

IN THE MATTER OF THE ARBITRATION BETWEEN

VIKING DRILL AND TOOL, INC)	FMCS. CASE NO. 05-1109
“EMPLOYER”)	
And)	DECISION AND AWARD
)	
GENERAL DRIVERS, HELPERS AND TRUCK)	
TERMINAL DRIVERS EMPLOYEES LOCAL)	RICHARD R. ANDERSON
UNION NO. 120 a/w INTERNATIONAL)	ARBITRATOR
BROTHERHOOD OF TEAMSTERS, JOINT)	
COUNCIL 32)	
“UNION”)	FEBRUARY 4, 2006

APPEARANCES

FOR THE EMPLOYER:

Frederick W. Vogt, Attorney
Mary Peterson, Human Resources Manager
David Swanson, Director of Operations
Dennis Jungemann, Vice President of Engineering
Ronald Marciniak, Production Facilitator
Karen Horton, Quality Control Inspector

FOR THE UNION:

Martin J. Costello, Attorney
Katrina E. Joseph, Attorney
Jerry Pitra, Business Agent
Jerry Evensen, Grievant
Rosemary Vaught, Steward/Shipping Clerk
David Radman, Flute Grinder

JURISDICTION

The hearing in above matter was conducted before Arbitrator Richard R. Anderson on December 19, 2005 in St. Paul, Minnesota. The parties were afforded a full and fair opportunity to present their case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced and received into the record. The hearing closed on December 19, 2005. Post-hearing Briefs were mailed by the parties on January 20, 2006.¹ The Union's Brief was received on January 23, 2006 and The Employer's Brief was received on January 26, 2006.² This matter was then taken under advisement.

This matter is submitted to the undersigned pursuant to the terms of the parties' collective bargaining agreement, hereinafter the Agreement, that was effective from January 1, 2001 through June 5, 2005.³ The language in Article 13 [GRIEVANCE PROCEDURE] provides for the filing and processing of grievances and Article 14 [ARBITRATION] provides for the arbitration of grievances including the final and binding authority of the Arbitrator. Pursuant to this authority, the parties stipulated that this matter is solely before the undersigned Arbitrator for final and binding decision. The parties further stipulated that this matter does not involve any procedural issue that warrants consideration.

¹ Both parties' briefs were post-marked January 20, 2006.

² Evidently, the delay was attributed to mail delivery.

³ Joint Exhibit No. 1 and Union Exhibit No. 1-A. The grievance was filed pursuant to the terms of this Agreement. A successor agreement is currently in effective.

BACKGROUND

The Employer operates a cutting tool manufacturing plant in St. Paul, Minnesota. There are approximately 165 employees in a unit of production and maintenance employees, tool room employees, inspectors, shipping and receiving employees and drivers that are represented by the Union. The bargaining unit is set forth in Article I Section 2 [RECOGNITION] of the Agreement. The Union has represented these employees since the late 1960's.

The Grievant, Jerry Evensen, has been employed as a full-time production employee since July 24, 1989 and worked in a number of departments. He is currently works in the Cut-off Department where he was working at all times relevant herein. He has been a Union Steward since 1999 and the Union's representative on the Employer's Employee Stock Ownership Plan (ESOP) since 2000. On April 19, 2005⁴, the Grievant received a three-day suspension for allegedly violating the Employer's Policy Prohibiting Harassment and Company Rule 3.3—harassment of another teammate including sexual harassment, which occurred on or about April 13th.⁵ The Grievant also received a concurrent written warning notice for making inappropriate disparaging comments against the Employer. On April 21st, the Union filed a grievance protesting the Grievant's discipline.⁶ The parties held a Joint Grievance Committee hearing on July 27th to discuss the discipline, at which time the

⁴ Unless otherwise indicated, all dates are in the year 2005.

⁵ Employer Exhibit No. 6 and Union Exhibit No. 4.

⁶ Joint Exhibit No. 2 and Union Exhibit No. 5.

Joint Committee deadlocked on the grievance.⁷ Thereafter, the Union moved the matter to arbitration. The undersigned Arbitrator was notified of being selected as the neutral Arbitrator by letter from Union' Counsel dated December 7th.

RELEVANT CONTRACT PROVISIONS

PREAMBLE

This Agreement is made and entered into by and between Viking Drill and Tool, Inc., hereinafter referred to as the Company, and the General Drivers, Helpers and Truck Terminal Employees, Local Union No. 120, affiliated with the International Brotherhood of Teamsters, Teamsters Joint Council 32, hereinafter referred to as the Union.

It is, therefore, the intent to set forth in this Agreement all matters respecting rates of pay, hours of work and conditions of employment to be observed by the Company, the Union and the employees covered by this Agreement; to provide procedures for equitable adjustment of grievances; to prevent lockouts, interruptions, work stoppages, strikes, or other interference's of the work of the Company during the life of this Agreement; and, to mutually undertake promotion of harmonious relations between the Company, its employees, and the Union.

ARTICLE 1, RECOGNITION

Section 3: *It is agreed by and between the Company and the Union that there shall be no intimidation, coercion or favoritism practiced by either party.*

Section 4: *Neither the Company nor the Union carrying out their obligations under this Agreement shall discriminate against any employee because of sex, race, color, creed, political or religious affiliation, or nationality. The Company will not discriminate in hiring for any of the foregoing reasons.*

ARTICLE 5: UNION SHOP

Section 1: *All present employees who are members of the Union on the effective date of this Agreement shall remain members of the Union in good standing as a condition of employment. All present employees who are not members of the Union and all employees who are hired hereafter shall become and remain members in good standing of the Union as a condition of employment upon completion of their probationary period.*

⁷ Union Exhibit No. 9.

