

IN THE MATTER OF THE ARBITRATION BETWEEN

THE INTERNATIONAL)	FEDERAL MEDIATION AND
ASSOCIATION OF MACHINISTS)	CONCILIATION SERVICE
AND AEROSPACE WORKERS,)	CASE NO. 08-55604
DISTRICT LODGE 77,)	
)	
)	
)	
Union,)	
)	
and)	
)	
ALLSTATE SALES CORPORATION,)	DECISION AND AWARD
)	OF
Employer.)	ARBITRATOR

APPEARANCES

For the Union:

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On July 22, 2008, in South St. Paul, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the

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Employer violated the labor agreement between the parties by discharging the grievant, Ronald R. Block. Post-hearing briefs were received by the arbitrator on August 24, 2008.

FACTS

The Employer is a franchised dealer for Peterbilt trucks. At its facility in South St. Paul, Minnesota, it sells and services heavy-duty trucks of that and other brands. The Employer is a subsidiary of W.D. Larson Companies, Inc. ("Larson Companies"). The Union is the collective bargaining representative of the non-supervisory employees of the Employer who repair and maintain trucks in the Employer's Service Department.

The grievant was hired by the Employer in 1969 -- though his seniority date is October 2, 1975, coincident with the Union's first representation of the Employer's employees. From the time of his hiring until his discharge on March 27, 2008, he worked as a Journeyman Bodyman in the Body Shop of the Employer's Service Department.

On March 27, 2008, Kristi Borgwardt, the Human Resources Director for Larson Companies, issued the following memorandum to the grievant, discharging him:

Effective immediately, your employment with Allstate Peterbilt Utility is terminated for just cause. This decision is based on your continued and repeated violations of [the policies of Larson Companies], both before and after your recent leave of absence, including insubordination towards your supervisor, the use of profane and abusive language in the workplace, and inability or unwillingness to work in harmony with your coworkers. This behavior is significantly interfering with our ability to efficiently run the business and can no longer be tolerated.

The Employer presented in evidence the following excerpt from the policies set out in the Larson Companies' Employee Manual:

Discipline. The following are examples of actions for which disciplinary action up to and including dismissal may be imposed. These items do not limit the Company's right to discipline for conduct not specifically listed.

4. Insubordination, e.g., not following the Company policies or the specific instructions of a supervisor, or excessive arguing with a supervisor.
6. Inability or unwillingness to work in harmony with other employees.
7. Use of profane, obscene or abusive language on Company premises or while on Company business.

On March 28, 2008, the Union brought the grievance now before me, alleging that the discharge of the grievant violated Article XI, Sections 1 and 3, of the parties' labor agreement.

Those provisions are set out below:

Section 1. An employee shall be discharged only for just cause. Included in the right to discharge is the right to discipline short of discharge, such as warning letters, suspensions, lay-offs and demotions. The Company reserves the right to apply different degrees of discipline to employees engaged in unlawful conduct according to the degree of their leadership or instigation of contract violation.

Section 3. The Union shall have the right to challenge in writing any disciplinary action it feels is discriminatory or arbitrary except for disciplinary action imposed for violation of the no-strike clause, and to be considered, such protest must be filed with the Company within five (5) working days after said disciplinary action, and such protest shall be handled through the Grievance Procedure and Arbitration as herein set out.

Dallas J. Kiecker, the Employer's Service Manager, gave testimony that I summarize as follows. As Service Manager, a position he has held for three years, he supervises the Service Department, which includes the Body Shop, the Paint Shop and the

Parts Department. When Kiecker first became Service Manager, Richard Kylander served under him as the Manager of the Body Shop. There were then about four or five employees in the Body Shop and two in the Paint Shop. The Employer has laid off and recalled several Body Shop and Paint Shop employees over the past several years, as available work has decreased and increased.

On July 31, 2007, the Employer laid off Kylander from his position as Manager of the Body Shop, and Kiecker took on that responsibility in addition to his duties as Service Manager. On October 22, 2007, Kiecker assigned Grady J. Schuck to be the Manager of the Body Shop. Kiecker testified that Schuck had little experience as a manager.

