

IN THE MATTER OF ARBITRATION BETWEEN

OHLY AMERICAS	)	
"Employer"	)	
	)	FMCS Case No. 13-54921-3
AND	)	
	)	Cell Phone Ban
TEAMSTERS LOCAL NO. 471	)	
"Union"	)	

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: July 11, 2013; Minneapolis, MN

DATE OF RECEIPT OF POST-HEARING BRIEFS: July 31, 2013

APPEARANCES

FOR THE EMPLOYER:     Jeff Betker, Production Manager  
                           Ohly Americas  
                           35 Adams Street North  
                           Hutchinson, MN 55350

FOR THE UNION:         Richard Kaspari, Attorney  
                           Metcalf, Kaspari, Engdahl & Lazarus  
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THE ISSUE

Did the Employer violate the Agreement when it banned employee cell phones from the locker room and break areas of its Hutchinson facility.

If so, what remedy applies?

## INTRODUCTION

This matter came on for hearing before Neutral Arbitrator on July 11, 2013 at the offices of the Federal Mediation and Conciliation Service in Minneapolis, MN. Testifying by telephone for the Employer were Maintenance Supervisor Randy Woodside and Production Manager Darwin “Junior” Blum, Jr. Also present for the Union were Secretary/Treasurer Dave Laxen and Shop Steward Mike Marvan.

At the hearing, the parties stipulated that this matter presents no procedural issues and the merits are properly before the Neutral Arbitrator for resolution. The parties were unable to stipulate to the issue, leaving it to the Arbitrator to frame. The Union proposes that the issue be stated as on Page 1.

## CONTRACTUAL PROVISIONS Collective Bargaining Agreement

### ARTICLE 2 – One Agreement

This Agreement shall be the sole Agreement existing between the Company and its employees covered hereby, and shall supersede the provisions of any existing agreement between the Company and said employees or any of them.

### ARTICLE 6 – Management Functions

Section 1. By way of example only and not in limitation thereof, the Union recognizes that the Company has the exclusive responsibility for the management, operation and maintenance of its facilities, the right to select and hire, direct the work force, schedule work, determine what work is to be done, what is to be produced and by what methods and means, to determine the size of the work force, to relocate or remove any portion of the facilities, to subcontract, to transfer bargaining unit work, to abandon any operation, and shall not be subject to grievance and arbitration. If the Company subcontracts or transfers bargaining unit work, it will provide the Union advance notice of the decision and will comply with applicable “effects” bargaining under federal labor law.

Section 2. In exercising its other management responsibilities the Company shall be subject to express provisions of this Agreement, including grievance and arbitration procedures. By way of example only and not in limitation thereof, these responsibilities include the right to promote, demote, layoff, recall, discipline, or discharge employees for just cause and the right to establish and enforce reasonable rules of work, conduct, safety and health to assure efficient operation.

### ARTICLE 11- Grievance Procedure

Should any grievance or dispute arise between any employee(s) and the Company with respect to the interpretation or application of any of the terms of this Agreement, it shall be settled in the following manner:

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After the Step 4 meeting between the Company, the Union will notify the Employer within twenty (20) calendar days if it intends to pursue arbitration.

#### ARTICLE 12 – Arbitration

Section 1. Not later than seven (7) calendar days after the Union serves the Company with written notice of intent to appeal a grievance to arbitration, the Company and the Union shall jointly request the Federal Mediation and Conciliation Services to furnish, to the Company and the Union, a list of five (5) qualified and impartial arbitrators. Within seven (7) calendar days after receipt of that list by the Company, the Company and the Union shall alternately strike names from the list, until only one (1) name remains. The Union shall make the first strike. The arbitrator whose name remains shall hear the grievance. The parties may select an arbitrator by other means if such other method of selection is confirmed by written agreement.

Section 2. The jurisdiction and authority of the arbitrator and his/her opinion and award shall be confined exclusively to the interpretation and/or application of the express provision(s) of this Agreement at issue between the Company and the Union. He/She shall have no authority to add to, detract from, alter, amend, or modify any provision of this Agreement; to impose on either party a limitation or obligation not explicitly provided for in this Agreement. The Arbitrator shall not hear or decide more than one (1) grievance without the mutual consent of the Company and the Union. The written award of the arbitrator on the merits of any grievance adjudicated within his jurisdiction and authority shall be final and binding on the aggrieved employee, Union and Company.

Section 3. The fees and expenses of the arbitrator shall be shared equally by the Company and the Union. All other preparation, presentation, and witness expenses shall be borne by the party incurring them.

#### FACTS

The Employer's facility in Hutchinson, MN manufactures yeast-based flavorings used in a wide variety of processed foods. Production operations include fermentation, drying, and packaging processes which operate on a 24/7 basis. The facility also includes a distribution warehouse and an adjoining building housing a quality control lab, as well as management and sales offices. The Union has represented the production, warehouse, and maintenance employees who work at the facility for many years.

The employees in the bargaining unit work 12 hour shifts, during which they are permitted a break every two hours, for a total of five breaks over the course of a shift. Employees take their breaks in the facility's locker room and lunch room, and in an outdoor break area immediately adjacent to the plant.

The parties first addressed the subject of employees' use of personal cell phones during working hours during the negotiations of their 2009-2012 Collective Bargaining Agreement. At

the opening of these negotiations, the Employer proposed adding the words “excessive use of cell phones” to the list of workplace offenses, set out in Article 10, Section 1, of the Agreement which will subject an employee to the lowest level of progressive discipline. Speaking for the Union, Dave Laxen asked what the Employer would consider to be appropriate use of cell phones by employees. Production Manager Jeff Betker responded that employees could use their cell phones on break time and in break areas. Laxen replied that that understanding was agreeable to the Union and the proposed language was added to the Agreement.

