

**FEDERAL MEDIATION AND CONCILIATION SERVICE  
UNITED STATES GOVERNMENT  
UPPER MIDWESTERN REGION**

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GMP LOCAL 63B,

UNION

-and-

GRIEVANCE ARBITRATION  
FMCS Case No. 050426-03239-7  
ARBITRATOR'S AWARD  
(Discharge of Tim Lewnau)

PROGRESS CASTING GROUP, INC.

EMPLOYER.

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ARBITRATOR:	Rolland C. Toenges
DATE OF GRIEVANCE:	January 31, 2005
DATE OF ARBITRATOR SELECTION:	June 22, 2005
DATES OF HEARING:	October 27, 2005 November 2, 2005
RECEIPT OF POST HEARING BRIEFS:	December 5, 2005
DATE HEARING CLOSED:	January 5, 2006
DATE OF AWARD:	March 5, 2006

**ADVOCATES**

**FOR THE EMPLOYER**

Joseph M. Sokolowski, Attorney  
Parsinen Kaplan Rosberg & Gotlieb, P.A.

Ann Kremer, Attorney  
Parsinen Kaplan Rosberg & Gotlieb, P.A.

**FOR THE UNION**

Dale Jeter, Executive Officer  
GMP International Union, AFL-CIO

### WITNESSES

Tobby Stroud, Supervisor  
 Jason Mutschler, Employee  
 Joe Casey, Pres., Casey Safety Consultants  
 Linda DeRosa, Human Resources Manager  
 Brad Fitzgerald, Vice Pres. of Operations

Glen R. Hansen, Employee  
 Jeffrey T. Wilson, Employee  
 Tim Lewnau, Grievant  
 Nick Hill, Employee

### ISSUE

**Did the Employer violate the Collective Bargaining Agreement when it discharged Tim Lewnau?**

### ALSO PRESENT

Greg Sticha, Progress Castings

### JURISDICTION

The matter at issue, regarding the discharge of Tim Lewnau, came on for hearing pursuant to the Grievance Procedure contained in the Collective Bargaining Agreement (CBA) between the Parties. The Grievance Procedure, Article 6, provides for the arbitration of grievances where settlement cannot be reached between the Parties.<sup>1</sup>

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<sup>1</sup> CBA, Article 6, GRIEVANCE PROCEDURE, Section 2.

Step 5. Grievances shall be presented to the Vice President of Operations/General Manager within five business days from step 4 or the disputed event in the case of a termination. If satisfactory settlement cannot be reached within ten (10) business days from step 4, then;

Step 6. To a Board of Arbitration consisting of three (3) members, one (1) to be selected by the Company, one (1) to be selected by the Union, which two (2) shall select the third (3<sup>rd</sup>) neutral member to act as impartial Chairman. In the event the Employer and the Union members cannot agree on the third (3<sup>rd</sup>) member within seven (7) business days, the third (3<sup>rd</sup>) member shall be selected from a list to be provided by the Federal Mediation and Conciliation Service.

The Board of Arbitration shall meet promptly after reference of a matter in controversy to it and shall render its decision within five (5) business days after hearing the evidence in the matter. The Arbitration Board shall not have authority to alter, amend or add to or subtract from the terms and provisions of this Agreement. The decision of the Arbitration Board shall be binding on both parties to the arbitration. Any expenses incurred by or for the service of the third (3<sup>rd</sup>) member of the Board shall be shared equally between the Union and the Company.

The CBA, in Article 4, contains provisions relating to the discipline/discharge of employees.<sup>2</sup>

The Parties selected Rolland C. Toenges as Neutral Arbitrator, from a list of Arbitrators provided by the Federal Mediation and Conciliation Service, to hear and render a decision in the interest of resolving the disputed matter.

The Arbitration hearing was conducted as provided by the terms and conditions of the CBA and the Federal Mediation and Conciliation Service. The Parties were afforded full opportunity to present evidence, testimony and argument bearing on the matter in dispute.

All witnesses were sworn under oath. There was no request for a stenographic record of the hearing. The Parties stipulated that the grievance matter has progressed through the Grievance Procedure and is properly before the Arbitrator for a final determination.

The Parties waived the five (5) day time limit set forth in Article 6, for the Arbitrator to render a decision.

### **BACKGROUND**

Progress Casting Group, Inc. (Employer) operates aluminum foundries in Plymouth and Albert Lea, Minnesota. The Employer produces aluminum castings for its customers, which includes defense, space and automotive industries. Approximately 280 of the employees are in a bargaining unit represented by the Glass, Molders, Pottery, Plastics and Allied Workers International Union, AFL-CIO-CIC and its Local 63B (Union). Tim Lewnau (Grievant) was a member of this bargaining unit.

The Employer and Union are Parties to a Collective Bargaining Agreement (CBA), in effect from June 1, 2004 to September 30, 2005, that was at all times, relevant to the matter at issue.<sup>3</sup> A succeeding three-year Agreement has been negotiated between the Parties. The Collective Bargaining relationship between the Parties dates back to 1946.

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<sup>2</sup> CBA, Article 4, DISCIPLINE/DISCHARGE.

Discipline or discharge of employees shall be for just cause. A warning notice in writing of any complaint not considered cause for immediate discharge, shall be given any employee affected, and a copy of such notice shall be furnished to the Union. Any employee discharged or disciplined may request an investigation of such discharge or discipline, and should such investigation prove that an injustice has been done, the employee affected shall be reinstated and compensated for any pay lost while they have been out of work because of such discipline or discharge. Appeal from disciplinary action or discharge must be made within seven (7) business (Mon – Fri) days by written notice from the affected employee to the Company.

<sup>3</sup> Joint Exhibit #1.

The CBA contains provisions relating to “Shop Rules” that are relevant to the matter in dispute.<sup>4</sup> Among other things, these rules address safety practices. The foundry is a dangerous, hot and dirty work environment. The Employer has also instituted rules, policies and employee training in the interest of maintaining a safe and respectful work environment. The rules and policies specify potential consequences for their violation.