ARTICLE 13 GRIEVANCE PROCEDURE

Section 1. *In the event a difference arises as to the interpretation or application of any of the provisions of this Agreement, the people affected shall handle it in accordance with the following procedure. All employees have the right to have a Union steward or other bargaining unit employee present at any disciplinary procedure.*

Step 2. *In the event of discharge or other disciplinary action, the grievant shall meet with the union to prepare a written grievance which must be submitted to the Employer within five (5) working days of the occurrence. Failure to appeal within five (5) working days from the date of disciplinary action shall cause the grievance to be barred and permanently waived.*

WRITTEN GRIEVANCES: *All written grievances must contain the following information:*

- The specific Articles and Sections of the Agreement which have been violated.*
- A statement describing the incident and in what ways our Agreement has been violated.*
- Describe the relief sought*
- Signature of the grievant.*

Step 4. *In the event that the previous meetings fail to resolve the grievance, a Joint Committee with four (4) members, two (2) representing the Employer and two (2) representing the Union, shall be convened without undue delay to hear the employees complaint. Each member of the Joint Committee may have the privilege to appoint an alternate in his or her place. When a Joint Committee meeting is called, it shall be compulsory on each member of the Committee or the alternate to attend. It shall be the function of this Joint Committee to adjust disputes, which cannot be settled between the Employer and the Local Union. A majority decision of the Joint Committee shall be final and binding on the Employer and the Union.*

ARTICLE 14 ARBITRATION

In the event the grievance is not resolved in Step 4, either the Union or the Company within ten (10) days after the issuance of the Step 4 decision, may request the Federal Mediation and Conciliation Service to submit a panel of seven (7) Arbitrators from which a single Arbitrator shall be selected to hear the grievance. The Union and the company shall make the selection after receipt of the panel either by agreement or by striking names with the Union striking the first name

The loser of an arbitration case shall pay the cost of the Impartial Arbitrator's services and expenses and all other direct expense of the arbitration proceedings, but each party will be responsible for their own expenses which include, but are not limited to, witness expenses and legal expense. If it is a split decision, the Impartial Arbitrator shall make as part of his or her decision a ruling on how these costs shall be prorated.

Any grievance not appealed to the succeeding step within the time limits specified in this Article shall be deemed abandoned and not entitled to consideration. The time limits of the grievance procedure can be mutually extended by the parties. Request for such extensions must be in writing and approved with signatures of both parties. Grievances must be resolved within a period of one (1) calendar year from the date of the initial submission of the grievance. Grievances not resolved will be considered denied

The provisions of this Article apply when the Company and the Union are unable to satisfactorily adjust a dispute in accordance with the Grievance Procedure provided in this Agreement. In deciding a case, it shall be the function of the Impartial Arbitrator to interpret this Agreement and all Supplemental Agreements thereto and to decide whether or not there has been a violation thereof. The Impartial Arbitrator shall have no right to change, add to, subtract from, or modify any of the terms of this Agreement or any Supplemental Agreements thereto or to establish or change any wage rates except for newly created Job Classifications.

ARTICLE 22 COMPANY RESPONSIBILITIES

Section 1. All rights of Management not specifically limited or abridged by this Agreement, including the right to direct the working force; to hire; suspend; discharge and transfer; to lay off employees for lack of work or other legitimate reasons; and to establish and enforce plant rules not inconsistent with this Agreement are reserved to the Company

ARTICLE 25 COMPANY RULES

Section 1. *Company rules will be simply written and issued over the signature of an authorized Company representative. These rules will be posted on the Company bulletin board where they may be read by all employees.*

Section 2. *Before the Company issues any new or changed Company rules, it will provide a copy to the Union and discuss them with the Human Relations Committee. All Company rules must be consistent with the terms of this Agreement. If the Union objects to any new or changed Company*

rule it shall have the right to challenge the reasonableness of such rule or its application through the grievance or arbitration procedure.

RELEVANT COMPANY RULES AND POLICIES

COMPANY RULES [See Appendix A]

POLICY PROHIBITING HARASSMENT [See Appendix B]

THE ISSUE

The Issue stipulated to by the parties is, "Whether the Employer had just cause to discipline the Grievant; and if not, what is the appropriate remedy".

FACTS

The Employer has a number of work related policies including the Policy Prohibiting Harassment, hereinafter the Policy, last revised June 1, 1999 [Appendix A].⁸ The Policy prohibits harassment including sexual harassment by any employee. It uses the Equal Employment Opportunity Commission [EEOC] definition to define sexual harassment. In its Guidelines issued on November 10, 1980, sexual harassment is defined as:

Harassment on the basis of sex is a violation of Section 703 of Title VII of the Civil Rights Act. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when

3. Such conduct has the purpose or effect of unreasonably interfering "with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

⁸ Employer Exhibit No. 1 and Union Exhibit No. 3-B.

The Policy also cites examples of sexual harassment conduct. It states that,

Harassment can occur intentionally or unintentionally. Some examples of conduct that is prohibited by this policy are listed below. Please note that these are not the only examples.

3. Unwanted sexual comments, innuendoes, flirtations, propositions, suggestions or invitations to social events;

4. Use of offensive words of a sexual nature describing body parts or the sexual act, telling suggestive jokes or stories, and conversations about sexual exploits, sexual preferences, and desires or suggestive or sexist remarks about a person's clothing or body;

The Policy encourages employees to report incidents of harassment. The Policy also cites levels of discipline including:

Counseling the offender

Transfer of the offender to another position

Placing the offender on probation, with a warning of suspension or discharge for continuing offenses

Discharge

The discipline is not progressive; rather, the Employer retains the “*discretion to apply any sanctions or a combination of sanctions to eliminate any unlawful conduct and remedy the impact of any discrimination...*”

The Policy is given to all employees at new employee orientation and posted at the Employer's facility. The Grievant acknowledged receipt of the Policy on June 9, 1999.⁹ Employees also undergo sexual harassment training approximately every two years and are given another copy of the Policy at said training. The Grievant attended such training and acknowledged his participation and receipt of another copy of the Policy on April 15, 2003.¹⁰

⁹ Employer Exhibit No. 3-A.

¹⁰ Employer Exhibit No. 3-B.

The Employer also has Company (work) Rules, hereinafter the Rules, last revised October 26, 1993 [Appendix B].¹¹ There are three categories of rules—(I) Attendance, (II) Work Performance and (III) Conduct. Category III, specifically Section 3.3, prohibits “Harassment of another teammate including sexual harassment.” The penalty for violating a rule and its application is set forth in the Rules. The provision states:

In situations where discipline becomes necessary, the severity of the incident, the past record of the individual and any extenuating circumstances will be considered. The resulting penalty may be used when appropriate, but some offenses could be serious enough to warrant immediate discharge. Each type of action is described below:

1. Verbal Reminder. *This is a discussion between the individual and his/her facilitator. Its purpose is to inform the individual of a rule violation and to point out the need for improvement. A written record of the incident will be retained to document that the violation has been fully explained.*
2. Written Warning. *This is a written reprimand intended to impress upon the individual the severity of a rule violation and to stress the need for improvement.*
3. Suspension. *This is an enforced absence from work to demonstrate the gravity of the offense. A suspension is also recognized as the last step before discharge.*
4. Discharge. *This is the termination of an individual's working relationship with the Company. It may result from:*
 - A. *A single infraction of severity to warrant immediate discharge,*
 - B. *Repeated violation of a specific rule,*
 - C. *Four warnings under Category I in any twelve (12) month period, if the final warning is given within four (4) months of the third warning,*
 - D. *Four serious violations, (Written Warnings or Suspensions,) within a twelve (12) month period under Category II and/or III.*

Thus, discipline depends upon the “severity of the incident”, “the past record of the individual” and “any extenuating circumstances”. The penalty may encompass a “verbal reminder”, or “written warning”, or “suspension” or “discharge”. Also, the discipline

¹¹ Employer Exhibit No. 2 and Union Exhibit No. 3-A.

imposed may or may not be progressive; rather, the Rules state, "*progressive discipline will be used when appropriate, but some offenses could be serious enough to warrant immediate discharge*". All of the aforementioned Rules are distributed to employees at new employee orientation and posted at the Employer's facility.

