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**In Re the Arbitration between:**

**FMCS No. 07-57077-3**

Smurfit-Stone Container Corporation,

Employer,

**GRIEVANCE ARBITRATION  
OPINION AND AWARD**

and

USW District 11, Local 1259,

Union.

Discharge of Agustin Garcia.

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Pursuant to **Article 20** of the Collective Bargaining Agreement effective March 1, 2003 through March 1, 2011, the parties have submitted the above captioned matter to arbitration.

The parties selected James A. Lundberg as their neutral Arbitrator from a Federal Mediation and Conciliation Service list of Arbitrators.

The grievance is properly before the Arbitrator for a final and binding determination and there are no procedural issues before the Arbitrator.

The grievance was filed on March 27, 2007.

The hearing was conducted on September 5, 2007.

The record was closed upon receipt of the hearing transcript.

**APPEARANCES:**

**FOR THE EMPLOYER**

Howard O. Hallman  
Smurfit Stone Container Corp.  
114 Titleist Circle  
Savannah, GA 31419

**FOR THE UNION**

Paul T. Lindgren  
USW District 11, Local 1259  
2929 University Avenue SE, Suite 150  
Minneapolis, MN 55414

**ISSUE:**

**Whether the Employer had just cause to discharge grievant, Agustin Garcia on March 27, 2007?**

**If not, what is the proper remedy?**

**FACTUAL BACKGROUND:**

The Employer, Smurfit- Stone Container Corporation, manufactures packaging products at its Minneapolis, Minnesota plant. The Plant is organized by USW Local 1259 and employs 110 bargaining unit members. The Minneapolis plant has been in operation, since 1955.

The grievant, Agustin Garcia, was hired by the Company on February 9, 2004. Until the incident that resulted in his discharge, Mr. Garcia was involved in no disciplinary incidents.

On March 26, 2007 Mr. Garcia was working as a machine helper. His shift began at 3:00 PM. When he arrived at work, Mr. Ken Petrie was the Machine Operator at the same worksite as Mr. Garcia. Mr. Petrie had been working for four (4) hours at the time that Mr. Garcia's shift started.

Mr. Petrie testified that when the grievant arrived at work, Mr. Petrie told grievant he was going to take a break. Mr. Petrie then left Mr. Garcia in charge of the job that was running on their machine. Upon returning from his break, Mr. Petrie observed that the print on the material coming out of the machine was "bad." Mr. Petrie explained "I asked him (Garcia) why the print was off, he was supposed to be watching it, and then we got into a little argument and the next thing I know he was pushing me over." **Transcript p. 47 Lines 17-20.** When asked how he addressed Mr. Garcia, Mr. Petrie admitted that he

was a little upset. At the time that Mr. Garcia shoved Mr. Petrie the two men were approximately eighteen (18) inches from each other. Mr. Petrie fell to the floor but was not injured.

According to Mr. Garcia, Mr. Petrie offered to put in the employee numbers when he arrived and he did not recall Mr. Petrie going on a break. Mr. Garcia described the incident as follows:

I started running the machine and it starts stacking and put the sheets on the conveyor, that the way you end up where you a got a stack over there and when he came back, maybe in two minutes, he don't take too long, and he come back, it's not a proper manner to tell while the other workers, he starts yelling at me, like that, he made me feel stupid in front of the other co-workers, something like that, it's not a proper manner to tell to the co-corkers, it made me feel bad.

**Transcript p. 92 Lines 7-18.**

Mr. Garcia admits that he shoved Mr. Petrie.

Mr. Petrie left the work area and asked to speak to a supervisor by the time clock area. The supervisor took Mr. Petrie's report of what happened. The supervisor also asked Mr. Garcia what happened.

The Smurfit-Stone Corporate policies and procedures include a policy on "Workplace Violence." The policy says:

It is the policy of the Company to expressly prohibit attacks, threats, offensive acts or remarks, intimidation, coercion or menacing or aggressive behavior by any employee, former employee, or any other person against anyone in or about SSCC facilities. The Company will not tolerate any acts or threats of violence against its

employees, customers, vendors, or any other visitor on the Company's premises or anyone while engaged in business with or on behalf of Smurfit-Stone Container Corporation, both on or off Company property, which includes Company owned (or leased) parking facilities. No person shall possess any firearm or other weapon on Company property, in a Company vehicle, on Company business or in a personal vehicle while on Company business. In addition, jokes or offensive comments regarding violent events will be taken seriously and will not be tolerated.

On March 27, 2007 Mr. Garcia was discharged for disorderly conduct and the discharged was grieved by the Union.

After Mr. Garcia was discharged, an operator in the plant, Mr. Joel Brown, "heard" that Mr. Petrie might be in trouble, as well as, Mr. Garcia as a result of the March 26, 2007 incident and determined he would share information about Mr. Garcia that would aid Mr. Petrie. According to Mr. Brown, at some time in the past, when he was teamed with Mr. Garcia and a third person, the following transpired:

And so I [Brown] go to the stacker end and I'm putting in the counter on the panel that controls the stacker and I turned around, I look and the stacker had not been touched, it had still been set up for the previous run. And so that's when I kind of lost it and I said "how come you assholes have got to stand there and watch me work and you can't set a stacker." **Transcript p. 72 Lines 8-16**.... Well, Auggie got in my face and is telling me I (Auggie) don't know this job, ... **Transcript p. 72 Lines 23-25**.