The Employer first disciplined an employee for excessive use of a cell phone on August 18, 2010, when Betker issued a verbal warning to employee Don Holmquist, which stated as follows:

Pursuant to Article 10 (Discipline and Discharge) Section 1. You are receiving a verbal warning for excessive cell phone use during working hours. You have been frequently observed on your cell phone outside of normal break times. You must stop this type of cell phone use at once or face further, more severe disciplinary action including termination of employment. The employee use of personal cell phones is limited to break times only.

The Union did not pursue a grievance regarding this warning.

The Employer issued no further discipline for excessive cell phone use prior to April 4, 2011, when Betker posted a notice in the work place, with a copy provided to the Union, which read as follows:

#### AN OPEN LETTER TO THE BARGAINING EMPLOYEES OF OHLY AMERICAS ON THE USE OF PHONES AT WORK

On various occasions employees have been observed abusing phone privileges (excessive calling *and* texting, during shift other than at break times). While I understand this isn't *everyone*, it has become necessary to address the issue to clarify for *everyone* the expectation and potential outcome.

Think about it...

When you report to work you are here to work. It's really that simple. Being on the phone is a distraction that is not only a cause for concern for poor work performance but is a concern for both employee and food safety as well. I have often mentioned to employees here that phone use (other than for emergency purposes or conversations pertaining to their job requirements) must be limited to ***break times only***. With that said, judging from what I have observed, certain employees here are on break quite a bit! So much so that I felt this letter was necessary. The abuse of this privilege, and I do consider it a privilege, must stop immediately or further and more aggressive action will be taken.

So, here is how we'll handle it...

Option #1

First, Employees will be given a chance to clear up this issue up on their own with no action taken by the Company. Beginning today, cell phones may be brought into work but MUST BE kept in your lockers at all times (other than formal breaks). If improvement is not observed, then the following actions will be taken:

Pursuant to Article 10, Section 1

The issue can and will be addressed in accordance with progressive disciplinary action up to and including termination. Ask yourself, is it worth it?

In addition

We will institute a ZERO Tolerance Cell Phone Policy (an *absolute ban* on cell phones in the workplace). After the ban is implemented any employee caught with their cell phone in the workplace will be severely disciplined up to and including termination.

Ultimately, it's up to you how this issue gets addressed but it will be resolved one way or the other. Personally, I would choose to act as suggested in Option #1.

Thanks,  
Jeff

After reviewing the notice, Laxen discussed it with Shop Steward Mike Marvan, stating that he believed that Betker's characterization of appropriate use of personal cell phones in the workplace was consistent with the understanding reached between the parties during negotiations, and that a requirement that employees leave their cell phones in their lockers, except while on break, was a reasonable extension of that understanding. Laxen also told Marvan that the Employer could not make good on its conditional threat to implement an absolute ban on cell phones without violating the Agreement. Neither Laxen nor Marvan discussed the notice with Betker.

Following the posting of the April 4, 2011, notice, the Employer revised its "Employee Good Manufacturing Practices (GMP's) and Safety Guidelines" by adding a provision which stated as follows:

Cell phone use is prohibited in all production areas. Cell phones can only be used in the following areas:

- Front Office
- Management Offices
- Quality Lab
- Break Areas

The Employer issued no further discipline for excessive cell phone use until May 7, 2012, when Supervisor Rob Malone gave Holmquist a written warning, which described the basis for discipline as follows:

On May 3<sup>rd</sup> you were observed using your cell phone in the warehouse. This is a direct violation of our cell phone policy. You have been warned previously and are a habitual abuser. This behavior will not be tolerated. The current company policy is KEEP IT IN YOUR LOCKER with the exception of break time.

The Disciplinary Action Form for this written warning then went on to state, as part of its stock language, "Any future infractions of this nature or violations of other Company Policies and Procedures may result in further disciplinary action taken, up to and including discharge." Marvan discussed this incident with Betker, who revised the written warning on May 20, 2012, by adding a notation as follows:

Resolution as agreed: Disciplinary action remains at the "Written Warning" step. Language indicating "Termination of employment" upon one (1) more infraction removed. Company agrees that issue will remain in progressive discipline.

(Id.) The Union pursued no further grievance regarding the written warning.

On August 10, 2012, Malone again disciplined Holmquist, stating as follows:

On August 10, you were observed using your cell phone outside of your scheduled break time. This is in direct violation of our cell phone policy and will not be tolerated. Further infractions of this nature will result in discipline up to termination.

Holmquist's disciplinary status would move to the level of suspension, one step short of discharge, although Holmquist was not actually deprived of any work. The Union did not grieve this discipline.

On November 15, 2012, Malone again gave Holmquist a Disciplinary Action Form, with copies sent to the Union, which stated as follows:

You have been observed, on several occasions including today, using your cell phone outside of scheduled break times. You have been reprimanded on several occasions previously for this very issue. This is a serious reoccurring infraction of company policy. Going forward there will be random locker checks performed by management. If your cell phone is not in your locker there will be further disciplinary action taken up to and including termination.

No discipline other than this warning was imposed on this occasion. The Union did not grieve the matter.

Neither party raised the issue of personal cell phone use during the negotiations of the current Collective Bargaining Agreement, which was completed on June 28, 2012. Although Betker testified that there were "seven or eight fairly chronic abusers" of the cell phone policy in the bargaining unit, no one other than Holmquist was disciplined for this sort of infraction prior to March 13, 2013. On that date, without first discussing the matter with the Union, the Employer posted the following "NOTICE" in the plant:

TO: All Bargaining Unit Employees of Ohly Americas Hutchinson Facility  
RE: Ban on personal employee Cell Phones from Plant facilities  
DATE: March 13, 2013

Effective Monday, March 18<sup>th</sup> all Bargaining Unit employees personal Cell Phones will be prohibited from the Hutchinson facility. This means that under no circumstances shall any employee referenced above bring their personal Cell Phone into any of the Plant site buildings or facilities. This Cell Phone ban includes employee lockers.

This Cell Phone ban shall not apply to Company issued Cell Phones used by Leads for work related circumstances.

We do feel it is unfortunate that we have to implement this absolute ban on personal Cell Phones however, due to the actions of a select few employees who continue to disregard instruction and directive on Cell Phone use in the workplace we strongly feel that an outright ban is appropriate and necessary.