The Grievant received written notification on April 19th that he was being given a three-day suspension for violating the Employer's Policy and Rules and a concurrent written warning notice for making disparaging comments against the Employer.¹² A series of events in early April led to the Grievant's discipline. Quality Control Inspector Karen Horton testified that on or about April 7th, she was proceeding through the plant picking up scrap drill parts, a normal part of her daily job duties, when she was approached by the Grievant. According to Horton, the Grievant, whom she has known for approximately sixteen years, asked her if Vice President of Engineering Dennis Jungemann was back or still in China.¹³ Horton testified that the Grievant then made the remark, "Once you go China pussy, you always go back."¹⁴ Horton stated that she was extremely upset and responded by calling the Grievant "a damn pig" and walked away.

Horton testified that this was the first time the Grievant made a sexually implicit remark to her, but was not the first time he made what she considered inappropriate remarks directed at Jungemann or the Employer. According to Horton in the weeks just prior to the aforementioned incident, she was the brunt of a number of what she considered inappropriate remarks by the Grievant directed at her boss (Jungemann).

¹² Employer Exhibit No. 6 and Union Exhibit No. 4.

¹³ The Employer outsources drill blanks from China and apparently certain management officials including Jungemann made business trips there.

¹⁴ Hereinafter, the statement will be referred to as the "China " remark.

These remarks included “he (the Grievant) better get his black suit out cause he (Jungemann) will be dead” in reference to Jungemann being in China where there is Asian bird flu. Also, the Grievant called Jungemann a “greedy bastard” in reference to the Employer outsourcing drill blanks to China. In addition, the Grievant told a new hire in her presence that “he would be working in a hostile environment”; and made a remark that the Employer was “hiring scabs” in the receiving department.”

Horton testified that she was concerned about the Grievant's inappropriate negative remarks and brought them to Jungemann's attention in the hope that he would talk to the Grievant.¹⁵ She also testified that she was reluctant to report the Grievant's latest remark regarding the "China remark" because she was a Union member and the Grievant was the Steward. Further, she was worried she could lose her Union membership because the Grievant told her a few years ago that there was a policy that members should not “rat out” other members. Horton also testified that the Grievant's latest remark upset and embarrassed her to the point that it affected her job performance.¹⁶ She was also concerned about future Grievant remarks and worried that she might be subjected to more obscene remarks.

Horton further testified that after discussing the situation with her co-workers and thinking about it over the weekend, she decided that she did not want to work in a hostile environment and went to Jungemann. She told Jungemann about the Grievant's "China remark".¹⁷ Jungemann testified that Horton was visibly upset by the remark, that he had never heard such a remark used at the Employer, and that he found it to be very

¹⁵ It appears that Jungemann never did talk to the Grievant about these negative comments.

¹⁶ She testified that after the remark, her "mind was elsewhere".

¹⁷ Horton could not remember whether this conversation occurred on a Monday or Tuesday.

offensive and contrary to Employer policies. Horton, pursuant to Jungemann's query, agreed to talk to Human Resource Manager Peterson. Jungemann proceeded to contact Peterson who arranged a meeting with Horton for April 13th.

The meeting took place in Peterson's office. In attendance were Peterson, Horton and Peterson's Administrative Assistant Valdene Inlow who took notes. Peterson testified that she did not have any advanced knowledge of what Horton would tell her, only that she wanted to report an inappropriate remark by the Grievant. During this meeting, Horton told Peterson about the Grievant's "China remark" and other remarks directed at the Employer and/or Jungemann. According to Peterson, Horton told her that the Grievant had been making inappropriate remarks to her lately and she could not let this one go by; that this remark was the "one that broke the camel's back". Peterson also testified that Horton told her that she was very offended by the remark and did not want to deal with that type of remark ever again. Peterson testified that her reaction as HR Manager was that the Grievant's "China remark" was "completely offensive and inappropriate in the work place; and we don't tolerate that type of language". Further, that "when I have an employee coming up to me and indicating what is being stated and they are offended by it, I have a responsibility to stop that from happening again". After the meeting, a statement was drafted from Inlow's notes, which Horton reviewed and signed on April 14th.¹⁸

The Grievant was interviewed by Peterson on April 14th. Also in attendance were Inlow who once again took notes and employee David Radman, who was there as the Grievant's Union representative at this investigative interview. The Employer prepared a

¹⁸ Employer Exhibit No. 4.

statement from Inlow's notes that the Grievant signed under protest on April 26th.¹⁹ During the interview the Grievant was asked about the alleged "China remark" directed at Horton.²⁰ Both the contents of the Grievant's interview statement and his testimony adduced at the hearing reflect that he did not remember making such a remark. During his hearing testimony, the Grievant offered that if he did make such a remark, it was not sexual; rather, he was referring to the Employer's outsourcing of the drill blanks—that once you start getting drill blanks from China, you keep going back, which causes employees to lose jobs.

The Grievant's interview statement reflects that during the interview he was questioned about some of the inappropriate remarks that management apparently had knowledge through Horton and other employees. When questioned about the Grievant "hiring scabs remark", the statement reflects that he did not recall making it, however, he stated that he uses the term to refer to anyone that does not have a union card. He also did not recall making the "black suit/dead remark" alleged by Horton that was directed at Jungemann. The Grievant stated that he joked with Jungemann and others in management about the bird flu, and that it was an unsafe place to be in at the present time.

The Grievant's interview statement also reflects that he was also questioned on other alleged inappropriate remarks. Regarding the topic of the Employer's "operation being a sweat shop" (hostile environment), the Grievant's interview statement indicates that a

¹⁹ According to Peterson, the Grievant was merely protesting not receiving a copy of the statement, which is Employer policy.

²⁰ Employer Exhibit No. 5.

new employee came up to him and made a comment that the Employer's operation is a sweat shop. The Grievant's response was to agree with this employee. During his hearing testimony the Grievant stated that in his opinion the standards for a sweat shop are stretched out hours, work overloads, terrible attendance and terrible turnover, all of which were present at the Employer. Further, the Grievant's response indicated that he did not think that agreeing with an employee that the Employer's operation was a sweat shop was damaging to the Employer and that he was just letting someone know what it was like to work there.