Mr. Brown also testified that Mr. Garcia grabbed his hand and started bending his fingers back. Brown asked him to release his hand and Mr. Garcia did release his hand.

Mr. Garcia denied that the incident occurred and the Employer did not rely upon Mr. Brown's information, when it made the decision to discharge Mr. Garcia.

To the extent that Mr. Brown's testimony concerned an uncorroborated past event that was never reported to management and was not considered in the decision to discharge, the testimony is of no value to this arbitration. However, the testimony adds what may be called "some flavor" to the kinds of verbal interactions that may routinely be taking place between team members at the various machines in the plant. The testimony supports a finding that there is a significant amount of rough language tossed about the plant and workers often make comments that demean their co-workers.

**SUMMARY OF EMPLOYER'S ARGUMENT:**

There is no dispute over what happened on March 26, 2007. Mr. Garcia pushed Mr. Petrie in the work area and Mr. Petrie fell to the floor. The incident was investigated and the Employer determined that Mr. Garcia had engaged in disorderly conduct. Plant work rules provide that an individual engaging in disorderly conduct may be disciplined up to and including discharge.

The Employer argues that by placing his hands on Mr. Petrie, Mr. Garcia engaged in conduct that is so egregious that no form of discipline short of discharge is appropriate. Plant rules clearly prohibit employees from engaging in physical violence against co-workers. All employees, including Mr. Garcia, receive plant rules at the time they are hired. Periodically, management reviews plant rules with employees. Also, the Company

posts rules on a bulletin board that is centrally located and positioned so that employees can review rule postings and other important information.

There are only two other incidents in the past ten years involving violence within the plant. The employees involved in the violent incidents in the past were both discharged. Mr. Garcia was treated the same as other employees under the same circumstances.

The plant manager asserts that he has “Zero Tolerance” for physical violence in the plant and there was just cause to discharge the grievant. The grievance should be denied.

**SUMMARY OF UNION’S ARGUMENT:**

The Union argues that the discipline in this case is too severe. In this situation two employees working in close quarters got into an argument and one employee shoves the other. The grievant in this case had just gotten to work. Right after he arrived at work, Mr. Petrie was yelling at him about a problem with the print coming off a machine that Mr. Garcia did not set up. Mr. Garcia felt demeaned and embarrassed. His reaction under the circumstances was understandable. The Union does not condone the misconduct but believes that termination was not the proper penalty.

The Union argues that the Employer did not conduct a thorough and fair investigation. In fact, the Union no investigation was conducted. Instead, the supervisor talked to Mr. Petrie and asked Mr. Garcia if he pushed Mr. Petrie and the decision to terminate was made. No information was obtained from other workers who observed the incident to determine what took place. Absent from the supervisory review is any discussion of why Mr. Garcia pushed Mr. Petrie.

The Employer has not notified employees that it has a Zero Tolerance policy with regard to physical violence. The plant manager has a Zero Tolerance policy but the terms of the policy have not been circulated within the workforce. There is no written Zero Tolerance policy and there is no evidence that bargaining unit members were told that the Employer has a Zero Tolerance policy regarding physical violence.

Forewarning is an essential element of industrial justice. In this case the Employer did not publish or otherwise communicate a policy on violence that would warn employees that placing hands on another employee will result in discharge. Implementing a Zero Tolerance policy without forewarning does not afford an employee reasonable due process. Consequently, the Employer did not have just cause to discharge the grievant.

The grievant should be returned to work with full back pay.

**OPINION:**

The Employer promulgated a corporate policy on Workplace Violence, which is designed to facilitate and maintain the orderly and effective operation of the plant. Included in the workplace violence policy is a prohibition against “attacks, threats, offensive acts or remarks, intimidation, coercion or menacing or aggressive behavior...”

It is in the best interest of the Employer and the bargaining unit for the Employer to insist upon a civil and considerate work environment. Antagonistic relationships can have a detrimental impact upon the entire operation of the business. The purpose served by the Workplace Violence policy is reasonable and the policy is related directly to the effective operation of the plant. The Workplace Violence policy comports with the principles of fundamental fairness that must be present in order to sustain an employee

termination for just cause. The Employer reasonably arrived at a determination that Mr. Garcia violated the Workplace Violence policy<sup>1</sup>, when he shoved Mr. Petrie.

There is some question as to whether the Employer's work rules were broadly and effectively disseminated throughout the workforce. However, no one argued that grievant was unaware of the impropriety of shoving a co-worker. There was no suggestion that grievant's misconduct did not violate the Workplace Violence policy. Any failure by management to effectively deliver the specific terms of the Workplace Violence policy to the grievant must be weighed against the Union admission that the conduct was wrong and the lack of any evidence demonstrating that Mr. Garcia did not understand the impropriety of his action.