Failure to adhere to this NOTICE shall result in disciplinary action up to and including employment termination.

Betker provided Laxen and Marvan with a copy of this notice by e-mail on March 14, 2013. Laxen telephoned Betker and requested to meet with him regarding the matter. Laxen followed up that conversation with an email, dated March 19, 2013, in which he described the Union's position as follows:

After reviewing the contract, I feel that at *[sic]* total ban of cell phones from Ohly facilities is a contract violation. The current contract has language in Article 10 addressing the "excessive use of cell phones." I view this language as an acceptance of management that employees may want to use their cell phones and the understanding that cell phones have become a way of life for your employees.

The fact that "excessive use of cell phone" will get a person in trouble also implies that non-excessive use would not get a person in trouble. So a total ban on cell phones is disciplining employees who have not abused their usage of their cell phone.

At our meeting I am open to discuss this issue especially given the fact that the advancement of cell phones and their usage has evolved since we discussed it in our 2009 negotiations.

At this point I would request that the total ban on cell phones be lifted and the contractual language followed. I will see you on the 5<sup>th</sup>.

The parties met on April 5, 2013. During the meeting, Laxen noted that the Employer had the option to issue discipline to employees who, it believed, had violated its earlier cell phone policy. Betker responded that such violations would be a poor reason to fire an employee,

apparently in reference to Holmquist. Laxen noted that there could be other disciplinary options and cited the possibility of repeated suspensions as an example. Betker repeated the Employer's position that only a total ban would suffice to address the problem. Laxen inquired about whether employees could bring their cell phones anywhere onto the Employer's property, and Betker replied that they could leave them in their cars. The parties agreed that the Union would file a formal grievance and move the matter to arbitration. Later that same day, Laxen emailed a summary of the meeting to Betker, asking him to confirm these points. The following Monday, Betker responded with an email stating, in pertinent part, as follows:

The employee personal safety and the GMP issues associated with cell phones which pose a risk to our product safety are well documented throughout the industry. This undeniable fact makes this more of a management rights issue. We have the right and responsibility under Article 6 to manage the operation and enforce reasonable rules. There is absolutely nothing unreasonable about the cell phone ban in this workplace. We have tried to allow the employees here to be responsible with cell phone use. We have talked to the employees about the consequences, issued warning letters and memos outlining the expectations and potential consequences of failure to adhere to those expectations but the abuse of those privileges continued regardless which ultimately led to the cell phone ban. The employees were well aware of that consequence.

Cell phones have changed drastically since 2008/2009 when we first discussed their use in our workplace. As you know today's cell phones provide internet access, are equipped with cameras, can play games all of which adds to their addictive nature. In reviewing my negotiation notes from the 2009-2012 contact the committee at that time was opposed to any language being added to the CBA referring to cell phones. Your comment to them was that they were lucky to even be able to have their cell phone at work.

In truth employees here are not terribly inconvenienced by the cell phone ban. The Company provides "land line" phones in several areas that the employees can use for emergency situations. If those phones are not answered for some reason the option is available to call the office in which case the employee would be paged. Employees do not need internet access while at work. They can do those things, check their email and play their phone games on their own time.

We obviously cannot restrict what employees have in their vehicles and their cell phones must remain in their vehicle. Use of cell phones in their vehicle will be monitored and disciplinary action will be the result if that use leads to loafing, unsatisfactory work performance or leaving work area. Regarding employees that walk to work or ride bicycle I don't feel a response to that is warranted as the employees fully understand the expectation of the ban.

Regarding your inquiry as to the grievance process...

I can agree that we are at Article 11, Step 4, Paragraph 2. Yes.

The following day, Marvan filed a formal grievance, stating, in pertinent part, as follows:

## Statement of Grievance

## Class Action – Open

On March 18, 2013, the employer unilaterally issued a cell phone policy banning all cell phones from the Ohly Americas Hutchinson Facility, excluding an employee's personal vehicle. The policy is unreasonable and a violation of the Collective Bargaining Agreement.

Local 471 charges Ohly Americas with violations of Articles 2, 6, 10 and any other provisions [*sic*] of the Collective Bargaining Agreement which may apply.

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## REMEDY REQUESTED:

Retract Cell Phone Policy and allow employees to store their cell phones in their lockers and allow employees to use their cell phones in the appropriate areas of the facility and during the employees free time. (Jt. Ex. 2)

During the last week of March, 2013, Betker disciplined two employees bringing their cell phones into the production areas of the facility. Shift lead workers, who are members of the bargaining unit, carry an Employer-issued cell phone in the production areas of the plant while they are on duty. Other employees carry Company-issued two-way radios. When a maintenance employee left such a radio inside one of the facility's fermenters, and the fermenter was returned to production, it caused approximately \$10,000 worth of damage to product and equipment.

In keeping with normal food safety protocols, employees are required to wash their hands before returning to work after breaks.

At hearing, Betker sought to justify the total ban on cell phones by stating that they are a pathogen risk to the facility's product and might further damage product or equipment if accidentally dropped into the production process. He also submitted two articles indicating that cell phones can be a source of nosocomial pathogens in hospital settings and another article noting that proposed federal food safety regulations require manufacturers to take preventive steps to reduce the likelihood that small pieces of glass or hard plastic will be included in the food products.

Betker stated that cell phone use can be addictive and submitted three articles in support of that view. He went on to state that he didn't believe that he could terminate an addicted employee for cell phone use "with a clear conscience." Supervisor Randy Woodside testified that, while progressive discipline would be appropriate to deal with excessive cell phone use, he preferred a total ban because "it puts everyone on the same playing field." Woodside also cited an additional concern that cell phones equipped with cameras could take pictures of proprietary equipment in the facility's production areas. Supervisor Junior Blum testified that he believed that employees were taking shorter breaks since the cell phone ban, and seconded Betker's opinion that addressing the problem through progressive discipline would result in "terminating good employees." Blum acknowledged that the Employer would discipline employees for misconduct resulting from other sorts of addictive behavior, such as that manifested with

alcoholism, and that none of the Employer's proprietary equipment is located in employee break areas.