Regarding the topic of "high employee turnover", the Grievant's interview statement indicates that he acknowledged making the remark to employees that the Employer had gotten rid of over 400 employees in the last six years. The Grievant embellished on this topic during his testimony at the hearing. He testified that turnover was a major problem and was in excess of 350 over the six-year period. The Grievant testified that the seniority lists reflect this turnover.²¹ Further, the Grievant testified that the parties had to reopen the current contract eighteen months early to increase wages in order to attract new employees and to eliminate turnover.

There was also an apparent query about the Grievant allegedly telling employees that the Employer was "stockpiling drills in preparation of a strike". The Grievant's interview statement reflects that he did not remember telling employees this, however, it was a concern during negotiations for the current Agreement. The Grievant testified that this

²¹ Union Exhibit Nos. 2 (A-D) covering the years 2000-2004. The Employer did not furnish the 1998-2000 seniority list according to the Union.

was a rumor in the plant, and as Steward, he conducted an investigation, which included talking directly to Shipping Clerk Rosemary Vaught. Both the Grievant and Vaught testified that the Grievant approached Vaught about the large stockpile rumors. After Vaught told him that backorders resulted in the large stockpile, the Grievant testified that he was satisfied and the matter was dropped. The Grievant added that Director of Operations Dave Swanson later issued a memo to employees that supported his conclusion.

After interviewing the Grievant, Peterson convened a management meeting to discuss the results of the investigation. In attendance besides Peterson were Swanson, Jungemann and Facilitator (Supervisor) Ron Marciniak. The committee collectively decided that the Grievant had violated the Employer's Policy and Rules for his "China remark". It was also determined that the Grievant would receive a three-day suspension without pay solely for this remark and a written warning for other inappropriate and disparaging remarks. The decision to implement a three-day suspension was based on (1) the nature and severity of the offensive conduct and the Employer's obligations to respond in light of same; (2) any defense or mitigation proffered by Grievant; (3) Grievant's prior employment history and past record, including any extenuating circumstances such as prior discipline for other disruptive conduct or other violations of Company policy; (4) the Company's prior response to similar circumstances, if any. Pursuant to the aforementioned management meeting, the Grievant was issued a

disciplinary notice on April 19th.²² The disciplinary notice states:

Three-Day Suspension without pay; violation of Policy Prohibiting Harassment and Company Rule 3.3—harassment of another teammate including sexual harassment; violation of Collective Bargaining Agreement page 3—Statement of Agreement and Article 2, Section 1(b).

DETAILS OF DISCUSSION:

On or about April 13, 2005 we received a complaint from a fellow employee that you have made offensive and inappropriate sexual comments, and that you have been making statements with the intent and effect of disrupting Company operations, and damaging the Company's business reputation. Pursuant to our policies and practices, the Company conducted a full and impartial investigation into these allegations, which included interviewing employees and interviewing you, in order to afford you a full opportunity to present your side and/or respond to the allegations. Such allegations are taken very seriously, as our employees are our primary asset, and we have an obligation to protect our employees from such conduct.

Following our investigation, we have determined that you have violated the Company's Policy Prohibiting Sexual Harassment. You said to a female employee that, "once you go China pussy, you always go back." The employee was very offended and disturbed by this vulgar statement, as are we. Such comments will not be tolerated, for this reason alone, you are being suspended for three (3) days.

In addition, however, our investigation also confirmed that you have been making false statements about the Company's operations and conduct, for the sole purpose of damaging the Company's reputation, disrupting the work force, inflaming and/or frightening employees, and otherwise creating an intimidating and hostile work environment. Your actions are in violation of the Collective Bargaining Agreement, Company policies, and the law. Specifically, the Statement of Agreement of the Collective Bargaining Agreement states that the parties should work together "to mutually undertake promotion of harmonious relations between the Company, its employees, and the Union." Further, Article 2, Section 1(b) specifically prohibits the interference with the operations of the Company. Our investigation determined that you have violated these contract provisions by falsely claiming that, for example, the Company has been stockpiling drill bits and that the Company has "gotten rid of 400 employees in the last six years," and other comments designed to sabotage the Company and encourage employees or potential employees not to work at Viking Drill.

²² Employer Exhibit No. 6 and Union Exhibit No. 4.

Your conduct is part of an ongoing pattern of attempting to create disharmony, conflict, and discord among employees without any legitimate basis. You have been disciplined for similar conduct in the past, and your continued violation of the Collective Bargaining Agreement or Company rules and policies will not be tolerated. Be advised, that in addition to violating the Company's own policies and rules, sexual harassment is illegal under state and federal law. Further, your conduct may also constitute illegal slander, defamation and breach of duty of loyalty. If you continue engaging in unjustified disruption and interference with the Company's operations, and violating Company rules and policies, you will be subject to further discipline, up to and including immediate discharge. Moreover, to the extent your actions constitute illegal slander or defamation, you may also be subject to civil legal action.

You must make immediate and sustained improvement. Failure to do so, or any further performance or disciplinary issues, will result in further disciplinary action, up to and including termination.

Evidence adduced at the hearing disclosed that the Grievant was previously disciplined during his tenure. He was charged with interfering with the processing of a reasonable suspicion drug and alcohol test of a fellow employee. On September 26, 2003, he received a written warning for a violation of the Collective Bargaining Agreement [page 3—Statement of Agreement and Article 2, Section 1(b)], some of which are similar provisions that he is accused of violating herein.²³

Testimony disclosed that there was an ongoing dispute between the Union and Employer over the Employer outsourcing of drill parts that culminated in a Union grievance being filed in early 2003.²⁴ This dispute was still ongoing at the time the Grievant was suspended.

Finally, witness testimony disclosed that employees in the shop area work in a noisy, dirty and rough environment. The use of profane words by both men and women

²³ Employer Exhibit No. 7.

²⁴ Union Exhibit No. 9.

is a commonplace occurrence in shop areas of the facility. In fact, witnesses for the Union testified that they have heard Horton utter the word “fuck” on at least one occasion. Testimony, of various witnesses indicated that while these words literally imply body parts or sexual actions, they are never used in those contexts.²⁵ The Grievant also testified that Horton once said to him out of the blue, “I guess you’re not getting any,” referring to sex.