The Grievant was hired October 13, 1997. At the time of his termination (01/27/05), the Grievant was working the first shift (4:00 a.m. to 2:00 p.m.) as a molder in the plants “tail cone cell.” The tail cone cell derives its name from the casting manufactured there, which is used for defense and space purposes.

In the tail cone cell, pouring hot metal into sand molds forms castings. As a part of their duties, the Grievant and another employee removed freshly cast tail cones from the mold. The casting, coming out of the mold filled with sand and “chills,” was then placed into a vibrating (knockout) machine that removed the sand and chills from the casting. When the sand and chills had been removed from the casting, the Grievant and/or the other employee pushed the casting off the knockout machine rails onto a tray where the casting and tray traveled about ten feet down a roller conveyor to the next work station. The worker at the next workstation removed excess material from the casting using a band saw. The Grievant’s work procedure was repeated approximately 40 times during a typical work shift.

The knockout machine creates a high noise level and is surrounded by an enclosure with air-operated doors to contain the level of noise within OSHA standards. Operators of the knockout machine are to close the doors when the machine is in operation.

On January 26, 2005 the Grievant, when working alone, pushed a casting(s) and tray off the knockout machine rails onto the conveyor with the result that it/they ended up careening off the conveyor. The concern of a casting falling off the conveyor is potential damage, making it unusable, and potential injury or distraction to other employees who might be struck or distracted by the falling casting. The castings weigh some 80 pounds and remain hot for some time after being removed from the mold.

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<sup>4</sup> CBA, Article 3, SHOP RULES.

Section 1. Employees covered by this Agreement shall observe such rules and regulations as may be established by the Company which do not conflict with the provisions of this Agreement. Such shop rules and regulations will be posted on the shop bulletin board. Any changes in rules, regulations or policy will be given to the Shop Chairperson in writing.

Section 2. The Company agrees to print new shop rules and regulations, include them in information provided to newly hired employees, distribute a copy to all employees, and post them.

The incident was reported to management by the employee operating the band saw, who feared that a casting falling from the conveyor could strike him causing him injury and/or distract him from needed concentration operating the band saw. The band saw is the most dangerous machine in the plant as mishaps can, and have, resulted in amputation of fingers and hands. The band saw operator at times works with his back to the conveyor and would not be aware that a casting was about to hit him.

Another workstation in close proximity to the conveyor is the “grinder station.” This station is located on the side of the conveyor between the knockout machine and the band saw station.

The Employer, after investigating the January 26, 2005 incident, charged the Grievant with disruptive behavior, reckless, willful and/or deliberate destruction or abuse of property and a careless disregard for the safety of other workers. The Employer discharged the Grievant effective January 27, 2005. On January 31, 2005 a grievance was filed on behalf of the Grievant claiming a violation of the CBA, by unjust treatment.

The Grievance was processed through the CBA Grievance Procedure but without resolution. The Parties, being unable to resolve the grievance, referred the matter to the arbitration step resulting in the instant proceeding.

### **EXHIBITS**

#### **JOINT EXHIBITS:**

- J-1. Collective Bargaining Agreement – June 1, 2004 to September 30, 2005.
- J-2. Grievance Form dated January 31, 2005.
- J-3. Letter, dated January 27, 2005, from Linda De Rosa discharging Grievant.
- J-4. Memorandum dated February 7, 2005, denying grievance.
- J-5. Employer notes from meeting of February 7, 2005 with Lewnau.

#### **EMPLOYER EXHIBITS:**

- E-1. Diagram of Tail Cone Cell work area.
- E-2. Photo of air activated knockout door from inside.
- E-3. Photo of air-activated knockout machine with door up.

- E-4. Photo of air-activated knockout machine with door down and band saw in foreground.
- E-5. Statement of Toby Stroud dated January 26, 2005.
- E-6. New Hire Orientation Checklist Signoff by Grievant dated October 12, 1997.
- E-7. Safety Pledge by Grievant dated October 13, 1997.
- E-8. Handbook for new hires dated May 12, 2003 – page 14, Grounds for discharge.
- E-9. Health and Safety Program Manual – page 13, Employee Communication.
- E-10. Respectful Workplace Policy – examples of unacceptable behavior.
- E-11. Employee Change Notice – Grievant suspended 4 days for damage to property and disruption to workforce February 24, 2004.

UNION EXHIBITS:

- U-1. Photo – showing conveyor and band saw workstation.
- U-2. Photo - Casting and carrier resting on conveyor.
- U-3. Photo – Casting at band saw station supported by hoist.
- U-4. Photo – Looking inside vibrator housing from output side.
- U-5. Photo – Looking inside vibrator housing from input side.
- U-6. Photo – Looking from vibrator output side at conveyor and sawing station.
- U-7. Photo – Casting resting askew on vibrator rails.
- U-8. Photo – Casting in vibrator chamber.
- U-9. Photo – Casting and carrier resting on end of conveyor.
- U-10. Photo – Casting and carrier resting on end of conveyor.
- U-11. Photo – Casting suspended by vibrator above rails and carrier.
- U-12. Photo – One casting near end of conveyor and other suspended in vibrator.
- U-13. Photo – Two castings and carriers resting on conveyor.

- U-14. Photo – Two castings and carriers resting on conveyor.
- U-15. Photo – Casting and carrier resting on conveyor near vibrator output door.
- U-16. Photo – Two castings and carriers resting on conveyor.
- U-17. Photo – Measurement being taken of vibrator output door width.
- U-18. Grievance of Steve Rice, Jr., dated April 24, 2002 –suspension withdrawn.
- U-19. Memorandum – Steve Rice misconduct dated April 26, 2002.
- U-20. Memorandum – Todd Sharkey Update dated January 14, 2003, suspension.
- U-21. Notice of Violation – Todd Sharkey on January 8, 2003 – warning and suspension.