On October 30, 2007, Kiecker issued a "verbal warning" to the grievant for having come to work before the usual 7:00 a.m. starting time on October 29, 2007, and then asking to leave early. Kiecker testified that the grievant often followed the same pattern of early arrival and early request to leave and that he wanted the grievant to adhere to the regular hours of work in the Body Shop -- from 7:00 a.m. till 3:30 p.m. with two fifteen minute breaks and a half-hour lunch period. According to Kiecker, the grievant worked on his own projects during the time between his early arrivals and the start of the work shift. Kiecker testified that his early presence interfered with the ability of Kiecker and Schuck to do the work they did in preparation for the start of the shift. Other than the warning of October 30, 2007, the grievant has never been disciplined.

During the fall of 2007, the Body Shop employed three Journeyman Bodymen -- the grievant, Frederick J. Herkel and Rick W. Krevinghaus. Herkel had been employed since 1979, with a two-year interruption of his employment starting in 1981, and Krevinghaus had been employed since 1978.

Kiecker also testified as follows. For many years, the grievant and Herkel had a contentious relationship, and their complaints directed at each other increased over the years. For example, a typical complaint the grievant would make about Herkel was that he took breaks extending beyond the time allowed. Herkel and others complained that the grievant tried to avoid work assignments he did not like. The grievant did not actually refuse to do work assignments, but often did them at a slow pace and complained that others were better skilled for particular jobs and should be assigned to those jobs. According to Kiecker, the grievant disliked doing work such as straightening bent truck frames, installing new cabs, fine welding, and working on suspensions, hard roll-overs, burn-outs and air conditioning. He did not complain about light work, such as work on fenders, bumpers and dent repair. Sometimes Kiecker asked Bodymen to clean the shop. When Kiecker assigned the grievant to do so, he would start, but then complain that he had been in the Body Shop for over thirty years and should not be "pushing a broom."

Kiecker testified that, in early October of 2007 while he was still the interim Manager of the Body Shop, a truck came in for repair and restoration after it had been burned out in a

fire. When Kiecker assigned the work to the grievant, the grievant told him that he had not done that kind of work before and said that Herkel and Krevinghaus would be more capable because they had done that kind of work. Kiecker told the grievant that Herkel and Krevinghaus were busy on other jobs and that the grievant must do the work. According to Kiecker, the grievant started on the job, removing the damaged interior of the truck and cleaning part of the cab, but that he then filed a workers' compensation claim and started a light duty assignment. While the grievant was on the light duty assignment, Kiecker had Herkel and Krevinghaus complete the work on the burned-out truck. They complained to Kiecker that the grievant had arranged his light duty assignment purposely to avoid working on the truck. As noted above, a short time later, on October 22, 2007, Schuck became Manager of the Body Shop.

On November 5, 2007, the grievant requested that he be given short-term disability leave. He supported his request with a note from his physician that stated he had fallen [at home] and that he "has a hairline fracture to his skull, causing hearing loss and vision impairment on his right side." The note recommended that the grievant be "off work for one week, as of now" and that he be seen for further evaluation.

Kiecker testified that in early November, 2007, before the grievant began his short-term disability leave of absence, Schuck threatened to quit his new position as Manager of the Body Shop. Schuck said that he was "sick and tired" of hearing the disputes between the grievant and Herkel, which Schuck said

were provoked by the grievant. Kiecker testified that Schuck, Herkel and Krevinghaus also complained that the grievant was reluctant to work.

The grievant testified that his fall referred to in the physician's note of November 5, 2007, was related to heart problems he was experiencing, and that, on November 12, 2007, he had a pacemaker implanted in his chest. The Union presented in evidence the following note by a Nurse Practitioner from the St. Paul Heart Clinic, which, though undated, appears from its text to have been written about January 21, 2008:

[The grievant] is currently being treated at the St. Paul Heart Clinic by Dr. Michael Peterson. On 11/12/2007 [he] had a permanent pacemaker implanted. As of 1/21/2008, [he] can return to work with the following restrictions -- No working over running car/truck engines.