When the Employer promulgated the Workplace Violence policy it included in its prohibition "offensive acts or remarks". The policy encompasses both comments that are provocative or demeaning in nature, as well as, inappropriate responses to provocation. The Workplace Violence policy extends to any employee who initiates or gets caught up in potentially violent interactions with a co-worker. In order for the policy to be justly administered, it must be applied to both the person who provokes another, as well as, the person who reacts inappropriately.

In order to conform to the principles of fairness upon which the just cause standard is based, the discipline imposed upon Mr. Garcia (who reacted inappropriately to provocation) may not be administered in the absence of reciprocal treatment of the provocative behavior. There is no evidence that the Employer imposed any form of

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<sup>1</sup> The investigation could have been more thorough. However, the grievant admitted that he shoved Mr. Petrie and his conduct was a policy violation.

discipline upon Mr. Petrie or took any steps to assure that Mr. Petrie would find less provocative ways of addressing his co-workers in the future.

The conduct of Mr. Petrie is not before this Arbitrator for review and the Arbitrator does not have jurisdiction or authority to impose any form of discipline upon Mr. Petrie. Furthermore, there is no evidence that Mr. Petrie was ever informed that his conduct was being scrutinized and that he could be disciplined for his role in the March 26, 2007 incident. The Arbitrator has not authority to decide to give Mr. Petrie some form of discipline in order to remediate the disparate treatment of Mr. Garcia.

An evaluation of the penalty imposed upon Mr. Garcia for his roll in a situation, wherein both he and Mr. Petrie violated the Employer's Workplace Violence policy, must recognize the fact that Mr. Garcia was disciplined for his misconduct and Mr. Petrie was not and will not be disciplined for his misconduct. There is disparity in the treatment of the two employees, which requires remediation.

While there is no question that pushing another employee is misconduct in any plant, there is a fundamental problem with how the Employer's treated of Mr. Garcia in this situation. In his testimony, Mr. Petrie initially said little about how he addressed Mr. Garcia on March 26, 2007. On cross examination, Mr. Petrie admitted that he was upset with the product that Mr. Garcia was running off their machine. He did not inform the Arbitrator of the specific words he used when he spoke to Mr. Garcia nor did he reveal what his general attitude toward Mr. Garcia was that day. However, it is clear from Mr. Garcia's testimony and other testimony at hearing that what Mr. Petrie said to Mr. Garcia and how he said it to Mr. Garcia could not be characterized as a gentle reprimand.

Mr. Garcia's testimony together with Mr. Petrie's testimony makes it clear that Mr. Garcia reacted to demeaning and perhaps threatening comments made by Mr. Petrie. Essentially, Mr. Petrie provoked Mr. Garcia and Mr. Garcia reacted inappropriately. The problem with management's treatment of the situation is that there is no evidence that Mr. Petrie was either cautioned or disciplined in any way for his provocative behavior. Management's failure to address the provocative behavior as well as Mr. Garcia's behavior amounts to disparate treatment. It is fundamentally unfair to impose the ultimate form of industrial punishment on one employee and fail to impose any form of punishment upon the employee who provoked the misconduct. Because the Employer treated Mr. Garcia disparately, some form of discipline short of discharge is appropriate in this case.

The Arbitrator does not have jurisdiction over Mr. Petrie and can not impose discipline upon him commensurate with the discipline imposed upon Mr. Garcia in order to remedy the disparity in treatment.<sup>2</sup> However, the Arbitrator can modify the discipline of Mr. Garcia in a manner that is consistent with the Workplace Violence policy and simultaneously address the provocation that occurred in this situation.

The Employer has an Employee Assistance Program and the Workplace Violence policy allows the Employer to make mandatory referrals to EPA in situations involving conduct that violates the policy. In this situation a long suspension of Mr. Garcia without pay will severely punish him for his misconduct. Requiring Mr. Garcia to participate in Employee Assistance counseling to learn how to cope with the kind of demeaning conduct that Mr. Petrie engaged in on March 26, 2007, should be a condition of his return

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<sup>2</sup> The Arbitrator is not saying that both employees should have been discharged but something should have been done by management to address Mr. Petrie's conduct.

to work. Reducing the discipline to a suspension and requiring the grievant to participate in counseling designed to teach him how to better cope with his environment is the only remedial mechanism available to the Arbitrator whereby he can support the overall purpose of the policy which is intended to sanction both provocative behavior as well as inappropriate actions taken by an employee in reaction to provocation.

**AWARD:**

1. *The Arbitrator finds that the grievant violated the Employer's Workplace Violence policy but the Employer did not have just cause to discharge the employee, due to disparate treatment.*
2. *The Employer shall reinstate the grievant as of the date of this decision without back pay.*
3. *The grievant's reinstatement is conditioned upon his participating in counseling through the Employee Assistance Program, which shall be designed to teach him how to cope appropriately with the provocative treatment of his co-workers. The Employer may require the grievant to participate in such counseling for up to six months.*
4. *The cost of all counseling provided under this award shall be paid for by the Employer.*
5. *The Arbitrator shall retain jurisdiction solely over the remedy.*

**Dated: October 5, 2007**

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**James A. Lundberg, Arbitrator**