POSITION OF THE EMPLOYER

It is the Employer's position that it had just cause to discipline the Grievant and the appropriate discipline was a written warning notice for making inappropriate remarks and a three-day suspension for violating the Employer's harassment policy. The Employer argues that the Grievant violated Employer policies and work rules. The Employer, pursuant to Article 22 Section 1 of the Agreement [COMPANY RESPONSIBILITIES], has the right to establish work rules and policies. The right of the Company to promulgate and establish Company Rules is further delineated in Article 25 [COMPANY RULES]. The Employer has a right and has developed both a policy [Policy] and work rules [Rules] prohibiting harassment including sexual harassment of employees.²⁶ The Grievant during the first week of April 2005 violated the Employer's Policy and Rules by uttering the offensive and profane sexual "China remark" to co-worker Horton who then complained directly to management.

²⁵ For example, calling someone a “pussy” is a derogatory reference to that person, usually a man, being a sissy, weakling or wuss; that calling someone a “cocksucker” is a derogatory reference to that person being extremely offensive or undesirable; and that calling someone a “prick” refers to someone who is disliked or has engaged in objectionable conduct or behavior.

²⁶ Section 2 permits the filing of a grievance and arbitration by the Union to protest any changed or new rule.

The Employer argues that his "China remark" violates its Rules [Company Rule 3.3—harassment of another teammate including sexual harassment]. The Grievant by his remark also violated its Policy prohibiting harassment and sexual harassment. More specifically, the Grievant's remark violated these provisions:

- A. Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her race, color gender, national origin, age, disability . . .or that of his/her relatives, friends, or associates and that:
 - 1. Has the purpose or effect of creating an intimidating, hostile or offensive work environment;
 - 2. Has the purpose or effect of unreasonably interfering with an individual's work performance... .
- B. Sexual harassment is defined in accordance with the EEOC Guidelinesas:
... verbal or physical conduct of a sexual nature constitute sexual harassment when:
 - 3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.
- C. Examples:
Harassment can occur intentionally or unintentionally. Some examples of conduct that is prohibited by this policy are listed below. Please note that these are not the only examples.
 - 1. Epithets, slurs, negative stereotyping . . . that relate to race . . . gender, national origin... .
 - 3. Unwanted sexual comments, innuendoes... .
 - 4. Use of offensive words of a sexual nature describing body parts or the sexual act . . .

The Employer further argues that the Grievant made the "China remark" that he is accused of making is unrefuted. Evidence disclosed that the Grievant never denied making said remark only that he could not recall making it. The Grievant's assertions at the hearing that he was referring to outsourcing if he made the remark; and if he used the term "pussy", he was referring to management's "weakness" or management being "wusses". This is absurd. The plain commonly understood meaning of the Grievant's remark is overtly sexual, demeaning, and highly offensive especially to women, and in a

work environment. The statement is offensive on its face and speaks for itself. Horton perceived it this way, as did each member of management who was involved in the matter.

The Union through its witnesses focused on establishing that employee's use of certain profane words did not refer to body parts or sex acts. This implies that employees would then be free to engage in vulgar, demeaning remarks and conversations, no matter how offensive, as long as the language used was not literally sexual in nature. This position is unsupportable and absurd. The term "sexual" as used and applied by courts in all jurisdictions does not require an actual sexual connotation or physical description. Also, a vulgar remark particularly demeaning to women, as in the instant case, falls well within the parameters of unacceptable remarks that are sexual in nature.

Further, the Employer argues that it is immaterial that the Grievant did not intend to harass Horton by his remark. The Employer's Policy clearly states that harassment can be intentional or unintentional on the part of the perpetrator—it is the impact, not the intent that matters. Finally, It is immaterial whether or not the conduct in question violates any State or Federal sexual discrimination laws since it is unrefuted that the Employer has both the authority and the obligation to address and discipline employees who engage in inappropriate conduct that it determines violates its own Policies and Rules.

At the hearing, the Union took the position that because foul language is pervasive through out the work place, that the Grievant's "China remark" to Horton could not be

offensive to her or another reasonable person. This position is not supported by the facts. Both Horton and other Employer witnesses testified that they considered the Grievant's remark to be highly offensive, vulgar and inappropriate. This remark was not ordinary crude shop talk or cussing, but something out of the ordinary. Further, this was not crude or vulgar language directed at machines or to "put someone down for being a weakling", etc.

The Employer also argues that the Grievant's "China remark" had a severe and demonstrable impact on Horton. Horton testified that she struggled with the aftermath of the remark and it was always on her mind. She also felt embarrassed, humiliated and fearful to the extent her work noticeably suffered. The impact of this statement is sufficient to meet the legal threshold of a hostile environment and sufficient to be a "severe" violation of the Employer's Policy.

The Employer further argues that when it received a report of the Grievant's conduct it conducted a full and impartial investigation. The Grievant queried the Grievant on the alleged "China remark" and on other inappropriate remarks that he had allegedly made. After the interview, the Grievant was allowed to review the report of his interview and make any necessary revisions he felt were necessary, and after doing so he signed it. Thereafter, the Employer pursuant to its policy discussed the results of the investigation and its response options in determining the level of discipline, if any, to be implemented.

The Employer determined from the four factors it considered in assigning discipline that it had ample justification issuing the Grievant a three-day suspension together with

the concurrent written warning notice for inappropriate remarks directed at management officials or the Employer. First, the Employer considered the Grievant's "China remark" to be highly offensive, vulgar and inappropriate conduct in the work place that violated the Employer's Policy and Rules. The Grievant received harassment including sexual harassment training, which covered a prohibition of similar conduct. Its investigation also determined that the Grievant had been making inappropriate remarks to employees concerning management individuals and the Employer.

Second, the Grievant did not deny making the "China remark", only that he could not remember making it. The Grievant also did not offer any extenuating circumstances or acceptable mitigation. The only mitigation offered by the Grievant was that if he made the remark, he was referring to management being weaklings for outsourcing to China. His explanation was too absurd to be given any weight. The Grievant also did not offer a satisfactory explanation for the other inappropriate remarks for which he received the concurrent written warning notice.

Third, in looking at the Grievant's employment record, it was determined that the Grievant had a long history of engaging in a "disturbing pattern of intentional disruptive actions" and policy violations, including unjustified interference with the Employer's operation, and repeated violations of the Agreement, particularly acting contrary to his obligation to promote "harmonious relations between the Company, its employees, and the Union", as set forth in the Agreement's Preamble. The Grievant had received a written warning in September 2003 for interfering in the Employer's drug and alcohol testing policy when he encouraged an employee to seek legal counsel before

submitting to a "test". He was charged with a violation of not abiding with the Preamble's "*harmonious relations*" requirement and its requirement to, "*prevent ... other interference's of the work of the Company*". Swanson also verbally warned the Grievant in March 2005 for making the statement "Chinese cocksuckers will put us out of business with all the (drill) blanks they are putting in." Swanson warned the Grievant not to repeat those vulgar remarks. The Employer also states that although the Policy and Agreement reserve the right of the Employer to issue discipline at any level, it followed a progressive discipline. Based on the previous verbal and written warnings, the next step was suspension.