### **POSITIONS OF THE PARTIES**

THE EMPLOYER SUPPORTS ITS POSTION WITH THE FOLLOWING:

1. The CBA expressly requires that all union employees abide by all rules and regulations.
2. The CBA provides that where an employee's misconduct gives rise to the right of immediate discharge, the employer is not required to warn the employee, orally or in writing before the termination.
3. The Grievant received and acknowledged receiving written policies governing workplace behavior and safety.
4. The Grievant acknowledged the right of the Employer to immediately terminate him for any violation of these policies.
5. The Grievant admitted under examination that, when hired, he received a copy of the Employee Handbook containing discipline policy and offenses subject to immediate termination.
6. The Handbook identifies the following offenses as subject to immediate termination:

Willful violation of and/or gross disregard of company or government regulated safety rules that jeopardize the safety of the employee or others,

Reckless, willful and /or deliberate destruction or abuse of company property,  
and

Disruptive behavior in the workplace.

7. The Handbook also sets forth expectations regarding safety and provides that every employee is to “exercise caution and good judgment at all times to perform his/her duties in a safe manner.”
8. An employee’s gross disregard of company’s safety rules and engaging in conduct that jeopardizes safety is grounds for immediate termination without prior or written warning.
9. The Grievant received Company Safety Policy that governs workplace conduct and sets forth an open door policy encouraging all employees to address safety issues.
10. The Safety Policy further provides that a violation resulting in “significant endangerment” may be grounds for immediate termination.
11. Under the Safety Policy, “significant endangerment” is defined as “placing oneself or another in imminent danger of serious injury or harm.”
12. The Grievant received the Employer’s Respectful Workplace Policy that prohibits engaging in conduct that “compromises the safety or well-being of any individual in the workplace.”
13. Employees who violate the Respectful Workplace Policy are subject to discipline, including immediate termination without prior warning.
14. As a part of his employment, the Grievant signed a Safety Pledge that he would use “common sense” and abide by safety rules at all times.
15. The Grievant’s reckless conduct endangered other employees.
16. Regardless of whether hands or feet are used to maneuver the casting out of the knockout machine, each and every employee testifying at the hearing agreed that the castings needed to stay on the rollers and be guided toward the band-saw operator in a manner that would not jeopardize the safety of the operator or other nearby employees.
17. The band saw operator observed the Grievant repeatedly kicking castings out of the knockout machine with such force that the castings projected off the rollers and crashed onto the floor – some were damaged (scrapped) as a result.
18. Toby Stroud, the Grievant’s supervisor personally observed the Grievant’s reckless conduct.

19. Stroud had come to observe the Grievant's behavior because of a complaint from the band saw operator and had to jump out of the way to avoid being hit by a casting projecting off the conveyor.
20. Stroud testimony was that he felt the Grievant was acting in a reckless manner and creating a serious safety risk for employees around him, including the band saw operator.
21. Stroud took the Grievant off the floor and suspended him pending a full investigation of the matter.
22. All witnesses testified that the band saw is the most dangerous piece of equipment in the plant – it has an open blade and can amputate hands and fingers if the operator is not fully vigilant.
23. It is crucial that the band saw operator maintain focus and is not distracted from his work – there have been amputations due to mishaps with the band saw.
24. The band saw operator found the Grievant's behavior extremely distracting and was concerned that the Grievant's forceful kicking of castings onto the conveyor would either hit him or tip a fan over on him.
25. The band saw operator felt the Grievant's behavior was intentionally reckless and showed a lack of disregard for his safety.
26. The investigation of the Grievant's behavior revealed that he had been raging up and down the line kicking castings and Stroud recommend that the Grievant be terminated.
27. At the grievance meeting the Grievant admitted to kicking the castings and "admitted that his behavior was neither appropriate nor acceptable in the workplace."
28. The Employer had just cause to terminate the Grievant and complied with all of the seven factors frequently considered by arbitrators in determining just cause.
29. The Employer's safety and disciplinary policies were clearly communicated to the Grievant and he testified that he understood the consequences.
30. In fact the Grievant admitted at the hearing that he fully understood conduct compromising the safety of other employees would result in immediate termination without prior notice.
31. The Employer's rule or managerial order was reasonably related to the orderly, efficient and safe operation of its business.

32. The work environment in the foundry is inherently dangerous and the Employer takes pro-active steps to ensure the safety and well being of employees.
33. The Employer routinely trains employees in safety rules and policies and requires each employee to sign a Safety Pledge.
34. The Employer's prohibition of conduct that jeopardizes the safety of employees is not just reasonably related, but is the heart of the orderly, efficient and safe operation of the company's business.
35. The Employer conducted a fair and objective investigation of the Grievant's behavior before administering discipline, which provided substantial proof that the Grievant was guilty of the alleged wrongdoing.
36. Moreover, the Grievant himself admitted that he kicked castings and that his behavior was inappropriate and not acceptable.
37. The Grievant had better alternatives available to venting his frustration with the knockout machine other than kicking castings with such force that they projected off the conveyor and created a safety risk to other employees.
38. The Grievant could have; 1) informed his lead of the problem (two were present that day; 2) informed the line Supervisor, Toby Stroud; 3) informed his union steward; 4) informed the safety director, Kerry Barbetti; or 5) locked-out-tagged-out the machine and waited for maintenance to fix it before resuming work.
39. The Union's suggestion that the Grievant did not stop work out of fear that he would be found "insubordinate" is without basis and belies the evidence.
40. The Employer applies its safety and disciplinary policies in an even-handed manner and no evidence was presented to the contrary.
41. The Employers safety expert, Joe Casey, who has observed the tail-cone operation and heard witness testimony of the Grievant's behavior at issue, testified that his behavior was dangerous and placed the band saw operator in imminent danger
42. Casey, who has 25 years of experience in the safety industry and is a former OSHA Inspector, testified that other employees have been terminated by their employer for similar conduct.
43. The Union's attempt to challenge the Grievant's termination by comparing it to Tony Ward, who engaged in unsafe behavior but was not terminated, is misplaced.

44. The Tony Ward situation was entirely different in that Ward did not place another employee in apprehension of imminent bodily harm and no other employees reported fear for their safety.
45. The most compelling testimony came from Union Witness, Jeffery Wilson, who testified that he felt Ward should have been terminated or his conduct.

