who is uttering foul language ("I'll beat the crap out of you") and Harlander who was on the receiving end of this foul language and once again it was Harlander who received the discipline. When Harlander was "provoked" into uttering a foul word it was he who received the disciplinary action. When Schlangen was "provoked" into uttering a foul word, he received no discipline at all and Harlander was disciplined. The Company's own evidence proves the application of this rule has been discriminatory.

Reasonable. The Company rule was not reasonably applied leaving the rule open to potential arbitrary and capricious administration.

The labor agreement has a Safety and Sanitation Article (Article 22) that contains language ensuring a "clean work environment. Garbage cans have been placed throughout the facility and it is a common practice for employees to throw garbage into the garbage cans. The Company should reasonably expect employees to throw things in the garbage or they would not have garbage cans in the plant nor have contract language that insures a "clean" work environment. Jesse Harlander was lying on a dolly removing washers from under a semi-trailer. He needed to free his hands to remove the next washer and did not want to lay the washer down and run over it with his dolly. He saw the garbage can a few feet away and proceeded to toss the washers into the garbage. He obviously thought he was close enough to the garbage for the washer to go into the can. The Company provided no evidence whatsoever that this "throwing things" rule had been administered to anyone other than Harlander for throwing things into the garbage. To apply their "throwing things" rule to include throwing things into the garbage would be unreasonable; for it would open the rule to all kinds of arbitrary, capricious and discriminatory judgment calls. Does an employee now have to stand directly over the garbage can and "drop" the garbage into the can to be free from discipline? What happens if they are two feet away from the garbage can? What about four feet away? To apply this rule to throwing things in the garbage without any past history of applying this rule for throwing things into the garbage is

unreasonable. To think that the first person ever to be disciplined for throwing things into the garbage resulted in a termination is unreasonable.

The Company did not make a thorough investigation of the incident.

The Company did not, before administering discipline, make an honest effort to discover whether the accused did, in fact, willfully violate or disobey their "throwing things" work rule. The Company did not talk to Harlander to get his side of the story. If they had gone out into the plant and reenacted the incident they would have realized that there was a garbage can nearby that Schlangen was sitting on the other side of this garbage can. A thorough investigation might have opened their minds to the possibility that Harlander was simply throwing washers into the garbage and accidentally missed and hit Schlangen. The Company's faulty and inadequate investigation consisted entirely of members of management pouring over Harlander's past work record for two full days and no time spent going over the known facts of the case, which included; no witnesses willing to testify that they saw Harlander throwing washers at Schlangen; no witnesses willing to testify that they heard Schlangen yell at Harlander and no witnesses that saw a confrontation between Harlander and Schlangen. The Company relied completely on Harlander's past record and by the time of the meeting on January 30th had spent so much time going over his past record that they had worked themselves into a "you are guilty because of your past frenzy" which steeled their minds and prevented them from considering Harlander's logical arguments in the meeting on January 30th. When asked what questions were asked of Jesse in that meeting, the Company could not even remember what they asked him. The Company based their entire case on his past record, on hearsay evidence and other "lightweight" or "non-weight" evidence.

The Company did not follow Due Process.

Jesse Harlander was not informed promptly, and in reasonable detail, of the charges (or possible charges) against him and given a chance to defend himself. The Company did not inform him of the charges against him or allow him time to investigate their claims against him or defend himself until the meeting on January 30th, a full two days after the actual incident and only one day before they terminated him. This narrow margin of time, less than one day, was not adequate time for Jesse to tell his side of the story and for the Company to objectively and honestly analyze, not from a management perspective, but from the viewpoint of a disinterested third party, Jesse Harlander's side of the story. Instead, they made a "bench decision" on January 31st from what little information they had gathered from the meeting on January 30th.

It is the Union's position that there could be no clearer case of unreasonable discipline. The Company made a poor decision when they terminated Jesse Harlander. The company's decision to terminate Mr. Harlander was based

entirely on his past record, not on the current alleged work rule violation. For the specific reasons set forth above, the Union believes that the Company has failed to establish by a preponderance of the evidence that they had Just Cause to justify Mr. Harlander's termination. Accordingly, the Union respectfully requests that the grievance be sustained, that Mr. Harlander be reinstated to his previous job and classification and that he be made whole in every way for any loss of pay, seniority and benefits which he has suffered by virtue of this unjust discharge.