### POSITION OF THE UNION

The Employer's total ban on the possession of personal cell phones by members of the bargaining unit while on the Employer's premises violates Article 10, that the Employer will only discipline employees for cell phone use if that use is "excessive," and the parties' mutual understanding that employees' use of cell phones while on break and in break areas is not "excessive" within the meaning of the Agreement. That blanket prohibition also violates Article 6, Section 2 of the Agreement, which permits the Employer to "establish and enforce reasonable rules of work" during the life of the Agreement. The cell phone ban is an unreasonable over-reaction to excessive cell phone use by a few employees which, in effect, punishes the entire bargaining unit for those employees' misconduct.

The Union now addresses the Employer's motion for summary judgment on the ground that the Union failed to demand bargaining in response to the posting of April 4, 2011. The Arbitrator denied the motion at hearing, but, in the event that the Employer renews the motion on brief, two points of law are pertinent. First, in order to give up its right to bargain over a mandatory subject of negotiation, a party must make a "clear and unmistakable waiver" of that right. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). As noted at hearing, a union's silence in response to an employer's statement that it might wish to make a change in terms and conditions of employment at some unspecified time in the future conveys no such waiver of rights. See, e.g., *Coastal Cargo Co.*, 353 NLRB 819, 821 (2009). More fundamentally, a union has no obligation to return to the bargaining table in response to an employer's threat to change *contractual* terms and conditions during the life of a collective bargaining agreement. See, e.g., *Hotel Donatelo*, 311 NLRB 1 (1993). Such disputes, "with respect to the interpretation or application of any of the terms of this Agreement" must be resolved through the contractual grievance or arbitration procedure. Article 6, Section 2, of the Agreement specifically notes that management's rights to promulgate and enforce work rules "shall be subject to the express provisions of this Agreement, including grievance and arbitration procedures." A party which files and pursues a timely grievance under those procedures preserves its rights with respect to the matter in question. Because the Union asserted its contractual rights regarding the cell phone ban in a timely fashion after the ban's implementation, the merits of this matter are properly before the Arbitrator.

The interpretation of any contract begins with its text. One of the most basic rules of textual construction holds that a contract must be read to give meaning to all of its terms. Here, the Agreement provides that the Employer may impose progressive discipline for "excessive use of cell phones." By prohibiting bargaining unit employees' personal cell phones from the facility, the Employer asserts the right to discipline employees for *any* cell phone use in the workplace. Upholding that prohibition would effectively delete the word "excessive" from Article 10's reference to cell phone use. An interpretation of the contract producing that result would be inappropriate, and is explicitly prohibited by Article 12, Section 2, of the Agreement.

For this reason alone, the Employer's total ban on the use of personal cell phones by bargaining unit employees at the facility must be rescinded.

In negotiating the pertinent provision of Article 10, the parties did more than simply agree to add the phrase "excessive use of cell phones" to its first numbered subparagraph. They gave that phrase a measure of specific meaning when the Union conditioned its agreement to the addition of that proposed ground for progressive discipline on a mutual understanding of when cell phone use in the workplace would be appropriate. The Union specifically asked for and received the Employer's agreement that employees could use cell phones while on break in the facility's break areas without fear of discipline. Because the Union did not agree to the Employer's proposal until receiving this assurance, this minimum definition of appropriate personal cell phone use by bargaining unit employees at the facility effectively became part of the Agreement. The Employer's ban on personal cell phone use at the facility by members of the bargaining unit must be rescinded to the extent that that ban prohibits employees from possessing and using personal cell phones while on break in the break areas of the plant.

At hearing, the Employer did not contest the fact that the Agreement allows it to prohibit only excessive cell phone use or that it agreed that employees could use their personal cell phones in break areas on break time during the negotiation of the pertinent contract language. This implicit concession provides more than sufficient grounds to sustain the grievance and grant the Union the remedy which it seeks. However, because the Union also challenged the total cell phone ban as "unreasonable" under Article 6, Section 2 of the Agreement, and the Employer focused its entire defense on the proposition that the ban is operationally reasonable, it is appropriate to address that point as well.

In addition to violating Article 10 of the Agreement, the Employer's ban on all personal cell phone use by bargaining unit members at the facility is unreasonable because it is overbroad to accomplish the Employer's legitimate goals, and imposes a form of group discipline as an inappropriate substitute for individual, progressive discipline.

At hearing, the Employer articulated concerns about potential contamination of its products, loafing and unsafe distraction during working time, and the possible disclosure of proprietary information as reasons for supporting the ban. Each of these concerns can be addressed by prohibiting employees from bringing their personal cell phones into the production areas of the plant, and then properly enforcing that prohibition. Bargaining unit employees' use of personal cell phones in break areas on break time threaten none of these employer interests. The Employer recognized as much in its April 24, 2011 posting requiring employees to leave their personal cell phones in their lockers except when they were on break. It also acknowledged the extent of its legitimate interests regarding personal cell phone use in its GMPs Safety Guidelines which prohibit the use of cell phones only in production areas and, until March of this year, explicitly permitted their use in break areas. The Union never challenged the limited ban of cell phones from production areas implemented on April 4, 2011, and it is not at issue here.

The Employer will respond to this point by arguing that its earlier, limited ban failed to produce the desired result because some employees, and one employee in particular, are so enthralled by their cell phones that they cannot help but use them excessively, even in the face of

the threat of discipline. According to this argument, these cell phone addicts will inevitably bring their phones into production areas or abusively extend their breaks in order to get in one more text, email or call, even if they know they will face discipline for doing so. The Employer caps its argument concerning the futility of progressive discipline in response to addictive misconduct by noting that cell phone abuse seems a “silly reason to fire someone.”