THE UNION SUPPORTS ITS CASE WITH THE FOLLOWING:

1. The Grievant acted out of frustration but termination is too severe discipline for the Grievant's behavior.
2. The Grievant and other employees had been complaining for several weeks, but to no avail, about instability in moving the castings from the vibrator onto the conveyor because of a change in the casting design.
3. Tony Ward, prior to becoming a supervisor repeatedly, kicked and damaged equipment causing hours of down time was suspended instead of terminated, even though his actions were more extreme than the Grievant's.
4. The CBA requires "just cause" in discipline and discharge. If indeed the Grievant's actions are found to be inappropriate, the Union believes terminating is too severe and discipline should be no more severe than that administered to Tony Ward.
5. The Union relies on the standard for just cause set forth in Elkouri and Elkouri, 5<sup>th</sup> Edition "How Arbitration Works" and the 2<sup>nd</sup> edition of "Just Cause: The Seven Steps" by Koven, Smith, & Farwell and examines each of the seven steps relative to the instant case. A "no" answer to any of the seven steps constitutes unjust action.
6. Items #1 and #2, contained in Joint Exhibit #5, even if true are not violations of Employer rules and certainly not disciplinary offenses and not factual representations.
7. The Grievant testified that he was frustrated because of problems with the knockout machine, not that he was unhappy being assigned to work on the tail cone or working with Troy Halverson.
8. It was because of being left to work by alone the last hour of he shift that troubled the Grievant, not working with Halverson.
9. Regarding item #5, in Joint Exhibit #5, there was no testimony that the Grievant exhibited temper fits by kicking carts throughout the day.

10. Regarding item #3, in Joint Exhibit #5, there was no testimony supporting any statement by the Grievant that he did not care about the process or safety of his co-workers.
11. It is allegations #3 (failure to shut the knockout machine door), #4, (kicking castings causing them to be scrapped) and #6 (co-worker safety and distraction) that the Union feels, if true, violate Plant Rules #5 and #11 contained in the Employee Handbook on page #14 (Exhibit E-8).
12. Although the Handbook indicates that violations of rule #5 and #11 generally lead to immediate dismissal and first appears understandable, if page 15, of the Employee Handbook is reviewed, a reasonable person could believe violation of items #5 and #11 would result in a 3-step progressive discipline for violation of items #3 and/or #7, thus making it not so clear what the probable consequences are for being found guilty of the infractions charged against the Grievant.
13. Therefore, an employee deliberately and willfully engaging in actions like those charged against the Grievant could possibly expect either progressive discipline or dismissal, depending on which rule and page the Employer decides to use.
14. Based on the referenced provisions of Employee Handbook, employees do not have clear, unmistakable knowledge of the consequences of like conduct.
15. Although the Union makes no claim that Plant Rules #5 and #11 are unreasonable as written, the Union takes issue with the even administration of these rules.
16. Although the Union makes no claim that an investigation was conducted before administration of discipline, the Union takes issue with the flawed results of the investigation in that it is not proven, as fact, that the Grievant violated these rules.
17. The Employer's initial decision was not to terminate the Grievant, but later changed to termination after hearing the desire of the complaining employee. This reveals that the decision to terminate was based on the desire of the complaining employee, rather than the evidence gained during the investigation to prove or disprove the Grievant's guilt.
18. The testimony at the hearing supports the Union's claim that the Grievant was not guilty as charged.
19. Allegations that the Grievant did not shut the door on the knockout machine, kicked castings causing them to be scrapped and endangering co-workers, is what the Employer claimed. Further, that the Grievant's actions constituted reckless, willful and/or deliberate destruction or abuse of property, a violation of Rule #5 and constituted disruptive behavior, a violation of Rule #11. Theatrics at the hearing would lead one to believe the castings were flying around the work area, which is not supported by testimony.

20. The Grievant's use of his foot to push the casting out of the knockout machine was normal procedure. Witnesses, Tim Lewnau, Toby Stroud, Glen Hanson and Jeffery Wilson, testified that it was the normal method used to send the 80 pound casting out of the knockout machine onto the conveyor - the design of the casting, its weight and its temperature was not conducive to pushing it by hand.
21. The Union's evidence (U-12) brings into question whether the band saw operator could, in fact, see how the Grievant was moving the casting out of the knockout machine due to his limited view of the Grievant. This calls into question whether the band saw operator actually saw what the Grievant was doing or just assumed it was his fault that the castings fell off the conveyor.
22. Testimony at the hearing disputes that the castings were scrapped due to their falling off the conveyor. The Grievant testified that the casting was already scrap before it fell off and was identified as such on the casting itself.
23. Testimony of the Grievant and Glen, that there was only one casting that fell off the conveyor, contradicted the testimony of Jason and Toby, that three to four castings fell off the conveyor on the day in question. Toby's only knowledge of there being more than one was from information he received from Jason.
24. The evidence does not support the Employer's claim that the casting fell off the conveyor because of the way the Grievant kicked it. Both Glen and Jeff testified that they also had castings fall off the conveyor, even though they pushed them in the normal manner.
25. Both Glen and Jeff testified that the reason the casting fell off the conveyor was due to its redesign that caused it to not sit stable on the rails and conveyor - it sat higher on the rails causing it to catch on the knockout machine when it was pushed out.
26. Both Glen and Jeff testified that that employees had made numerous requests to lead-men, supervisors, managers, engineers and the safety director to get the machine repaired, but no repairs had been made until after the Grievant was terminated.
27. Union's Exhibits #3 and #13, show the additional knobs on the casting following the design change - Union Exhibits #2, #10 and #14, show how the knobs extend beyond the edges of the cart with the probability that they would catch on, tip over and fall off the conveyor as was testified by witnesses.
28. The evidence showed that the knockout machine door, that the Grievant was charged with not closing, was left open by other employees as well. The band saw operator testified that other employees also left the door open.