Other documents relating to the grievant's ability to return to work were presented in evidence. The parties disagree about the date that the grievant provided these documents to the Employer. The evidence indicates that the Employer did not receive them until March 10, 2008. I note that resolution of any dispute about the date they were received is not relevant to the primary issue presented in this case -- whether the Employer had just cause to discharge the grievant.

The parties do agree, however, that the grievant was cleared by the Employer to return to work on March 17, 2008, and that the grievant requested and the Employer approved a one-week delay in his return to work. Thus, he finally returned to work on March 24, 2008, after having been off work since November 5, 2007.

Kiecker testified as follows about the events that occurred between March 24, 2008, when the grievant returned to work, and March 27, 2008, when he was discharged. During the grievant's medical leave of absence, the Body Shop had run smoothly, without complaint from Herkel and Krevinghaus. When the grievant returned, however, they told Kiecker that they would quit if they were assigned to work with him. Kiecker testified that he could not run the Body Shop with only one employee and that it was difficult to find experienced employees with knowledge of Peterbilt trucks.

On Monday, March 24, the day the grievant returned to work, a White truck came into the shop for repairs. One of the repairs it needed was straightening its frame. When Schuck assigned that work to the grievant, he told Schuck that Herkel and Krevinghaus were better able to do it. Herkel and Krevinghaus were busy with other work, and Schuck considered sending the frame work out of the shop. When Herkel and Krevinghaus heard that Schuck was considering sending the frame work elsewhere rather than assigning it to the grievant, they were upset that the grievant was again trying to avoid work that he did not like. They told Kiecker that, if the work were sent out of the shop, they would also refuse to do frame work in the future. Kiecker decided that the grievant should do the frame work on the White truck.

On Tuesday, March 25, the grievant told Kiecker that Herkel and Krevinghaus should do the frame work because they were better able to do the work. The evidence shows that they

had more experience doing frame work than did the grievant and that they had improvised equipment for straightening truck frames that was better than the equipment previously used by the Body Shop for that kind of work. The grievant told Schuck that he needed help with the frame work, but Herkel and Krevinghaus told Schuck that one person could do it. Herkel testified that frames can be straightened without help and that he has done it, as has the grievant.

Later on March 25, Schuck, Herkel and Krevinghaus met in the break room to discuss the frame work assignment. The grievant, having heard that they were meeting, came into the break room and angrily confronted the others, provoking Herkel and Krevinghaus. Schuck told the grievant to leave; Krevinghaus became very upset. He and Herkel told Schuck that they were going to quit if the grievant stayed. Schuck allowed Krevinghaus to leave for the rest of the day because he was so upset.

Schuck testified that the grievant caused the Body Shop to be in turmoil after his return to work on March 24, that the grievant was hostile to the others and that they would not work with him because of his hostile attitude. Schuck testified that he spent most of his time supervising the grievant during the four days after his return to work on March 24 and until his discharge on March 27.

Schuck also testified that he had heard the grievant address Herkel as "jackass" in the shop and that Herkel told Schuck that the grievant often used that term to refer to him. Schuck testified that if the grievant were reinstated, he would

try to "deal with it," but would start looking for other work. He also testified that if Herkel and Krevinghaus refused to work with the grievant he would have to discipline them.

On cross-examination, Schuck conceded that the grievant had not actually refused work assignments, but, had resisted them -- as he described with respect to the frame work assigned to him on March 25. He testified that the grievant has used the frame straightening equipment that Herkel and Krevinghaus improvised.