ANALYSIS, DISCUSSION AND FINDINGS

As an Arbitrator, I am keenly aware that discharge cases are among the most important situations that I am called upon to determine. Discharge decisions have significant psychological, economic and legal effects on all parties involved. Accordingly, I am committed to making a clear, rational and fair decision, based upon the labor agreement, the record testimony and evidence and relevant and applicable arbitral precedent and case law in this matter.

As is the typical labor contract situation, this labor agreement in Article 23.01 – Discharge and Discipline, states that “*No employee shall be discharged, demoted or otherwise disciplined without good and sufficient cause.*” and like most labor agreements, this one contains no other statements, standards or definitions as to exactly what constitutes “*good and sufficient cause*”, as those terms are used in this labor agreement. An examination of Article 1.03 – Recognition, reveals words to the effect that management possesses the right to “*...administer discipline, including suspension or discharge for violation of such rules or for other proper and just cause*”; however, again, there is no contractual standard, criteria or definition as to what constitutes “*proper and just cause*”.

In spite of the absence of a definition of “good, sufficient and/or just cause” within the labor agreement itself, one would expect that - given the myriad of discharge cases that labor arbitrators have had to deal with over the course of many decades - that the labor arbitrators themselves have certainly reached a clear consensus as to the meaning of those terms. Wrong! The situation was aptly explained by a seasoned, veteran labor arbitrator who observed that neither he nor his esteemed colleagues have ever been able to reach agreement on an universally accepted definition of the term “just cause”, but he noted that he and every other labor arbitrator could readily recognize the presence or absence of “just cause” in any particular case.

However, there have been attempts and efforts, over the years, to define, codify or systematize the term “just cause”; unfortunately, none have found universal acceptance. As I indicated to the Parties in the hearing, I find that at least two of them do help me to organize information and also provide at least a basic analytical framework for looking at Just Cause issues.

In 1966 Arbitrator Carroll R. Daugherty, in an appendix to one of his Decisions, suggested that there is a consensus or “common law” of “just cause”. Enterprise Wire Co., 46 LA 359 (Carroll R. Daugherty, 1966) He articulated what has become known as the “The Seven Tests of Just Cause”. According to Daugherty, a “no” answer to one or more of the following questions normally signifies that just and proper cause did not exist:

1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?
2. Was the company’s rule or managerial order reasonably related to (a) the orderly, efficient and safe operation of the company’s business and (b) the performance that the company might properly expect of the employee?
3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the company’s investigation conducted fairly and objectively?
5. At the investigation, did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the company applied its rules, orders and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the company in a particular case reasonable related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee in his service with the company?

I, personally, find Daugherty’s “Test” to be a useful tool in organizing and analyzing the facts and evidence that come to the fore in discipline cases. However, like many arbitrators, I find that it is rigid and overly mechanical in its application as a true test of “just cause”, in that it fails to recognize and allow for the weighting of the myriad of factors and nuances that are involved in a typical discipline situation.

An alternative view of the “just cause” situation was set forth by Roger I. Abrams and Dennis R. Nolan in “*Toward a Theory of ‘Just Cause’ in Employee Discipline Cases*”, 85 Duke Law Journal 594 (1985). The authors begin by setting forth what they refer to as “The Fundamental Understanding” in the employment relationship:

A potential employer is willing to part with his money only for something he values more highly, the time and satisfactory work of the employee. The potential employee will part with his time and work only for something he values more, the money offered by the employer.

The Fundamental Understanding can be and is modified by collective bargaining agreements and the congruent interests of unions and employers. From the

point of view of employees, collective agreements can correct what they perceive to be the major flaw of the Fundamental Understanding – the insecurity of the employment relationship. Thus, the main addition to the Fundamental Understanding that unions seek in collective bargaining agreements is job security through limitations on the employer's power to discipline and discharge employees. Therefore, the basic Fundamental Understanding is modified by a particular collective bargaining agreement, as follows:

Employees will provide 'satisfactory' work, in return for which the employer will pay the agreed wages and benefits, and will continue the employment relationship unless there is just cause to terminate it.