29. Union Exhibits #4 and #5 show that, during normal production, the door is not closed. Union Exhibit #4 clearly shows the left door blocked open by a fan and Union Exhibit #5 clearly shows the right door is not even on the machine. Therefore, the Grievant did nothing different than other employees did and continue to do.
30. The Employer's claim that the Grievant put other employees at risk is disputed by the testimony of Jeff and Glen, who testified that the Grievant's actions did not put safety at risk.
31. The band saw operator testified that he lets two to three castings build up on the conveyor between the knockout machine and the band saw in order for them to cool. Union Exhibits #7, #13, #14 and #16 clearly show that a casting being pushed out of the knockout machine, if falling off conveyor, would fall before it reached the band saw work station because it would be deflected by other castings already sitting on the conveyor.
32. The Grievant did not intend to harm the band saw operator as evidenced by the band saw operator's testimony that they were friends and the Grievant would not do something to hurt him.
33. The testimony at the hearing clearly indicates that the Employer has not met the test of "Equal Treatment." Tony Ward, who intentionally punched electrical control panels, damaging them to the point of safety risk with loss of production and distracting other employees, received a two and one half day unpaid suspension and loss of his Lead pay for a few months.
34. De Rosa testified that no employee names were given to her claiming the Grievant's actions were disruptive or made them wary of working with him.
35. Glen testified, as Union Steward in the Grievant's work area, that no employees complained to him that the Grievant's actions were disruptive, made them wary of working with him or that he was a safety risk.
36. The Employer's unequal treatment is evidenced in Union Exhibit #19 that shows Steve Rice threw castings on the floor and received a suspension of six and one half hours for a safety rule violation and disruption of the workforce. Rice was the "eye of the storm" in a confrontation with another employee in which he threw castings. Union Exhibit #18 shows the six and one half hour suspension was grieved with the Employer rescinding it and giving Rice back pay.
37. The Employer's unequal treatment is further evidenced in Union Exhibits #20 and #21 that show Todd Sharkey intentionally and willfully ground off an electrical plug causing a safety hazard to another employee for which he was given a written warning.

38. The penalty of termination given to the Grievant is excessive discipline when compared to the discipline given employees Ward, Sharkey and Rice for also committing safety rule violations and disrupting the work force.
39. The Employer, based on its history discipline, has not clearly demonstrated what the appropriate discipline is for violation of safety rules; therefore, just cause has not been satisfied in the instant case.
40. The Employer has not met the test of a “fair investigation” by basing its decision to terminate the Grievant, not on the results of the investigation, but on the desire of another employee who was concerned that the Grievant wasn’t being discharged.
41. A “fair investigation,” as the basis for termination of the Grievant, would reveal sufficient evidence of wrongdoing in and of itself to support the Employer’s action and would not have depended on the desire of another employee to support termination.
42. The Employer has not met the test of “proof” to support termination of the Grievant. Testimony and evidence simply does not support a finding that the Grievant “recklessly, willfully, or deliberately destroyed or abused property, tools or equipment,” or that his behavior “disrupted the work place or the workforce” as alleged.
43. The Employer has not met the test of “equal treatment” as the record shows the discipline given the Grievant is grossly excessive when compared to that given other employees for violation of the same rules.
44. The Employer has not met the test of “discipline suited to the violation” as the penalty applied to the Grievant is grossly excessive when compared to the penalty applied to other employees for violations similar to those with which the Grievant is charged.
45. For all of the reasons set forth above, the Employer has not met the seven test of just cause with the result that the Grievant has been unjustly terminated and a make whole remedy is in order.

### **DISCUSSION**

To make a decision in the instant matter, it must be first determined if there is just cause to discipline the Grievant. A just cause standard is contained in the Article #4, of the CBA.<sup>5</sup>

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<sup>5</sup> CBA, Article 4, DISCIPLINE/DISCHARGE.

“Discipline or discharge of employees shall be for just cause.”

Both Parties have referenced the generally accepted standard for determining just cause consisting of seven conditions, namely:

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

Although the Parties are in essential agreement regarding the standards for determining just cause, they differ in how these standards apply in the instant case. The Union, while recognizing that there is evidence of wrongdoing on the part of the Grievant, argues that:

1. The Employer's rules and policy cannot be interpreted as clearly as the Employer asserts.
2. The investigation was flawed in that it did not produce proof of all the charges against the Grievant.
3. The investigation was not fairly conducted because the Employer ignored the result of its findings (insufficient evidence to terminate the Grievant) and proceeded to terminate the Grievant based on the desire of single employee.
4. The Employer has not administered discipline in a uniform manner.
5. The degree of discipline administered in the instant case is excessive considering, the charges against the Grievant that can be proven and, the discipline administered to other employees for similar offenses.

The Arbitrator finds that the Employer has reasonably complied with the “notice” requirement set forth in the first test of just cause. The Grievant was provided a Handbook<sup>6</sup> setting forth conduct expectations and consequences for non-compliance. The conduct expectations and consequences for non-compliance are clearly set forth in the Handbook and the Grievant acknowledge having received it.

The Employer entered into evidence a “New Hire Orientation Checklist Signoff”<sup>7</sup> containing the Grievant’s signature as proof he received information pertaining to employment conditions and benefits, including the Handbook. The Grievant also signed a “Safety Pledge”<sup>8</sup> in which he agreed to comply with all safety requirements and acknowledged that non-compliance could result in disciplinary action, including immediate discharge.

The Employer entered into evidence its “Environmental Health and Safety Program Manual.”<sup>9</sup> The Grievant testified that he was familiar with the Manual, specifically referencing page 13, Section 1.2. The Grievant testified that he understood employees are to be pro-active and report potential safety problems *before* they result in injury.

The Safety Program Manual in Section 1.2 addresses AWAIR requirements for communication with employees regarding safety. It also provides for safety meetings with employees and that “Any concerns an employee may have regarding any safety issues are appreciated and will be reviewed.”

The Safety Manual in Section 1.4, addresses “Enforcement” and provides that “A serious safety violation resulting in injury, or significant endangerment to the employee or their co-workers will result in a ‘decision day’ action, and may result in immediate termination of the offending employee. Significant endangerment means placing oneself or another in imminent danger of serious injury or harm.”