As an initial point, the Union notes that the distinction between vaguely defined “behavioral addictions” and simple bad habits is a slippery one. Even if some people’s cell phone use appears to be compulsive, that fact does not diminish the utility of appropriate corrective discipline as the primary means of handling cell phone abuse in the workplace. In order for any program of progressive discipline to be effective, the consequences for committing a particular type of misconduct must be reasonably predictable and certain. This is true when one is trying to correct a pattern of habitual misbehavior. As a rule, chronic offenders must understand that they will face an escalating schedule of real consequences for future misconduct, or they will continue to reoffend. In this case, management’s half-hearted effort to use corrective discipline to address the problem of personal cell phones in production areas lack this crucial element. According to Betker, seven or eight employees were observed to be “fairly chronic abusers” of the policy regarding personal cell phones, yet one of them, Holmquist, never received any form of discipline whatsoever.

The “absolute worse” offender, Holmquist received merely a verbal warning in August 2010, after having “been frequently observed on your cell phone outside of normal break times.” In May 2012, he received a written warning for the same behavior, in August 2012, another offense placed him at the suspension level of discipline, but did not result in any actual loss of work. When he was written up for the same offense in November 2012, he received no actual additional discipline at all. By that time, Holmquist might have believed that future violations of the cell phone policy would result in no consequence more painful than another piece of paper. The other “fairly chronic abusers” had no reason to believe that they would ever suffer any actionable consequence at all for using their cell phones during working time. It is unsurprising that these employees did not make the effort necessary to break the habit.

Of course, the principle that “the punishment should fit the crime” is another element of appropriate progressive discipline. In this regard, the Union agrees with the Employer’s observation that excessive cell phone use seems like a particularly unfortunate reason to fire someone. However, the Employer never really explored options for individual discipline, short of termination to address excessive cell phone use by the small group of employees. If the Employer had imposed an actual suspension on Holmquist in November 2012, and begun to write up other violators of the cell phone policy, it might have succeeded in getting the offenders’ attention. If Holmquist or any other employee continued to violate the policy, additional, real consequences could be imposed on that offending individual. If an employee should reach the level of progressive discipline where termination would be justified, the Employer might even propose a last chance agreement banning that employee from bringing a cell phone onto its premises on penalty of summary termination.

Instead of imposing consequences on the employees who abused their cell phones in the workplace, the Employer chose to punish the entire bargaining unit by prohibiting all union

represented employees from bringing a personal cell phone onto the Employer's premises. This action was profoundly unfair to the majority of the bargaining unit employees who never violated the Employer's prior cell phone policies. The response by the Employer amounts to group discipline in violation of fundamental notions of industrial due process. Such action is inappropriate, particularly unfortunate in a case in which management has yet to address the problem by imposing meaningful consequences on those few who are actually at fault.

In sum, the Employer's ban on bargaining unit members' possession of personal cell phones on the premises of its facility violates Article 10's provision that employees will only be disciplined for excessive cell phone use and the parties' clear agreement during negotiations that the use of personal cell phones by employees on break in the break areas is not excessive. It is also unreasonable and in violation of Article 6, Section 2, because it is unnecessary to address the Employer's legitimate needs and punishes the entire bargaining unit in response to the misconduct of a few. In order to restore the status quo, the Employer's current policy on personal cell phones must be rescinded to the extent that it prohibits employees from possessing and using their cell phones in the facility's break areas while they are on break.

For the foregoing reasons, the grievance should be sustained and an award issued directing the Employer to amend its current cell phone policy to permit bargaining unit employees to possess and use personal cell phones while on break in the break areas of the facility. The Union also requests that the Arbitrator retain jurisdiction for a period of 60 days following the Award to address any dispute which might arise regarding its implementation.

#### POSITION OF THE EMPLOYER

It has been held that the well settled concept of reasonableness in industrial relations consistently applied is that in order for a rule or policy to be considered reasonable and, therefore within the authority of the employer to promulgate and enforce, it must be related to the safe and efficient operation of the business as well as directly related to the legitimate business interests of the employer.

I. Cell phones have been identified as a legitimate hazard to the process and product of our facility due to their materials of construction, microbiology factors and battery contents.

The Company is engaged in the manufacture of food flavoring ingredients for human consumption. It cannot be argued that manufacturing a safe quality product free from all types of potential contamination or adulteration is not within the Company's legitimate business interests.

Pursuant to CFR Title 21, Section 110.10 which mandates among other things that unsecured items or objects be controlled in so much that they cannot fall into food, equipment or containers, additionally the rule states that protection must be ensured against contamination by these objects of the food, food contact surfaces or food packaging materials.

Furthermore, in January 2013, FDA released the proposed rule implementing Section 103 of the Food Safety and Modernization Act (“FSMA”) which revises FDA’s current good manufacturing practice regulations. In summary, the proposed rule implements the hazard analysis and preventative controls section of FSMA. The regulations will require manufacturers to implement food safety plans that include hazard analysis, preventative controls monitoring procedures, corrective actions, verification, and recall plans. This marks a major shift in FDA’s approach toward a more preventative model that places the primary responsibility on manufacturers to identify and control hazards.

Proposed Rule 117.130 deals with the hazard analysis. Under this regulation facilities must evaluate known reasonably foreseeable hazards for food manufactured at the facility to determine whether there are hazards that are “reasonably likely to occur.” The term hazard would be defined to mean “any biological, chemical, physical or radiological agent that is reasonably likely to cause illness or injury in the absence of its control.” The term “hazard that is reasonably likely to occur” would mean a hazard for which a prudent person would establish controls because experience, illness data, scientific reports or other information provides a basis to conclude that there is a reasonable possibility that the hazard will occur in the type of food being manufactured, processed, packaged or held in the absence of those controls.

Additionally, on October 23, 2013, The Wall Street Journal reported the significant number of bacteria and infectious agents that reside on cell phones and the difficulty there is to remove the bacteria and infectious agents from the cell phones. The article stated that per Jeffrey Cain, who is the President of the American Academy of Family Physicians and the chief of family medicine at Children’s Hospital Colorado, some of these bacteria and infectious agents that are on the cell phones can cause flu, pinkeye and diarrhea. Thus, employees using cell phones in the facility may transfer any bacteria and infectious agents on their cell phones into the food ingredient production process, which is not acceptable under FSMA.