Herkel testified as follows. He and the grievant had once been friends, but their relationship soured in the early 1980s after the grievant made what Herkel considered to be a derogatory remark about Herkel's mother, just after her death. The grievant then began routinely referring to Herkel as "jackass" or "asshole." Herkel tried to ignore this behavior, and later he complained about it both to management and to the Union, but nothing was done. He tried in several ways to stop the grievant's behavior -- first by attempting to improve his relationship with the grievant and then by responding in kind. Despite Herkel's efforts, the grievant continued what Herkel considered to be his hostile and abusive language toward Herkel. According to Herkel, the Body Shop is a small shop with a only few Journeymen, but all of them, including the grievant, have substantial experience and are capable of doing any of the work that comes into the shop. The grievant, however, by resisting difficult or dirty jobs, has been allowed to divert that work to Herkel and Krevinghaus because the supervisors have not wanted to deal with the grievant's resistance.

Kiecker testified that he was very concerned that, with the return of the grievant, he could lose Herkel or Krevinghaus or both. Krevinghaus had enough years to have a vested pension, and Herkel was close. On Wednesday, March 26, the grievant, Herkel and Krevinghaus all came to work. Because Kiecker was concerned that the discord among them might lead to the loss of sufficient skilled employees to keep the Body Shop running, he asked for advice from Borgwardt, the Human Resources Director for Larson Companies.

On Thursday, March 27, Borgwardt came to the Body Shop to investigate. She interviewed Kiecker, Herkel, Schuck and Krevinghaus. Kiecker and she discussed what the options were to deal with the grievant. During that meeting, Herkel called the conference room where Kiecker and Borgwardt were meeting and told Kiecker that the grievant had walked by Herkel in the Body Shop and shouted "jackass." Herkel testified that the grievant used that term to refer to him often and that he had found the initials, "J.A." written on his tool box and in other places around the Body Shop. The evidence shows that the grievant habitually used that term to goad Herkel. Herkel testified that if the grievant is reinstated, he will begin to look for other work.

On cross-examination, Herkel conceded that obscenities are often used by employees in the Body Shop and that many of his co-employees refer to him as "fuckhead" or merely "F.H."

Krevinghaus testified as follows. He and Herkel get along most of the time, but the grievant and Herkel "hate each

other," and their discord creates stress in the shop. He gets upset by the stress. The grievant often used the term "jackass" to refer to Herkel, and that upset Herkel. Krevinghaus testified that he did not have that kind of "personality conflict" with the grievant, but that "toward the end," he would not work with the grievant, even though he likes both Herkel and the grievant. Krevinghaus thinks, however, that he, Herkel and the grievant have all worked in the Body Shop for many years and that all of them know how to do whatever work comes into the shop or can quickly learn how to do it -- as they have always "learned by doing" over the years. When the grievant came to the break room on March 25, Krevinghaus was very upset and he told the grievant, "if you can't do the work, you should go out the door." Krevinghaus did not remember being so upset that he left work for the rest of that day.

Krevinghaus testified that when the grievant was gone between November 5 and March 24, the atmosphere in the Body Shop was free of stress. He also testified that "if things go back the way they were," he would not stay around; he would retire. Krevinghaus confirmed Herkel's testimony that, during Borgwardt's investigation on March 27, he heard the grievant again refer to Herkel as "jackass."

Kiecker and Borgwardt decided to discharge the grievant 1) because no one would work with him and his treatment of Herkel and Krevinghaus upset them so much that they were threatening to quit, 2) because the grievant's demeaning references to Herkel violated the policy against use of "profane

and abusive" language and 3) because his slow and reluctant work on assigned jobs was the equivalent of insubordination.

Kiecker testified that operations in the Body Shop would be severely damaged, if Herkel and Krevinghaus would not work with the grievant. Because many tasks in the Body Shop require that two employees work together, the loss of Herkel and Krevinghaus would disrupt its operations substantially. People with the skill and experience to work on large trucks are difficult to find. He and Borgwardt considered the grievant to be the one who had provoked the discord with Herkel and Krevinghaus, and they thought that Herkel and Krevinghaus were justified in not wanting to work with the grievant because they felt threatened by his behavior. As I interpret Kiecker's testimony, he and Borgwardt considered the grievant's resistance to doing difficult tasks as a de facto refusal to do them amounting to insubordination -- conduct prohibited by Larson Company policies.