The Employer introduced into evidence its “Respectful Workplace Policy.”<sup>10</sup> The Grievant acknowledged he was familiar with the Policy, which includes a description of “examples of unacceptable behavior” such as:

- “Deliberately or negligently damaging property or machinery belonging to the Company, our customers, vendors or other employees.”
- “Disorderly conduct, disruption to a work force or the use of offensive, abusive, intimidating or threatening behavior and/or language.”

The Policy contains a provision stating, “The company reserves the right to and will respond to any performance issues, behavior and/or language which, in its judgment, compromises the safety or well-being of any individual in the workplace, diminishes

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<sup>6</sup> Employer Exhibit #8.

<sup>7</sup> Employer Exhibit #6

<sup>8</sup> Employer Exhibit #7.

<sup>9</sup> Employer Exhibit #9.

<sup>10</sup> Employer Exhibit #10.

good order, discipline and morale, or detracts from the Company's overall business goals." The Policy also contains a provision on "Disciplinary Action Guidelines" that provides:

- "Violations of this policy will result in disciplinary action up to and including discharge. In some cases, no prior notice need be given before discharge."

The Union argues that the penalty of "immediate dismissal" (on page 14 of the Handbook) for violation of conduct enumerated in items #5 and #11, when compared to "progressive discipline" for related offenses as enumerated in items #3 and #7 on page 15, would cause a reasonable person to believe a 3-step progressive discipline would apply to all of these offenses.

The Arbitrator finds that offenses #5, #6 and #11 enumerated on page 14 of the Handbook are clearly associated with the statement; "offenses considered so serious they generally lead to immediate dismissal include, but are not limited to:" Although offenses #3 and #4 on page 15 are somewhat related to the foregoing offenses, it is clear from the wording that the offenses enumerated on page 14 are of a more serious nature.

In example, offense #5 on page 14 uses the terms "reckless, willful and/or deliberate." Offense #6 on page 14 uses the terms "willful or gross disregard." Offense #11 uses the term "disruptive behavior." In comparison, offense #3 on page 15 refers to a violation of safety rules such as failure to wear or use safety devices. Offense #7 refers to "horseplay and other action deemed unsafe or inappropriate."

The Arbitrator finds sufficient distinction between the degree of the offenses enumerated on pages 14 and 15 of the Handbook to associate those on page 14 with the penalty of "immediate dismissal" and those on page 15 of the Handbook with "progressive discipline."

With respect to Rule #2 of the "just cause" standard, the Arbitrator finds that the rules and policies, relied upon for the disciplinary action at issue, are reasonably related to the orderly, efficient and safe operation of the Employer's business and the performance the Employer might properly expect of employees.

With respect to Rule #3 of the "just cause standard, the Arbitrator finds that the Employer did make a reasonable effort to investigate whether or not the Grievant did, in fact, commit the alleged offenses before administering discipline.

With respect to Rule #4 of the "just cause" standard, the Union asserts that the investigation was not conducted fairly and objectively. The Union's assertion is that the Employer's decision to terminate the Grievant was not based on the overall evidence gathered in the investigation, but solely on the opinion of another employee who wanted the Grievant terminated. The Union bases its assertion on its understanding of testimony by Witnesses DeRosa and Fitzgerald that the Employer first considered returning the

Grievant to work, but later decided on termination after getting input from the band saw operator who wanted him terminated.

The record shows that about ten days after the incident, management officials met to discuss what action should be taken with respect to the Grievant.<sup>11</sup> Those present at the meeting included Brad Fitzgerald, Vice President of Operations, who had been called in for a briefing on results of the investigation and to provide approval for whatever action would be taken.

After being briefed on the results of the investigation, Fitzgerald went to the area where the incident took place to see it first hand<sup>12</sup>. While there he talked to the band saw operator and heard first hand from him what had happened. The band saw operator expressed concern that his safety was put at risk by the kind of behavior the Grievant had exhibited. Fitzgerald also talked to Supervisor Toby Stroud, whose comments echoed those of the band saw operator and said the Grievant's behavior was unacceptable.

Fitzgerald then talked to night shift Supervisor, Larry DePame, who said he knew of no one having a problem with the knockout machine and kicking casings out. Mike Wacholz, Lead on the second shift also said there was no need to kick castings off the knockout machine and workers were able to remove them in a safe manner. The opinion of those Fitzgerald talked to was that if the Grievant was having problems, he should have sought help.

Fitzgerald met again with DeRosa and Gary to share what he had learned from his investigation. Fitzgerald's conclusion was that the Grievant had committed a grievous act that warranted termination. Fitzgerald said there is no room for distraction when workers are operating dangerous equipment. He has seen amputation and does not want to see it again.

The Arbitrator does not find sufficient evidence in the record to support a conclusion that the Employer had decided not to terminate the Grievant but changed its mind based solely on desire of the band saw operator. The purpose of DeRosa's meeting with Fitzgerald was to seek his approval on the course of action to be taken. The record shows that, up to that point, no final decision had been made because Fitzgerald's approval was required.

Upon being asked to approve a course of action, Fitzgerald decided to further investigate the matter himself. Input from the band saw operator was a part of the investigation and, although the band saw operator's comments may have been an important factor in Fitzgerald's decision, there was also significant information gathered from other people. For example, Fitzgerald found that workers on the night shift were not experiencing the problem alleged by the Grievant, which tended to focus more on the Grievant's behavior than a problem with the knockout machine. The record indicates that Fitzgerald's decision was influenced by his concern that he didn't want to see any more saw operators

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<sup>11</sup> Testimony of DeRosa.

<sup>12</sup> Testimony of Fitzgerald.

suffer amputations. The Arbitrator does not find giving special consideration to this concern to be in conflict with a fair and impartial investigation.

The Union asserts that the Employer has not provided sufficient proof to support its charges against the Grievant. The Union specifically asserts that the record does not support the following charges:

- Failure to close the door on the knockout machine.
- Causing castings to be scrapped by kicking them off the conveyor.
- Putting co-workers at safety risk by causing distraction.