Customer audits of our facility area are already requiring our compliance with these proposed rules.

II. Employees’ misuse of cell phones has been identified as detrimental to the safe and efficient operation of the business.

The Company is not only committed to but also mandated to operate its facility in a safe manner to protect its employees and to ensure the purity of the food ingredient products that it produces for ultimate consumption by humans. Safe and efficient operation of the facility is a legitimate business interest of the employer.

The Company feels it is obvious event to the untrained observer that the use of a device that allows one to search the internet, play games, converse with someone and send text messages, etc. requires that individual to divide their attention between the activity and the assigned tasks. It is further obvious that such activity in the work environment increases the risk to self or others. The adverse influence of personal cell phone use in the work environment is very well known and should not require further debate. To be sure employers throughout the country, for that matter the world, are currently struggling with employee abuse of cell phones

and other forms for personal technology and are desperately trying to control it. Ohly Americas has observed and experienced this adverse influence first hand and its detrimental effect on the efficient operation of the business. The effect of the cell phone ban has drastically improved the safety and efficiency of the operation.

The Company points to a number of arbitration awards that have dealt with similar issues:

123 LA 198 Ozinga Illinois RMC Inc., FMCS Case No. 05/59203, Barry E. Simon Arbitrator (2006). In Ozinga the arbitrator denied the union's grievance and ruled that the employer's policy banning cell phones was a reasonable exercise of its managerial rights. The Company maintains that similar to Ozinga its policy banning cell phones is the only reasonable effective method of enforcement in that (a) our operational model (since the early 1990's) does not utilize managerial supervisors after 5:00 p.m., (b) night shifts, (c) human nature "if they have them, they will use them," Ozinga, (d) easily concealed, (e) that employee privacy is a highly volatile area of law. Finding a cell phone on the employee would most likely require a bodily search, (f) constant monitoring of employee cell phone use is extremely difficult and counterproductive, and (g) the general reluctance of co-workers/fellow Union members to assist or provide information during employer investigation of employee cell phone abuse.

BMS Case No. 10-PA-1030, Carol Berg O'Toole, Arbitrator, 6/1/2010, Metro Transit. In this decision the arbitrator ruled that the establishment of the cell phone policy is a rule requisite to safety. In this case it was specifically exempted from the arbitration provision of that agreement and was not arbitrable. Although difficult in certain aspects the Company points in this case to the fact that it was held by the arbitrator that the cell phone policy was in fact requisite to safety which is a legitimate interest of the employer.

The Company maintains that the Union, Union Steward, and employees were fully aware of the issue and likely consequences. The Company feels its efforts at managing the issue of misuse of cell phones in the workplace was fair, just and appropriate for the situation.

During the hearing the Union's attorney adopted a line of questioning pursuant to whether or not product processing takes place in the break room, locker room or other areas where cell phone use would be allowed under the previous directive. The answer to those questions are very obvious, NO, processing does not take place in the break room, locker room and such. It must be noted here that that is not the point. The point of issue is that despite the fact that the employees were aware that cell phone use was restricted to break times only and prohibited from all processing areas they did not comply with the rule. Whether this non-compliance can be attributed to force of habit, forgetfulness, technology addiction or actual covert blatant disregard would be difficult to ascertain. Management identified this issue as detrimental to plant efficiency as well as an undeniable risk to both employee safety and product safety that is considered "reasonably likely to occur." Management determined that the best method of control based on the Company's unique circumstances and experience was to institute the ban on employee cell phones as indicated in the memo issued April 4, 2011.

The Company made every effort to keep the Union and employees aware of the expectations and potential consequences regarding employee cell phone use in the facility, through verbal communication, disciplinary action, training, and posted memos. There can be no doubt of that awareness.

“Elemental concepts of fairness and common sense buttress the well settled principle in labor arbitration that the employee must give forewarning or foreknowledge of the possible or probable consequences.” Gladys Gershenfeld, *Common Law of the Workplace*

The Company points out those efforts were made to inform the employees of the consequences which included the very real likelihood of the cell phone ban.

During the hearing, Dave Laxen characterized those efforts of forewarning as threats and compared them to another issue (shift schedules) that the Arbitrator quickly ruled as not before him and irrelevant. The point here is that the Company strongly feels those types of comments are unnecessary by Union leadership and undermines the Company’s efforts at enforcing its rules. Pursuant to Article 1, of the Collective Bargaining Agreement:

#### ARTICLE 1 – Purpose of Agreement

It is the purpose of this agreement to promote mutual cooperation and understanding between the Union, the Company and employees, and provide for the operation of the companies plant at Hutchinson, MN in such a manner as to further the fullest extent the establishment and maintenance of plant efficiency, good working conditions, good industrial relations, peaceful adjustment of all disputes, and economic well being of the Company. It is for the attainment of these objectives that the parties have provided a contract on matters relating to wages, hours and other conditions of employment.

Certainly the Union characterizing Company directives and efforts at informing employees as mere threats falls short of mutual cooperation and does nothing in the scope of Article 1. The Union, as the Agreement makes clear in Article 1, has an important role to play in assisting the Employer with implementing changes to rules and procedures in the workplace that promote the efficient operation of the business. Whether they agree with those rules or procedures may be one thing but simply brushing them off as mere threats is not proper and sends the wrong message to the employees they represent.

During the hearing, the issue of progressive disciplinary action in regards to this issue was discussed in that only one employee was disciplined under the “excessive use of cell phones” found in Article 10. The explanation here is quite simple. The Company subscribes strongly to the premise that employee misconduct must be dealt with on a case by case basis rather than approaching discipline as a matter of strict liability. A thorough review of mitigating circumstances must be considered in most cases. The Company subscribes to the philosophy and feels it applied it in dealing with this issue. Arbitrators do appear to be divided on the use of strict progressive disciplinary action for addiction or dependency issues. Some apply strict adherence to progressive discipline while others realize these types of issues can be looked at as

illnesses or things the employee may want to correct but is struggling to succeed. Arbitrators have held that in those cases instruction and counseling are warranted in lieu of progressive discipline to the point of job termination. In this light the Company believes the approach it adopted in dealing with this issue was the most honorable in that no employee lost their employment.