Finally, the Employer followed past practice in issuing the Grievant's discipline. The Employer had previously disciplined a management employee with a three-day suspension for a remark that it deemed violated its Policy. Sometime in 2002 a bargaining unit employee approached his facilitator and requested vacation time so that he and his wife could celebrate their upcoming anniversary. This facilitator allegedly told the employee, "The bitch can wait." This incident was brought to higher management's attention; and after an investigation, the facilitator received a three-day suspension.

The Employer contends that the Union is requesting the Arbitrator to step in the shoes of management and second-guess management's application and interpretation of its own policies. The Employer argues that the issuance of discipline is the sole function of management pursuant to its policies and the Agreement. Moreover, it is a well-established arbitral rule that, absent a finding that discipline is so excessive "as to be arbitrary and capricious", an arbitrator should be hesitant to alter it. To reduce the

length of or revoke Grievant's suspension would essentially strip the Employer of its authority to protect its employees from such offensive and demeaning comments. Moreover, in failing to take the prompt and appropriate action that it did, or being prevented from doing so through arbitration, the Employer would subject itself to liability to Horton for failing to protect against a hostile work environment. Such a position is untenable. Courts have long held that an employer can be held vicariously liable for the conduct of co-workers if it knew or should have known that inappropriate or offensive conduct was taking place and failed to take prompt and appropriate action.

POSITION OF THE UNION

The Union's position is that the Employer did not have just cause to discipline the Grievant. The Union contends that there was no sexual harassment or any harassment by the Grievant nor did he make inappropriate disparaging remarks directed at the Employer warranting the discipline. The Union argues that the Employer must satisfy the accepted "seven test" arbitrators traditionally apply in order to satisfy just cause.²⁷ These factors are notice, reasonable rule or order, investigation, fair investigation, proof, equal treatment and penalty; and if any of these tests are not satisfied, there was not just cause for the imposed discipline. Several of these factors—particularly notice, proof, fair investigation and penalty—serve to show that the Employer has not met its burden of proof. Thus, by failing to show that the Grievant sexually harassed Horton or committed misconduct by making false statements against the Employer, the Employer has failed to it had just cause to discipline the Grievant.

²⁷ Citing Adolph M. Coven and Susan L. Smith, Just Cause: the Seven Tests (BNA, Washington, D> C>, 2nd ed. 1992).

The Union states that the Grievant is accused of sexually harassing Horton by his "China remark". The Employer considered this remark to be an offensive and inappropriate sexual comment that constituted harassment, specifically sexual harassment; and as such, violated its Policy. Employer testimony discloses that it considered this statement violated Section 1-B, Clause 3—the "hostile environment" portion of the Policy. It is not contending that the Grievant violated Clause 1 or 2 or any other Policy provision.

The Union argues that the statement alleged made by the Grievant does not constitute sexual harassment. First, the statement was not harassment. The Policy defines harassment as "*verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, gender, national origin, age disability, creed, martial status, status with regard to public assistance or sexual orientation*". The Grievant's alleged "China remark" simply does not meet the Employer's definition of harassment. While the "China remark" may have been unwelcome, it did not rise to the level of harassment.

Second, even if the Employer can prove the alleged "China remark" is harassment, it must prove the statement was made because of Horton's sex. This it cannot do. The Policy defines sexual harassment as "*harassment on the basis of sex*". The Union proffers that Supreme Court has held in determining whether harassment is based upon the victim's sex, "*the critical issue... is whether members of one sex are exposed to disadvantageous terms and conditions of employment to which members of the other sex are not exposed*". There is no evidence that the alleged "China remark" was made

to Horton because of her sex. The evidence shows that she did not even consider it sexual harassment; rather, it was Jungemann that first suggested that the statement was sexual harassment. Horton considered it a culmination to what she described as a series of inappropriate statements directed at her boss. Further, on its face, the statement does not fit the definition of sexual harassment. Nor can it be sexual harassment in the context in which it was allegedly made. Testimony clearly disclosed that the Employer's work place is rude, crude and vulgar. Employees, both male and female use foul, vulgar and obscene language in the shop areas. Thus, the Employer cannot show that Horton was "*exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed*".

Even if the Employer can prove that the Grievant made the alleged statement because of Horton's sex, it must prove that the statement was, "*verbal...conduct of a sexual nature*" as defined by the Policy. The Policy states, "*Use of offensive words of a sexual nature describing body parts or the sexual act*" is prohibited. The Policy does not define the term "sexual nature". Therefore, it is well settled judicial doctrine to construe words according to their plain meaning. Webster's Third New International Dictionary (1993) defines "sexual" as "*involving sex*" (*i.e., reproduction*)," "nature" as a thing's "*inherent character or basic constitution*". Accordingly, a word that is "of a sexual nature" is a word that inherently involves sex.

Union witnesses testified, without rebuttal, that the word "pussy" spoken at the plant refers to someone who is a weakling or is subservient. They also testified that if the Grievant used the term, he was referring to the weak subservient position that the

Employer's outsourcing to China was putting itself in. Accordingly, the Employer cannot show that the Grievant used words of a "sexual nature" when speaking to Horton.

Finally, the Employer has not proved that the Grievant's alleged remark to Horton created a hostile work environment. The Union avers that the Supreme Court has held that employees have "*the right to work in an environment free from discriminatory intimidation, ridicule, and insult.*"²⁸ However, in order for conduct to create a hostile work environment, it must, "*be sufficiently severe or pervasive to alter the terms of the victim's employment and create an abuse working environment.*"²⁹ Further, the existence of a hostile work environment is determined by looking at circumstances, including "*the frequency of the discriminatory conduct, its severity; whether it is physically threatening or humiliating, or a mere offensive utterance: and whether it unreasonably interferes with a employee's work performance.*"³⁰ Further, "*offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in terms and conditions of employment.*"³¹

In this case, a single remark attributed to the Grievant is the basis for accusing him of sexual harassment. Horton acknowledged that the "China remark" was not directed at her and testified that until approximately two weeks earlier, she and the Grievant were "polite" and "friendly". Finally, there were no previous incidents of alleged sexual remarks or any further incidents of the Grievant approaching Horton with any "sexual" or other "inappropriate" remarks directed at Jungemann or the Employer.

²⁸ Meritor Savings Bank v. Vinson, 477 U. S. 57, 66 (1986).