Kiecker testified that he and Borgwardt considered alternatives to discharge -- discipline short of discharge or a last chance agreement. They also considered transferring the grievant to work outside the Body Shop, but decided that there was none available that he was qualified to perform. They knew that the grievant, with over thirty years' service, could retire and receive a pension, but he did not want to retire.

On March 27, 2008, Kiecker and Borgwardt gave the grievant the notice of discharge, which I have set out above. Kiecker testified that on April 2, 2008, at a grievance meeting

attended by the grievant and a Union representative, the grievant, when asked to state his position, did so, but said nothing that caused a change in the decision to discharge him. He also testified that the grievant would have been reinstated if he had done so.

Kiecker testified that since the grievant's discharge, the Body Shop has run smoothly. The Employer has hired a new employee, not yet a Journeyman. According to Kiecker, if the grievant is reinstated to his position, Krevinghaus and Schuck would quit, Herkel would probably do so, and it would then be impossible to run the Body Shop with the grievant and an inexperienced employee.

Borgwardt testified that, on March 27, as she and Kiecker were considering what discipline to impose, they learned from Herkel that the grievant was in the shop again referring to Herkel as "jackass," and, when she learned that, she decided that discharge was necessary.

The grievant testified as follows. When he returned to work on March 24, 2008, Schuck assigned him to repair a White truck that came in to the shop that day. The truck repair required straightening the frame as well as other repairs. The grievant denied that he refused to straighten the frame, testifying that he started working on the truck and then told Schuck that Herkel and Krevinghaus were more experienced in frame work. According to the grievant, Schuck then said he would send the truck out for the frame work, and the grievant told him that he agreed. Later -- on March 25 as I understand

the grievant's testimony -- Schuck told the grievant that he had decided to do the frame work in-house. The grievant testified that he then asked Schuck to have Krevinghaus help him with the frame work because usually, though not always, it is better to have two people operate the frame straightening equipment.

According to the grievant, Schuck, Herkel and Krevinghaus then met in the break room, and the grievant went there when he heard them yelling. Krevinghaus was very upset about having to help the grievant do the frame work. The grievant tried to explain to Schuck that the controversy was one that Schuck should not have to deal with and that he could "handle it." The grievant left the break room.

The grievant testified that the controversy about doing the frame work on the White truck was not a refusal to do the work, but, rather, that it was a disagreement about who should do it. He denied that he ever told Schuck that he would not do any work as assigned.

The grievant also testified that on March 27, when he was called to the disciplinary meeting where he learned that it had been decided to discharge him, he was surprised. He had no discipline over his entire employment of more than thirty years, except for the warning of October 30, 2007, for having come to work before the usual 7:00 a.m. starting time on the previous day and then asking to leave early. On that day, he was on a light duty assignment, painting a hallway. After having come in early, he asked Schuck's permission to leave early without pay for the rest of the day and Schuck gave him permission to do so.

The grievant conceded that his personnel file contains other requests to leave early on a form the Employer uses for that purpose, but he pointed out that all of those request forms show a signed approval to do so by a supervisor.

The grievant denied having called Herkel a jackass. He testified that he and Herkel try to ignore each other and have not spoken to each other in over two years. He testified that in the past Herkel has had several physical confrontations with him, that Herkel pushed against him after the grievant, by accident, caused the antenna on a radio Herkel owned to break off as the grievant brushed against it while passing by.

The Union presented evidence that during March of 2006, the grievant filed a harassment complaint with the Employer, alleging that he had been harassed by James Marsolek, a co-employee who worked then in the Body Shop. The complaint alleged that Marsolek had angrily yelled at him while they were in the yard outside the shop. In response, Kiecker issued a "verbal warning" to Marsolek.

On cross-examination, the grievant conceded that at the grievance meeting on April 2, 2008, he had had the opportunity to give his side of the story to the Employer's representatives. The grievant testified that he would return to work if he is reinstated.