With only one exception, (Don Holmquist (a.k.a. Homey)) all the other employees identified by the Company abusing their cell phones had no other disciplinary action of record which led us to believe that these infractions were different than the usual employee misconduct. Those investigations and study led us to the real issue of cell phone addiction (Nomophobia). The Company provided reputable studies of cell phone addiction and dependence at the close of the hearing. The Company saw no gain for either side by aggressively enforcing a progressive disciplinary approach in this particular instance because it was deemed to be ineffective in light of the addictive nature of the offenses we were seeing. Increasingly frequent employee trips to the locker room then restroom, longer breaks or employees implying that they just arrived at break, smuggling their cell phone into prohibited areas, and hiding their cell phones all became impossible to monitor and enforce. The Company points to the Don Holmquist situation as strong evidence of that fact. Here a long term employee (23 years service) was administered strong progressive disciplinary action for this very issue and regardless this individual continued to offend to the point where employment termination was a real possibility and in fact would have been upheld if carried out. The Company instead adopted to address this with verbal instruction as it also did with the less frequent offenders. It should be noted here that Don Holmquist is a warehouse employee who works straight day shift and was much more easily observed by management than the majority of other employees who were more difficult to observe and monitor in that they are rotating shift/weekend employees supervised by fellow Union Leads and managements access to them was/is limited. The Company then eventually attempted a more aggressive approach with this individual (Holmquist) by skipping steps in disciplinary action basically as an attempt to serve strong notice to the employees and the Union as well as an attempt to “get their attention” and change the behavior but the Union opposed it and the language was adjusted and withdrawn.

The Company sees no benefit to terminating otherwise good quality employees that the Company has invested time and effort into training, operating experience and the like for infractions that the employer believed were not totally in those employees’ ability to control by normal means. Of all the technological developments causing employers to lament the loss of attentiveness, safety, efficiency and productivity in the workplace, the cell phone has quickly risen to number one on the list. Internet access, cameras, e-mailing, texting, tweeting, updating a Facebook account to online shopping modern smart phones have placed all of this squarely in the palm of employees’ hands. The addition and temptation have proven to be irrestable to many employees often with disastrous results. In short, it was management’s findings that the ban on employee cell phones in this facility was the only effective means to control this issue. Furthermore, the Company believes that a progressive disciplinary action approach to this issue actually does nothing to mitigate the risks identified by the Company to personal employee and product safety issues since an employee could only offend three times before actual discharge with the earliest offense falling off after 12 months. “Smart” employees who have identified ways to run the system could actually continue to offend with relative impunity. Under that

scenario the identified risk is certainly not under adequate control in light of current food safety rules and guidelines making an outright ban on cell phones in the workplace the only effective means of control.

The Company stresses that by no means was its decision to ban cell phones from the facility a “rush to judgment” as evidenced by the period of time (2011-2013) that passed before actual implementation of the cell phone ban. The Company fully understands the effect of change on employees in the workplace and we believe our approach to this issue always was informational, instructional and fair in that the Employer attempted to manage the issue by usual methods which were unsuccessful. The probability of an outright ban on cell phones as the method of control was always a potential outcome which the Union and employees were very much aware of.

The ban on cell phones does not impose any undue hardship on the employees in that they must keep it in their vehicle and are still allowed to access their personal cell phone outside the facility where this use can be more easily monitored and controlled. Because of this fact, the Company feels that the language contained in Article 10, Section 1, “excessive use of cell phones” can still apply and be enforced. Employees have complete access to “land line” phones in all areas of the facility for family contact and/or emergency needs as they arise. The Company strongly feels this is adequate and proper when balanced against the needs of the business.

The Company finds that the policy banning cell phones from the facility is the most effective and efficient method of control for this issue than attempting to constantly monitor the cell phone use of employees to ensure the efficient safe operation of the Company’s facility. The Company feels that it would be an unreasonable expectation on the employer to find otherwise.

The cell phone ban has resulted in much improved operational efficiency, employee safety, and process/product safety and employee morale.

It is the Company’s strong opinion that the Union’s position on this issue is more about self entitlement while the Company’s position has merit. Based on the above facts and arguments, the Company respectfully requests the Arbitrator to deny the Union’s grievance.

#### DISCUSSION AND OPINION

The testable question in this case requires a definition of the word “reasonable” as the Collective Bargaining Agreement means that term to be applied relative to the disputed prohibition against the possession of cell phones anywhere on plant premises. Arbitrators generally accord employers broad but certainly not unlimited rights to issue plant rules which:

1. Are clearly related to the safe and efficient operation of the business,
2. Do not restrict any employee’s rights or privileges established through past practice, and
3. Are applied in an even-handed manner throughout the entire work force.

Under the facts of the present case, the Employer presented persuasive argument that the possession of cell phones by employees had at least two harmful effects on safe and efficient operation of the business. Competent medical research findings produced by the Company show that dangerous pathogens commonly affect cell phones due largely to the fact that these are routinely exposed to sneezing, coughing and other contamination resulting from carrying these devices in clothing pockets.

The Union argues that the Company has not shown that the risk of pathogen contamination of the food product arising from cell phone possession on the job justifies the prohibition on possession elsewhere than the production area. The short answer to this contention is that the Employer need not wait until an incident of product contamination happens before taking steps to avoid such a possibility.

Even if arguably remote, the controlling fact remains that the FDA Food Safety Modernization Act (FSMA) implementation has taken a decided shift from reactive to preventive emphasis, i.e., no longer requiring merely remedial action to a food safety issue but favoring proactive measures to avoid a foreseeable risk. Accordingly, the Company has the implicit right to take a precautionary approach to avoiding the introduction of pathogens into its production area.