This modification of the Fundamental Understanding obviously limits the employer's power to discipline and discharge pursuant to the concept of "Employment at Will", which essentially permits the employer to discipline or discharge employees for any reason or for no reason whatsoever.

Under the modified Fundamental Understanding employee discipline should only be used to fulfill one or more of management's rational interests; 1) rehabilitation – the objective being to cure a specific problem and restore the employee to "satisfactory" work, 2) deterrence – the objective being to deter the errant employee from repeating a certain error by imposing one penalty and threatening to impose a harsher one in the future and 3) protection of profitability – certain employee conduct, though perhaps not prohibited by a specific rule, may still interfere with the employer's operation of the enterprise. This category is something of a catch-all and many of the situations falling within its confines involve off-duty conduct by employees.

Like management, unions also have certain interests and expectations with respect to discipline and discharge of employees. A rational union acknowledges that an employee's failure to meet his or her obligations works to the detriment of other employees as well as the employer. In the short run, an unsatisfactory employee simply makes the jobs of co-workers more difficult. In the long run, continued tolerance of substandard work performance by an employee will endanger the employer's competitive position, and that, in turn, will threaten the wages and even the jobs of the rest of the workforce. Therefore, the economic welfare of the workers, the union and management is interdependent.

The primary interest of the union and the employees in disciplinary matters is fairness. First, they seek fairness in disciplinary procedures; that is employees must have actual or constructive notice as to their work obligations. Secondly, they seek fairness in the administration of discipline. Disciplinary measures must be based on facts; management must ascertain what actually happened before it imposes discipline and must give the employee an opportunity to explain his or her view of the situation and must allow union representation during the investigation if the employee so requests. Thirdly, discipline should be imposed

in gradually increasing degrees, with the exception of certain “capital offenses” and, finally, proof by management that just cause exists for the discipline.

The foregoing concerns for procedural fairness in discipline situations might be termed “Industrial Due Process”.

The employee is also entitled to “Industrial Equal Protection” which requires like treatment of like cases. But, related, is the requirement that an employee is entitled to individualized treatment. Distinctive facts in the employee’s record or regarding the discipline must be given appropriate weight.

Like Daugherty’s “Test”, the Abrams & Nolan theoretical construct for Just Cause serves as a useful analytical tool for organizing, assessing, evaluating and considering the numerous facts and pieces of evidence that involved in a typical discipline or discharge situation.

Applying these tools to the instant matter and based on the record evidence, testimony and briefs:

- I find that Jesse Harlander, at the outset of his employment with the Employer, had clear and unequivocal notice of the Company’s policies, procedures, rules and regulations and the details of the disciplinary action process and potential consequences for violations of such policies, rules and regulations.
- I find that during the course of his approximately three and a half years of employment with the Company, he was the subject of a significant number of disciplinary actions, ranging from verbal warnings and admonitions to written warnings, disciplinary suspensions, disciplinary probation, etc. Accordingly, Mr. Harlander was no stranger to the Company’s disciplinary system and was quite knowledgeable about it. I also find that in each instance where he was disciplined during that period, Mr. Harlander had previous knowledge and awareness or reasonably should have been aware of the rules and the probable consequences for violating those rules.
- In reviewing the Company’s General Safety and General Work Rules, as set forth in the Shop Employees Manual (a copy of which the record shows Mr., Harlander receiving on about his first day of employment) I find that those rules are reasonable in nature and are directly related to the orderly, efficient and safe operation of the Company’s business and to the conduct and performance that the Company should reasonably expect of the employees.

The Union raises a question about the efficacy of the Company’s rule prohibiting “throwing things” (Safety Rule #8). Obviously, the intent of the rule is to eliminate potential safety problems in the work place resulting from employees routinely and indiscriminately throwing objects around or at each other. On a practical level, do employees still throw things in the

workplace? The answer is certainly yes, but if their action doesn't cause problems, injuries, complaints or concerns among employees or supervisors, generally no formal disciplinary action is taken, i.e. an employee "throws" a candy wrapper at a garbage can, no problems result and no one takes notice. However, if the candy wrapper, on its way to the can, happens to hit another employee in the eye and causes sufficient injury to require medical treatment or attention; then there will certainly be disciplinary consequences. Essentially, each time an employee makes a decision to throw something in the work area, s/he is risking a potential disciplinary action if their behavior causes a problem. Therefore, as Rule #8 says, don't throw things while in the work area!