The record contains conflicting testimony regarding closing the air-activated knockout machine door while a casting is in knockout process. The testimony of Supervisor, Toby Stroud was that it is a requirement that the door be down to maintain an acceptable noise level within OSHA established limits. Stroud testified that when he observed the Grievant operating the knockout machine operation on the day of the incident, the door was not closed. The band saw operator told him that this had been going on for some time and when he had complained to the Grievant about closing the door, the Grievant said he didn't care. Stroud testified that he does not allow the knockout machine door to be open on his watch, but acknowledged on cross-examination that others have operated it with the door open, but didn't know if they were disciplined. Stroud knew none had been terminated for leaving the door open.

Witness Jason Mutschler, Band Saw Operator, testified that the Grievant was kicking the castings out of the knockout machine and leaving the door open during the full shift. Mutschler testified on cross-examination that door couldn't be closed when castings bunch up on the conveyor so that the last one blocks the door, but that was not the situation on the day of the incident.

The Grievant testified that he was not closing the door on the knockout machine and understood that this was in violation of policy and OSHA. The witnesses testified that he operated with the door open the day of the incident and castings were not blocking it.

The record shows that although the Grievant violated safety policy by leaving the knockout machine door open, the Employer's enforcement of its policy has not been completely diligent. In the instant case, the record shows that the Grievant deliberately left the door open, even after being told to close it by the band saw operator. This indicates a disregard for the welfare of his fellow worker.

The Union asserts that the evidence does not support a conclusion that the Grievant is guilty of deliberately kicking castings off the conveyor. Further, the one that fell off did not cause it to be scrapped, because it was so labeled before it entered the knockout machine.

The record shows that the process for removing castings from the knockout machine is to insert a tray under the rails of the machine, lower the casting onto the rails and then push the casting off the rails onto the tray. The Tray is framed in iron and covered with heavy steel mesh to support the legs of the casting. Photos in evidence show that the casting must be pushed onto the tray with some care to insure it is positioned on the tray properly.

The record shows the conveyor, onto which the castings and supporting tray are pushed, is a steel roller design without sides. If the casting and tray are pushed forward on to the conveyor with appropriate force, the rollers will guide the casting and its tray straightforwardly to the band saw station located at end of the conveyor. If the casting and its tray are pushed out of the knockout machine with too much force, or at an angle, the casting and its tray can careen off the side of the conveyor or run beyond the end of conveyor into the work area occupied by the band saw operator. At times when more than one casting and tray are resting on the conveyor, a casting and tray pushed out of the knockout machine with too much force, or at an angle, can either careen off the side or knock other castings off the conveyor into the work area occupied by the band saw operator. The record shows that the conveyor rollers turn freely and castings resting on the conveyor can be easily moved with light force, such as with your hand.

The record shows some inconsistency in the procedure workers follow to move the casting out of the knockout machine, some use their hands (protective gloves are furnished), some use their foot and steady the casting with their hand and some use only their foot. Whatever procedure is used, the casting must be removed in a safe manner so as to not risk the safety of other employees or cause property damage.

There is also conflicting testimony regarding whether there were problems with the knockout machine that made it difficult to remove castings and whether there had been efforts by employees working on it to obtain corrective modification. The record shows that, sometime prior to the incident at issue, there had been a modification to the design of the castings that the Grievant claimed made it more difficult to slide the casting off the knockout machine rails onto its tray. The Grievant and Witness Glen Hanson (day shift employees) testified to this difficulty. However, Fitzgerald, in his investigation found that workers on the night shift were not reporting difficulty. Fitzgerald's information was derived from both the night shift Supervisor and night shift Lead-worker.

The record shows conflicting testimony regarding what efforts were made by the workers to obtain corrective modification to the knockout machine. Hansen testified that the "rails needed to be lowered so the part could be moved onto knockout machine without having to lift it up." The Grievant and Hansen testified that they made numerous requests for this modification but never got results. However, Supervisor Stroud testified that he doesn't recall receiving such a request or hearing anyone complaining about it during safety meetings where employees are encouraged to talk about such matters. The record shows that sometime after the Grievant's termination, a modification was made.

The record shows that a worker who believes a work activity is creating a safety risk has a specified procedure for obtaining corrective action. Failing such, the worker can, by notifying the lead-worker, “lockup/tag” the machine. The Grievant testified that he did not follow this procedure for fear of being disciplined. However, Witness Joe Casey testified that such fear is unfounded because OSHA protects employees filing such complaints.

The record shows inconsistent testimony regarding the number and condition of castings that fell off the conveyor during the day of the incident. The Grievant testified that only one fell off and any damage to it is irrelevant because it was marked scrap before being placed in the knockout machine, due defects in the molding process.

Mutschler, the band saw operator working in close proximity to the Grievant (at the end of the conveyor), testified that he witnessed at least three or four falling off due to the Grievant kicking them with excessive force and the Grievant had been doing so during the entire shift. Mutschler testified that he did not see any other employee having the problems alleged by Grievant in moving castings out of the knockout machine. Mutschler testified that he has seen other workers push them out with their foot, but the difference is between “kicking” them as the Grievant was doing and “pushing” them as done by other employees.

The Union asserts that there is insufficient evidence to support the Employer’s claim that the Grievant’s behavior caused such a distraction that it jeopardized the safety of other employees. The complaint about the Grievant’s behavior originated from Mutschler, who was operating the band saw directly at the end of the conveyor. Mutschler complained to Supervisor Stroud that he feared for his safety due to the Grievant’s behavior that was not only distracting, but he also feared that the castings being kicked by the Grievant would strike and injure him. The record shows that the band saw operated by Mutschler is the most dangerous machine in the plant and requires full concentration and physical control to avoid amputation of body parts.

Joe Casey, Safety Consultant who inspected the work environment at issue, testified that the band saw operated by Mutschler is dangerous, especially because of the fully exposed blade. Casey testified that the operator needs total concentration and any distraction could lead to serious injury. Casey testified that anything unexpected occurring on the conveyor could cause a distraction leading to serious consequences for the band saw operator. Casey testified that Mutschler took the correct course of action by reporting the matter to his supervisor and the AWARE program was designed to address this type of situation.