The case for prohibiting cell phone use in the production area cannot and indeed, was not seriously challenged by the Union. The question of merely banishing use of cell phones in the workplace, however, requires further examination.

The informative research on the addictive effects of cell phone usage offered by the Employer confirms what even casual observation demonstrates – a large number of people continue to converse on their cell phones, even when driving, in defiance of rules, regulations and laws banning their indiscriminate use.

The example of employee Don Holmquist demonstrates his refusal or inability to resist the lure of his cell phone conversations despite progressive disciplinary measures approaching termination. The evidence seems unmistakable that Holmquist harbors an irresistible impulse to respond to a call on his phone, apparently even after he has been suspended for such infraction and has been clearly informed that he faces discharge for another such offense. This self-punishing behavior can only be described as addictive.

While Holmquist was the only named cell phone rule offender, Company witnesses persuasively described frequent examples of covert texting with employees concealing their phones in lunch boxes and tool boxes while actually on the job in the production areas. There can be little serious question raised over the proposition that texting or spoken conversation over cell phones can be a significant distraction.

Unlike other forms of addiction such as alcoholism or drug dependency, no treatment programs are currently available to rehabilitate such behavior. This fact obviously places the Employer in a Catch 22 quandary. As manager Jeff Betker testified, citing the case of Don Holmquist, the Employer remains reluctant to discharge a proven long term employee when

control measures sought in this arbitration, i.e., banning cell phone possession on the premises can provide a less harsh result.

It must be noted at this juncture that the banishment of cell phones in areas outside the production area runs afoul of two well-established principles of rule making and enforcement. The most common test of the reasonableness of a plant rule requires that it relates to a legitimate business interest.<sup>1</sup>

The case has been made for the ban on possession of cell phones in the production area but falls short of justifying the prohibition in locker rooms, rest areas, and outdoors on the premises. Neither has the use of cell phones in such nonproduction areas been shown to have any adverse effects on the safe and efficient operation of the business.

Arbitral notice must be taken of the legitimate need of employees to maintain off the job contacts, including such vital family business as checking on the welfare of children, or sick and elderly in their care. A wide range of responsibilities are routinely handled by cell phone, including many that may only be done during working hours. These may cover such important functions as making medical appointments, ordering prescriptions, paying bills, or dealing with court matters.

At a minimum, employees certainly have the right of privacy to pursue friendships and romantic attachments during breaks from their work assignments. An absolute ban on the possession anywhere on the plant premises except in their automobiles places an unreasonable limitation of essential employee rights without any corresponding benefits to the Company in maintaining a safe and efficient production environment.

In regard to restricting cell phone use to personal cars, the time it would take to walk to the parking area and return to the job site could only reduce the time remaining for an employee to handle such personal matters. Further, to make such a trip, however short, in inclement weather could be especially burdensome.

A final and particularly onerous feature of the absolute prohibition on possession of cell phones anywhere on plant premises is that the ban discriminates against the privileges of compliant employees merely to control the misconduct of the relatively few mentioned by Company witnesses as the problem offenders. In regard to the propriety of a plant rule that so drastically limits the personal privileges of the many to control the misconduct of the few, such a ban violates the principle of fair treatment and equal justice.

As to the contractual effect of the plant premise-wide ban amounts to a penalty on the innocent without just cause, an implicit feature of the Collective Bargaining Agreement. For further reasons discussed above, the grievance is hereby sustained in full.

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<sup>1</sup> For further discussion see Hill and Sinicropi, Management Rights, BNA Arbitration Series, Washington, DC.

## REMEDY

Arbitrators generally avoid adding to or subtracting from the terms of the Collective Bargaining Agreement. In like vein, disputed plant rules that are found to violate the CBA, as in the present matter, are routinely voided but except in interest arbitration the arbitrator rarely substitutes new or revised versions to address the same subject matter. To do so would involve a legislative function rather than a purely interpretive action.

In the instant case, the issue was framed as follows: “Did the Company violate the Collective Bargaining Agreement by prohibiting possession and use of cell phones any place on Company property? If so, what remedy applies?” The Arbitrator would, under such a statement of issue, be required to provide the parties at least a remand to negotiations with guidelines as to the interpretation and application of the CBA to the formulation and enforcement of plant rules involved.

### Remand and Guidelines

The needs of the Employer and the employees would be served in a fair and balanced manner if this section of the GMP were modified to read as follows:

...Cell phone possession is prohibited in all production areas. Cell phones can only be used in the following areas:

- Front Office
- Management Offices
- Quality Lab
- Locker rooms and other designated areas.

Use of cell phones is prohibited in all areas of plant premises except during designated meal and rest breaks.

This advisory remedy needs also to specifically address the parties’ arguments concerning repeat offenders and progressive disciplinary treatment. It would be consistent with the spirit of this Award and Remedy if the Employer would penalize repeat offenders by prohibiting the possession of cell phones anywhere in the plant, including lockers, by any employee so impervious to corrective action that he/she is unwilling or unable to comply with a ban limited to use in production areas.

The obvious advantages of such a disciplinary step includes:

- Unlike the current prohibition on cell phones which burdens the innocent with the guilty, ban on cell phone possession only by chronic offenders affects only the guilty.
- Used as an alternative to discharge, a ban on possession limited to repeat offenders provides a capping step to progressive discipline.

In conclusion, the entire issue of inappropriate cell phone use covers not only the safety of product consideration, i.e., propriety of ban on use in production area, but also the question of excessive use which may lead to abuse of rest periods. The proper mechanism for formulating a fair and effective set of rules for effectively dealing with all aspects of employee cell phone possession and use is to remand this larger matter to the parties for negotiation.

The net effect of this Award and Remedy is to encourage the parties to consider the guidelines set forth herein in the course of the remand to negotiations. As for the Employer's ban on possession in personal lockers or in transit to and from designated rest areas, the grievance is, hereby, upheld.

August 8, 2013

Date

John J. Flagler, Arbitrator