DECISION

Just cause and progressive discipline. In the following discussion, I give a fair summary of what is "just cause" as defined in American labor law. The essence of the employment

bargain between an employer and an employee (or a union representing an employee) is that the employer agrees to provide the employee with pay and other benefits in exchange for the agreement of the employee to provide labor in furtherance of the employer's enterprise. When the employer and the employee (or a representing union) have also agreed that the employer may not terminate the employment bargain except for "just cause," they intend that discharge will not occur unless the employee fails to abide by his or her bargain to provide labor in a manner that furthers the employer's enterprise.

In previous cases, I have used the following two-part test of "just cause," which derives from that intention:

An employer has just cause to discharge an employee whose conduct -- either misconduct or a failure of work performance -- has a significant adverse effect upon the enterprise of the employer, if the employer cannot change the conduct complained of by a reasonable effort to train or correct with lesser discipline.

Under this two-part test, an employer must establish 1) that the conduct complained of has a serious adverse effect on the employer's operations and 2) that the employer has attempted to prevent repetition of the conduct by training and corrective discipline, thus seeking to eliminate any future adverse effect from the conduct before taking the final step of discharge.

The application of the first part of this test requires a determination whether particular conduct is significantly adverse to the enterprise. Some conduct may create such a threat to the enterprise that discharge should be immediate and need not be

preceded by an attempt to change the conduct by training or progressive discipline, as required under the second part of the test. Such serious misconduct may be so adverse to an employer that the employer should not be required to risk its repetition. For example, an employer should not be required to use training and corrective lesser discipline in an effort to eliminate the chance of repetition for most thefts, for drug use in circumstances that threaten the safety of others or for insubordination so extreme that it undermines the employer's ability to manage its operations.

Some misconduct or poor performance is only a slight hindrance to good operations. For example, a single instance of tardiness will not have a significant adverse effect on the operations of most employers. Conduct, however, that is only slightly adverse when it is infrequent, may have a significant adverse effect on operations if it occurs often. Thus, tardiness and absence that become chronic will usually cause a serious disruption to operations, and, if progressive discipline does not eliminate such poor attendance, it will accumulate in its adverse effect and constitute just cause for discharge.

Similarly, an isolated instance of poor work performance will not, in most circumstances, have a significant adverse effect on an employer, but poor performance that persists even after a reasonable effort to correct it will undermine the essence of the employment relationship -- that, in exchange for wages and benefits, the employee will provide the employer with satisfactory work in furtherance of the enterprise.

In the present case, the Employer makes the following primary arguments. In two respects, the grievant's conduct interfered significantly with the Employer's ability to carry on its operations effectively -- first, by his long history of avoiding difficult tasks and then, if required to do them, by performing them slowly and reluctantly. In addition, the Employer urges that this conduct of the grievant, together with his combative and unpleasant attitude and his unjustified harassment of Herkel caused Herkel, Schuck and Krevinghaus to be unwilling to continue to work with him.

The Employer emphasizes that, if the other employees in the shop quit, as they have indicated they would do rather than continue to work with the grievant, the Employer would be left without employees who could operate the Body Shop and would be forced to shut it down.

The Union makes the following arguments. It does not concede that the evidence supports the allegations upon which the Employer bases its arguments. Nevertheless, the Union argues that, even if, arguendo, one assumes that the evidence supports those allegations, none of them is sufficient to justify the discharge of a very long-term employee who has had no previous discipline, except an unjustified "verbal warning" for coming to work early and then leaving early without pay after receiving permission from his supervisor to do so. The Union argues that, even if it is found that the grievant referred to Herkel as a "jackass," the use of that term is mild in comparison to the language commonly used in the shop,

including Herkel's nickname among other employees, "fuckhead," which Herkel accepted without objection.

The Union argues that the evidence shows only that the grievant suggested to Schuck that he was not the most skilled employee in the shop to do frame straightening, a true statement, and that when Schuck, nevertheless, ordered him to do the job, he did not refuse to do so. Rather, he asked to have Krevinghaus help him perform what he thought was a job requiring two people. The Union urges that the evidence does not show that the grievant ever refused a directive to perform an assigned task.