With respect to the number of castings that careened off the conveyor, the day of the incident and whether they were damaged, the Arbitrator finds the testimony of Mutschler most creditable. After Mutschler reported his concern and Stroud arrived at the work site, a casting careened off the conveyor in the presence of Stroud and nearly struck him. The reason Mutschler reported the matter to Stroud was because of castings that had been careening off the conveyor earlier. The one that careened off near the end of the shift,

when Stroud arrived to witness what was going on, was obviously in addition to those that had already careen off and were the reason Mutschler had contacted Stroud.

The record indicates Mutschler's motive for reporting the incident was concern for his safety. The record shows that Mutschler and the Grievant were friends<sup>13</sup> and Mutschler had no motive to cause trouble for the Grievant. Mutschler testified that although he didn't feel the Grievant was intentionally trying to harm him, the effect of his behavior was subjecting him to an unacceptable risk of his safety.

Witness Hansen testimony tended to support the Grievant's version. However, Hansen was not in as favorable position to observe the Grievant's behavior, as was Mutschler. Hansen testified that "it wasn't his job to observe the Grievant and he didn't see what the Grievant was doing at all times – Jason [Mutschler] was in a better position to see what the Grievant was doing."

Witnesses Wilson and Hansen testified that when they were operating the knockout machine they had castings fall off the conveyor; however, the record does not provide sufficient detail of the circumstances under which this occurred to form a basis for comparison with the instant matter.

The Union asserts that the Penalty applied to the Grievant violates the sixth test of just cause, which is "equal treatment." The Union points to several other employees who have been charged with offenses similar to that of the Grievant as a basis to support its assertion:

- Tony Ward – who was given a 40 hour suspension and lost his Lead position in 2004 for "exhibiting loud and angry behavior with an outburst of physical violence resulting in a disruption to the workforce and damage to company property."<sup>14</sup>

The record shows Ward punched an electrical control panel in the P4 area, left and returned and punched a second electrical control panel, damaging them to the point that several hours of downtime in production resulted. The incident distracted employees to the point of leaving their work area to see what was going on.

Ward was reinstated to a Lead position some seven or eight months later and is now a line Supervisor.

- Steve Rice – who was involved in a yelling session with another employee that resulted in his suspension of six and one half hours for disruption of the workforce on April 24, 2002.<sup>15</sup>

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<sup>13</sup> Testimony of both Mutschler and the Grievant.

<sup>14</sup> Employer Exhibit #11.

<sup>15</sup> Union Exhibits #18.and #19.

The record shows that Rice threw castings on the floor (but not at anyone) and was the eye of the storm, so to speak, an obvious safety violation as well as causing a disruption to the workforce.

A grievance filed on behalf of Rice was resolved by removing the disciplinary notice from his file and restoring the six and one half hour pay he lost.

- Todd Sharkey – ground off a lug from an electrical plug in an effort to make it fit an outlet not designed for it.<sup>16</sup>

The effect of what Sharkey did was to expose himself and another employee (Ryan) to electrical shock.

Sharkey was told he must never alter any equipment and needs to think about Safety hazards from his actions. Sharkey was given a one and one half day suspension.

A comparison of the Ward and Rice offenses, to that which the Grievant is charged, shows similarities. In the case of Ward and Rice, they were demonstrating out of control behavior and committing acts that caused damaged to property and disruption of the workforce. It could be argued that the Grievant's actions were less disruptive to the workforce as the record indicates only one employee (Mutschler) was directly affected. The record shows that, in the case of Ward and Rice, their actions attracted the attention of a number of employees. The Ward incident even shut down production for some time.

The distinction the Arbitrator finds between the Ward/Rice cases and the instant case is that the Grievant's behavior subjected the band saw operator to injury that had the potential of being very serious. Ward punched control boxes and Rice threw castings on the floor, neither of which presented a safety threat to other employees.

Sharkey's offense, although it appears was done with good intentions, did pose a threat to himself and another employee. The distinction the Arbitrator finds between the Sharkey offense and the Grievant's offense is that the Grievant committed his offense knowing that it posed a safety risk to Mutschler and, when asked to stop it by Mutschler, said he didn't care. The record indicates that Sharkey committed his offense with good intentions and not being aware of the potential hazard involved.

The Union asserts that the penalty given the Grievant is excessive when compared to the level of discipline given employees Ward, Rice and Sharkey. Although the Arbitrator finds the Grievant's offense somewhat more serious for the reasons cited above, the Arbitrator does not find the Grievant's offense on January 26, 2005 to be grossly different.

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<sup>16</sup> Union Exhibits #20 and #21.

In the instant case the Arbitrator finds there was just cause to discipline the Grievant for his behavior on January 26, 2005. However, in determining the appropriate penalty, the Grievant's history of prior discipline is also considered to determine, if the instant matter is an isolated situation or, if the Grievant has demonstrated similar behavior in the past. Was the Grievant just having a bad day on January 26, 2005, or is there prior history of problem behavior?

It is noted on Joint Exhibit #5 that Brad Fitzgerald, Vice President of Operations, counseled the Grievant in 2003, "regarding work expectations and behavior." This indicates that the January 26, 2005 incident is not the first time the Grievant's has demonstrated problem behavior. Based on the Grievant's behavioral history, the band saw operator has good reason to fear that continuing the Grievant's employment has the probably of exposing him to further risk.

The Arbitrator finds that termination of the Grievant's employment is excessive discipline when based solely on the offenses committed on January 26, 2005, but for just cause when the Grievant's prior history of behavior is considered.

#### **AWARD**

**The Grievance is denied. The Arbitrator finds that termination of the Grievant was for just cause.**

#### **CONCLUSION**

The Parties are commended on the professional and thorough manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issued this 6<sup>th</sup> day of March 2006 at Edina, Minnesota.

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ROLLAND C. TOENGES, ARBITRATOR