- I find that the Company does have a reasonable and rational disciplinary procedure based on the concept of "progressive or escalating discipline". Obviously, the procedure also takes into account certain "capital offenses" for which only immediate discharge is appropriate.

Under a progressive discipline system, the intent is to correct errant behavior quickly with an initial "word to the wise". However, if that action fails to inspire the employee to immediately correct the errant behavior, then the consequences gradually increase in severity with discharge being the ultimate penalty. In my experience, I encounter very few managers or supervisors who take any personal pride or comfort in having to discharge an employee. The process inevitably leaves scars on everyone involved.

- I have reviewed each of Mr. Harlander disciplinary encounters over the course of his tenure with the Company and I find that in each instance the Company complied with both its promulgated disciplinary procedure and the applicable provisions of the labor agreement. More specifically, I note that the Company, where applicable, routinely involved the Union Steward(s) and afforded Mr. Harlander adequate opportunity to give his side of the story prior to imposing discipline.

The Union argues that during the investigation of the January 28, 2008 incident that resulted in Mr. Harlander's discharge the Company failed to properly investigate the situation and failed to provide him with adequate time or opportunity to articulate his response to the accusations. After carefully examining the circumstances, I find those arguments to be without merit. The Company first became aware of the alleged incident on January 29, via foreman Mike Sobieck. Sobieck then informed foreman Bob Suska about the alleged incident and Suska commenced a preliminary investigation via interviews with Schlangen and Strand later that same day. Suska apparently then reported the results to Director of Operations Waldvogel either later on January 29th or early on the 30th. Waldvogel then contacted Union Steward Storlie on the 30th and informed him of the results of the preliminary investigation into the incident. Storlie requested and was given an immediate opportunity to interview Schlangen and Strand and also to consult with Mr. Harlander. Upon completion of his investigation, Storlie and Harlander were later present for a joint meeting with management on the 30th to further review and discuss their

investigatory findings. During this meeting, Mr. Harlander was given full opportunity to hear the investigative findings and to give his side of the story. There is no evidence that Union Steward Storlie or Mr. Harlander requested additional time to address the situation. According to the testimony of Jim Bell, the Director of Human Resources, management decided, at the conclusion of the joint meeting on the 30th, to “sleep” on the situation and make a decision on the next day, the 31st. In their meeting on the 31st management concluded that the situation required that Mr. Harlander be terminated.

- The Union also argues that the Company was discriminatory in its disciplinary action against Mr. Harlander, back in November, 2007 with respect to complaints made to management by leadman Jerry Hienz. The record evidence indicates that Harlander was disciplined for 1) not following instructions and 2) abusive language /hostile behavior toward co-workers. The Union alleges that in the washer incident on January 28, 2008, Doug Schlangen allegedly told Harlander that, “I’ll beat the crap out of you”. The Union contends that Schlangen should have been disciplined for using abusive and hostile language toward Harlander on the 28th, but instead, it was Harlander who was disciplined. In reviewing the record evidence, I note that Harlander never reported or brought up any such allegation against Schlangen until he was interviewed during the meeting on the 30th. In that context, he told those present that he and Schlangen had a conversation by the trailer on the 28th and that Schlangen wasn’t mad at him, that the situation between them after the conversation was just fine and that they subsequently worked in harmony. If Harlander truly felt that he had been abused and/or threatened by Schlangen on January 28th, he would have immediately reported the matter to his supervisor, but he did not. Accordingly, I find the Union’s contention regarding discrimination to be without merit.

In view of my findings above, I find that, overall, the Company committed no significant procedural errors or violations of either its disciplinary procedure or the related requirements of the labor agreement with respect to the disciplinary action taken against Mr. Harlander. It is clear that the Company afforded him full and fair “industrial due process” at times material herein.