I make the following additional findings of fact. The evidence supports substantially all of the factual allegations made by the Employer. It shows that, for a number of years, the grievant has been an employee reluctant to perform many of the difficult tasks that must be performed in the Body Shop and that his reluctance has often been successful, as it was under Kylander, the Body Shop Manager until July 31, 2007. Though the evidence does not show that the grievant has refused an order to work, it does show that he has avoided difficult tasks by exhibiting reluctance and arguing about who should perform them, thus diverting them to Herkel and Krevinghaus and earning their justifiable resentment of his behavior.

During the period when Kiecker was the interim Manager of the Body Shop, from August 1, 2007, till October 22, 2007, the evidence describes another example of work the grievant was assigned to do during that twelve-week period that he was reluctant to perform. In early October of 2007, when Kiecker

assigned him to work on a burned-out truck, the grievant suggested that Herkel or Krevinghaus were better able to do that work. Kiecker refused to reassign the work to them, but, after the grievant started the work, he suffered a work-related injury a short time later, and, because he was assigned to light duty, Herkel, in the end, did the rest of the work on the truck.

The grievant was not under the supervision of Schuck, the new Manager of the Body Shop, for long between Schuck's appointment to that position on October 22, 2007, and the start of the grievant's disability on November 5, 2007. When the grievant returned to work on March 24, 2008, however, the grievant once again tried to avoid work he did not like -- the frame straightening of the White truck. At first, Schuck acceded to the grievant's suggestion that he send the truck out to have the frame work done outside the Body Shop, but, when Herkel and Krevinghaus objected, Schuck ordered the grievant to do the work, despite his objection. The grievant's request that Herkel or Krevinghaus help with the frame work was interpreted by them as showing that he intended to continue his avoidance of work he did not like by diverting it to them.

The evidence shows that over several years the grievant made demeaning references to Herkel and that he did so intentionally to irritate Herkel. The Union argues that "jackass" and "asshole" are mild epithets in a shop environment, and I recognize that ordinarily the use of those terms would not justify discipline. The evidence shows, however, that the grievant used them, not as merely random obscenities, but as

goads to provoke Herkel's anger -- conduct that does justify discipline because it has been disruptive to the work of the Body Shop.

I make the following rulings. The evidence shows that the grievant's hostility toward his coworkers and his reluctance to do the more difficult tasks required of a Journeyman Bodyman adversely affected the Employer's operations and that, consequently, the Employer had just cause to discipline him. Nevertheless, I rule that, because of the grievant's employment record, the Employer should have used progressive discipline in an effort to correct his conduct before discharging him. In over thirty years of employment, he had no previous discipline except the undeserved warning of October 30, 2007, for arriving at work early and then leaving early after obtaining permission to do so.

Because the Employer should have tried to correct the grievant's conduct with progressive discipline, the award directs the Employer to reinstate the grievant to his employment promptly. I reduce the discharge to a long suspension without pay -- from April 2, 2008, the date of the grievance meeting at which the Employer first gave the grievant the opportunity to state his position, till the date of his reinstatement. Because the Employer should not have discharged the grievant until it gave him the opportunity to state his position, I award him back pay for the short period between March 27, 2008, the date of his discharge, and April 2, 2008, the date when the Employer did allow him to state his position.

I recognize that the Employer is concerned that Herkel, Krevinghaus or Schuck may quit if the grievant is reinstated. Nevertheless, because the labor agreement provides that the Employer must have just cause to discharge a bargaining unit member, the grievant is entitled to progressive discipline as a component of the just cause standard. If the grievant corrects his conduct, the other employees will have no reason to quit, but if he continues with similar misconduct, discharge may then be appropriate under that standard.

AWARD

The grievance is sustained in part. The Employer shall promptly reinstate the grievant to his position without loss of seniority. For the reasons stated in the Decision, above, the Employer shall pay the grievant the wages and benefits he lost between March 27, 2008, and April 2, 2008. The period between April 2, 2008, and the date of the grievant's reinstatement shall be considered a long disciplinary suspension without pay.

October 10, 2008


Thomas P. Gallagher, Arbitrator