²⁹ Id. 67

³⁰ Citing Harris v. Forklift Sys., 510 U. S. 17, 23 (1993).

³¹ Citing Faragher v. City of Boca Raton, 524 U. S. 775, 788 (1998)

The Agreement has a just cause disciplinary standard. The Employer has not established just cause to discipline the Grievant; therefore, it had no basis for the Grievant's suspension. The Employer has also not proved that the Grievant made "*several false statements about the Company's operations and conduct*", as stated in the April 19th disciplinary notification.

The Union argues that the Grievant sought only to investigate, not perpetuate the stockpiling rumors circulating among employees. During this time period, it is uncontested that employees were receiving a significant amount of overtime, that there were a great deal of drill orders being stockpiled, and that the parties were in the process of negotiations. The testimony adduced at the hearing disclosed that Union member(s) asked the Grievant about the stockpiling rumors since they had assumed that the Employer was stockpiling drill orders in anticipation of a strike. The Grievant testified, that as Union Steward, he investigated the rumors. Shipping department employee Rosemary Vaught corroborated his testimony that the stockpiling was due to a large number of back orders. Once confirmed that the Employer was behind on filling customer orders, it is unrebutted that the matter was dropped. Thus, the Employer has not proved that the Grievant spread rumors of stockpiling.

The Grievant's comments about employee turnover were accurate and reflected legitimate Union and Employer concerns. Both Union and Employer witnesses testified that turnover had been a significant problem at the facility. It became such a problem that the parties renegotiated the Agreement approximately eighteen months early primarily due to this problem in hopes that higher wages would curtail the high turnover.

Union Exhibits Nos. 2A-2D show that approximately 220 new employees were hired at the facility between December 2000 and August 2005, although the size of the bargaining unit remained unchanged. The only evidence to rebut the alleged comment attributed to the Grievant was Peterson's testimony that the turnover was " more on the lines of 250 people" during that time period. As the Union Steward, the Grievant was entirely within his rights to complain about turnover. Therefore, the Employer's accusation that the Grievant made a false statement about turnover, which defamed the Employer, is not true. An essential element of defamation is the requirement that the statement be false. Simply put, the Grievant's statement was true that between 1998-2004 about 400 employees were either fired or quit. Accordingly, the Employer has not proved the Grievant made a false statement about the Employer.

Finally, the Union argues that even if the Grievant committed the misconduct, the discipline imposed may not stand because it is not an appropriate penalty. The penalty was not appropriate given the mitigating circumstances. The Grievant's alleged "China remark" was made on the shop floor where it is uncontested that employees both male and female engage in profanity including using the word "pussy". The Grievant, who is a sixteen-year employee, is only accused of one alleged sexual remark. Prior to the alleged sexual remark, Horton complained to Jungemann about the Grievant making inappropriate remarks. The Employer took no action to warn or counsel the Grievant about the remarks; rather it undertakes to suspend him for a single comment. In a belated attempt to punish the Grievant for its oversight does not deprive the Employer of its right to use progressive discipline. Before being suspended, the Grievant has the

right to be disciplined progressively, especially under the circumstances herein. Thus, if the Arbitrator finds that the Grievant committed misconduct, he has the authority to reduce or mitigate the penalty. This is especially true since there is no clause in the Agreement that precludes the Arbitrator from doing so.

OPINION

This issue presents a well-settled two-step analysis: first, whether the Grievant engaged in activity which gave the Employer just and proper cause to discipline him; and second, whether the discipline imposed was appropriate under all the relevant circumstances. It is the Employer's burden to show that the Grievant engaged in conduct warranting discipline and that the appropriate discipline was a written warning and a three-day suspension.

I conclude that the Employer has met the first test in that it had just and proper cause to discipline the Grievant for making the "China remark" to Horton. However, I conclude that the Employer did not have just and proper cause to issue the Grievant a written warning notice for the alleged inappropriate disparaging remarks attributed to him as set forth in the April 19th discipline notice.

In reaching the conclusion that the Employer had just and proper cause to discipline the Grievant for the "China remark", I have considered both parties' evidence and arguments.

The evidence clearly shows that the Grievant made the "China remark" to co-worker Horton during the later part of the first week in April 2005. Horton testified credibly that this remark was made to her by the Grievant. The Grievant never denied making the

remark, only that he did not remember making it. During his investigatory interview, the Grievant never tried to explain away his remark. During his hearing testimony, the Grievant hypothesized that if he, in fact did make the remark, he was referring to the weak or subservient position management was getting itself into since once you outsource to China, you keep going back. This implausible defense is totally rejected. The plain words of the remark speak for themselves. If he had been referring to outsourcing, he could have succinctly stated so.

As stated above, there can be only one interpretation of the Grievant's remark. The plain words of the remark connote sexual activities; that the Grievant was telling Horton that once or if her boss had sexual relations with a Chinese, he would always go back. Thus, contrary to the Union's position, I conclude that the remark is "of a sexual nature" as well as an "unwanted sexual comment". Statements, similar to the remark uttered by the Grievant to Horton, are per se unwelcome, especially when directed at a female by a male, absent evidence to the contrary that such comments are welcomed. No such evidence exists here.³² Moreover, such remarks are intolerable and have no justification in the work place, especially coming from someone in Union authority.

I also conclude that the Grievant's "China remark" per se creates a hostile work environment and is sexual harassment; and as such violates the Employer Policy specifically Section C-3 and 4 on page 2 of the Policy. Therefore, the Employer had just and proper cause to discipline the Grievant for making said remark.

³² The alleged "not getting anything" comment attributed to Horton, even if made, does not rise to the level of being "welcomed" nor does it mitigate the Grievant's "China remark".

The Grievant is also charged with uttering certain other inappropriate disparaging remarks that resulted in him receiving a written warning that is included in the April 19th disciplinary notice. The Employer has failed to establish that said remarks rise to the level of being either inappropriate, false or disparaging or that they justify a "written warning". The Grievant proffered satisfactory unrefuted explanations for these remarks. The Employer failed to rebut the Grievant's explanations.³³ Further, the remarks and the circumstances in which they were made fail to rise to the level warranting discipline. Even assuming arguendo that they do, the appropriate discipline should have been a "verbal warning" rather than a "written warning" under the Employer's progressive disciplinary policy since no evidence was presented that the Grievant had been "verbally" disciplined for engaging in similar conduct. Therefore, there is no basis for the written warning discipline regarding these allegations and will be expunged from the April 19th disciplinary notice.