Next, we’ll look at the facts and circumstances that led to Mr. Harlander’s termination on January 31st, 2008 to see if they were sufficient to meet the “good and sufficient and just cause” requirements of the labor agreement.

At the outset of the arbitration hearing, the Union strenuously objected when the Company began introducing testimony and evidence regarding Mr. Harlander’s record of disciplinary actions. The Union argued that his past record was irrelevant; that the record should focus solely on the incident that resulted in his termination. I, of course, had to overrule that objection. Under the concept of progressive discipline and the concept of Industrial Equal Protection, as

articulated by Abrams and Nolan, an employee's past record - whether good, bad or indifferent - becomes totally relevant and must be fully considered by an employer when contemplating what action to take in a new disciplinary situation.

According to the record evidence and testimony, Mr. Harlander's disciplinary record over the course of his tenure with the Company discloses:

- Three (3) verbal warnings – 9/28/05, 1/27/06 and 8/7/07.
- Three (30) written warnings – 12/22/06, 2/5/07 and 11/29/07.
- Two (2) disciplinary suspensions – 12/22/06 and 11/29/07.
- One (1) disciplinary probation – 12/22/06.

Three (3) of the above warnings, 1/27/06, 12/22/06 and 11/27/07, included specific warnings to Mr. Harlander that further problems would result in his termination.

In reviewing the specifics of each of the disciplinary actions, there appear to be some distinct patterns; 1) problems interacting with co-workers and leadmen, 2) engaging in horseplay and throwing things and 3) failing or refusing to obey instructions, rules and policies.

The Company pointed out in the hearing that the construction or assembly of a particular tank trailer involves a team of 2-3 employees consisting of an experienced, veteran lead person and one or two less-experienced employees. A team is typically responsible for the entire assembly process on their assigned trailer. Obviously, the team members must work closely and in coordination with each to complete their work in a proper and efficient manner. A number of Harlander's disciplinary actions indicate that he was having continuing difficulties in adapting to his assigned teams, following relevant instructions and working harmoniously with his fellow team members, particularly the team leadmen. The Company indicated that by November, 2007, 13 of the 14 leadmen in Assembly indicated that they had no wish to work with Harlander. Harlander, during his testimony, indicated that he subsequently polled those same individuals and they told him that they didn't have a problem working with him. However, on cross-examination, he conceded that they may have told him that to avoid hurting his feelings. Given the totality of the evidence, I am inclined to credit the Company's survey results with respect to the attitudes of the leadmen toward working with Harlander.

Two of the disciplinary actions indicate behavior perhaps reminiscent of Harlander's school days. In December, 2006 he admitted throwing a snowball at co-worker, Ed Linn, while Linn was operating a forklift, but said it was just in fun. Harlander had also received a verbal warning from foreman Suska about three months earlier after co-worker, Scott Lease, complained that Harlander was allegedly throwing tape balls at him on the work floor.

Finally, several of the disciplinary actions indicate an on-going problem for Harlander in adhering to the rule concerning side shields on his glasses. I find the encounters on 2/6/07 and 2/8/07 between foreman Dave Neisinger and Harlander concerning the side shields to be particularly interesting. In the 2/6/07 conversation, Neisinger advises Harlander that he is wearing his side shields incorrectly on his glasses. Harlander said he didn't know what Neisinger meant, so Neisinger explained that the shields needed to be turned around on the glasses and slid to the front of the ear pieces. Neisinger also showed Harlander exactly how the shields were installed on his glasses.

Two day later, 2/8/07, Neisinger again noted that Harlander had his eye shields installed incorrectly. When he told Harlander to place the shields in the proper position on the glasses, as he had been told on 2/6, Harlander said he couldn't do that. Neisinger asked for Harlander's glasses and slid the shields into their proper position and gave the glasses back to him.

These encounters appear to say something about Mr. Harlander's general attitude about rules, progressive discipline and his desire to avoid problems.