Having determined that the Employer had just and proper cause to discipline the Grievant for his "China remark", it is incumbent upon the Employer to show that the appropriate discipline was a three-day suspension. I conclude that the Employer has failed to sustain this burden. It is the Employer's position that the three-day suspension of the Grievant was based solely on his "China remark". The Employer argues that it used progressive discipline in issuing the three-day suspension even though under its Policy, the Employer has "discretion" to deviate from progressive discipline. The Employer may also deviate from progressive discipline under its Rules if the nature of

³³ The Grievant alleged the turnover was 400 in the last six years. The only rebuttal came from Peterson who testified that she believed the turnover from 2000-2004, a four-year period, was closer to 250. No evidence was presented on the two-year period prior to 2000.

the conduct is "severe". Even assuming arguendo that the Employer deviated from progressive discipline, the remark does not justify deviation. The conduct in question involves a single inappropriate sexual remark that violates the Employer's Policy and Rules; however, it is not so egregious as to constitute "severe" conduct nor is it of a sufficient basis to relieve the Employer of its obligation to use progressive discipline.

In any event, the Employer maintains that it did follow its progressive disciplinary procedures in disciplining the Grievant. In doing so the Employer states it relied on a number of factors to impose what it considered progressive discipline in establishing the Grievant's three-day suspension. The Employer relied on a previous warning issued to the Grievant in September 2003 as justification to advance to the next level of discipline. There is no provision involving time lines in the Employer's progressive disciplinary policy under the Rules regarding how long a written warning is operative when moving progressively from a written warning to a suspension.³⁴ There are, however, time lines in considering written warnings when discipline moves progressively from a suspension to a discharge. In this situation, the maximum time period that a written warning can be considered is a twelve (12) months.

Although it can be argued that timelines in one disciplinary category does not automatically apply to other disciplinary categories, it does give this Arbitrator guidance in determining whether the Grievant's September 2003 written warning automatically moved him to the next progressive level of discipline. I conclude that it does not.³⁵ More than eighteen months had lapsed between the episodes of conduct. In addition,

³⁴ At least not offered into evidence.

³⁵ It appears highly unlikely that the time lines would be greater for a category involving lesser discipline unless the contract set longer time lines.

the previous written warning was totally unrelated to the current conduct. The previous conduct involved alleged interference in the Employer's drug and alcohol-testing program while the current conduct involves making a prohibitive sexual remark. The current conduct was not reoccurring or similar conduct justifying any automatic progression in the Employer's disciplinary policy.

The only other evidence of the alleged Grievant conduct that could be a factor in determining an appropriate discipline is the Grievant's alleged remark "Chinese cocksuckers will put us out of business with all the (drill) blanks they are putting in.", which occurred in a conversation with Swanson on March 5th. Swanson testified upon hearing the Grievant's remark his only response was to tell the Grievant, "That kind of comment needs to stop here".

The Employer is stretching here to imply that Swanson's response constituted a verbal warning. A verbal warning as defined in the Employer's Rules is, "*This is a discussion between the individual and his/her facilitator. Its purpose is to inform the individual of a rule violation and to point out the need for improvement. A written record of the incident will be retained to the document that the violation has been fully explained*". Swanson's response hardly meets the definition of a "verbal warning". The Grievant was never "*informed of a rule violation*", "*a written record of the incident*" was "*not retained*", and the reply words uttered by Swanson do not expressly "*point out the need to improve*". Even assuming arguendo that Swanson's response remark to the Grievant was a "verbal warning", it does not justify the Grievant's suspension since the

next level after a "verbal warning" is a "written warning" under the Employer's progressive disciplinary policy.

There are also mitigating circumstances for not automatically invoking a three-day suspension for the Grievant. The Grievant is a long tenured employee (July 1989) Absent the 2003 written warning, the Grievant had an otherwise unblemished disciplinary work record.³⁶ The Grievant's remark was a one time event, that was not directed at the person addressed in the remark nor has similar conduct been repeated. Witnesses also established that profanity was pervasive on the shop floor. Further, the Grievant had been making what Horton described as inappropriate comments directed at the Employer, especially Jungemann, which were brought to the attention of Jungemann shortly before the "China remark". Jungemann, in choosing not to address the Grievant overt conduct, arguably exacerbated the situation.³⁷

The Employer further argues that past practice dictated that a three-day suspension was justified because it was consistent with its issuance of a three-day suspension to a facilitator for making a similar remark. This rationale fails since bargaining unit employees are subject to specific progressive disciplinary procedures pursuant to the Agreement, Policy and Rules; while facilitators have no bargaining unit rights; and management is free to unilaterally invoke any discipline it so chooses.

Finally, a progressive disciplinary procedure is designed to give an offender a chance to remedy prohibitive conduct before harsher disciplinary penalties are invoked.

³⁶ The Employer argued in its position that he Grievant had received multiple verbal and written warnings for engaging in misconduct; however, the only evidence of discipline proffered at the hearing was the September 2003 written notice and the alleged verbal notice warning issued by Swanson.

³⁷ Had Jungemann counseled the Grievant against making inappropriate remarks to Horton, the "China remark" might never have been made.

The Grievant was not given this opportunity. Further, there is no evidence to suggest that a written warning would not remedy the Grievant's misconduct or deter future misconduct.

CONCLUSION

I also conclude that the Employer had just and proper cause to discipline the Grievant for his "China remark"; however, the Employer had no justification in issuing the Grievant a three-day suspension, and that portion of the grievance is partially sustained. I will, therefore, reduce the Grievant's three-day suspension to a written warning.³⁸ In addition, the Grievant will be made whole for any loss arising from his suspension.³⁹

³⁸ The Employer argued, contrary to the Union, that I as an Arbitrator have no authority to reduce the Grievant's discipline. The Union correctly points out that Arbitrators have this broad authority, especially when an Employer acts arbitrarily and breaches its own progressive disciplinary procedure.

³⁹ In view of this split decision, I am attaching equal responsibility on the parties for the undersigned Arbitrator's expenses associated with this proceeding pursuant to Article 14 paragraph 4.

AWARD

IT IS HEREBY ORDERED that The Grievant be made whole for any loss of wages or loss of other economic benefits or loss of any other benefits or rights or privileges suffered as a result of the Employer's action.

IT IS FURTHER ORDERED that the Employer expunge any reference to the other specifically alleged conduct in Grievant's April 19, 2005 written disciplinary notice consistent with my Decision herein.

IT IS FURTHER ORDERED that the Employer issue a new written warning notice to the Grievant consistent with my Decision herein.

. The undersigned Arbitrator will retain jurisdiction in this matter for a period of forty-five (45) days from the receipt of this Award to resolve any matters relative to implementation.

Dated: February 4, 2006

In Eagan, Minnesota

**Richard R. Anderson
Arbitrator**