Turning to the incident on January 28, 2008, we have Mr. Harlander working underneath his tank trailer and removing some metal washers from installable parts. Concurrently, Doug Schlangen is welding on another tank trailer located next to Harlander's trailer. At some point, by his own admission, Harlander decides to throw the washers at or into a garbage can located in the space between his trailer and the trailer where Schlangen was working. Mike Strand, a co-worker, said he saw and heard the washers hit Schlangen and at one point heard Schlangen yell "knock it off" in Harlander's direction. Subsequently, he saw more washers hit Schlangen. He then saw Schlangen then walk over to Harlander and the two had what may have been a somewhat heated conversation. The two subsequently returned to work.

According to Harlander, Schlangen wasn't angry or upset when the two talked and that they got along just fine after the conversation. However, Schlangen apparently hadn't really quite gotten over the incident and was overheard telling another co-worker about it the following day.

In the investigative meeting on January 30, Harlander initially denied hearing Schlangen yell "knock it off!" However, after Mike Strand, who was on top one of the trailers, indicated that he had heard Schlangen yell; then Harlander admitted that he had indeed heard the yell, but said he didn't think Schlangen was yelling at him. The Company saw Harlander's change in story as a willful lie and he thereby lost credibility with respect to other aspects of his story.

The Union points out that Harlander denied throwing washers at Schlangen and contended that he was merely tossing the washers at the garbage can and that unbeknownst to him, at least some of the washers missed the can and apparently hit Schlangen, who was working on the opposite side of the can. It is essentially irrelevant as to whether or not Harlander hit Schlangen with the

washers by accident or by intent. The heart of the issue is that he threw washers in the work area!

In considering appropriate disciplinary action in connection with the January 28 washer incident, the Company weighed in on two issues; 1) Harlander admitted throwing washers. General Safety Rule #8 prohibits throwing things in the work area. In his disciplinary written warning on 12/22/06, for throwing a snowball at a forklift driver, Harlander was specifically informed that if he was subsequently caught involved in any “...horseplay or throwing of any items including snowballs, he will be terminated immediately.” (emphasis added) and 2) that the incident had caused at least a verbal confrontation between Schlangen and Harlander. Additionally, the Company saw the incident as part of the continuing and ongoing problem that Harlander had in harmoniously interacting and working with other employees. He had been specifically warned on 12/14/07 that if his “...behavior towards co-workers, leadmen, supervisors, managers, etc. doesn't improve immediately and continue into the future, Jesse will have terminated his employment with Polar.” (emphasis added)

As soon as Harlander made the conscious decision, on January 28, 2008, to throw or toss the washers at the garbage can, he concurrently put his continued employment with the Company at risk. When one or more of the washers hit Schlangen, Harlander essentially terminated himself. To put it more aptly, Mr. Harlander literally “threw or tossed” his job away in those few moments.

In view of the foregoing, I find that the Company did have more than sufficient evidence to establish “good, sufficient and just cause”, as required by the current labor agreement, to support its January 31, 2008 decision to terminate the employment of Jesse Harlander. In fact, given the two last chance warnings that had been previously issued to Harlander, the Company really had no other option without causing potential harm to the credibility of its disciplinary system and to its other employees. It is clear that, based on Harlander's disciplinary history and ongoing behavior and conduct, further efforts at rehabilitation would be futile. I also find that during the course of the investigation and imposition of discipline, the Company afforded Harlander full and fair “Industrial Equal Protection”, as outlined by Abrams and Nolan, as above.

Finally, I note that Union Steward James Storlie recognized that Harlander was having problems and on several occasions assured the Company that he would personally try to assist Harlander in addressing and correcting the problems. Obviously, Mr. Storlie's best efforts were less than fully successful.

CONCLUSION

In view of my analysis, discussion and findings, above, I conclude that the Employer/Company has clearly established, by a preponderance of the testimony and evidence, that employee, Jesse Harlander, was properly terminated for

good, sufficient and just cause in accordance with the provisions and requirements of the current labor agreement.

DECISION

The Union's grievance of January 31, 2008 is, therefore, without merit and is hereby dismissed.

Dated at Minneapolis, Minnesota, this 20th Day of June, 2008.

/s/ Frank E. Kapsch, Jr.
Arbitrator

Note: I shall retain jurisdiction in this matter for a period of thirty (30) calendar days from the issuance of this Decision to address any questions or problems related thereto.