

IN RE ARBITRATION BETWEEN:

**DISTRICT LODGE 77 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO**

and

UNITED PARCEL SERVICE

DECISION AND AWARD OF ARBITRATOR

BMS CASE 06-RA-1144

JEFFREY W. JACOBS

ARBITRATOR

OCTOBER 5, 2006

IN RE ARBITRATION BETWEEN:

District Lodge 77, IAM,
and
United Parcel Service.

DECISION AND AWARD OF ARBITRATOR
BMS Case # 06-RA-1144

APPEARANCES:

FOR THE UNION:

Steve Galloway, Business Representative
Howard Widing, grievant

FOR THE EMPLOYER:

Daniel Wilczek, Esq., Faegre & Benson
Alissa Raddatz, Esq., Faegre & Benson
Kim Todero, Automotive Fleet Manager
Teresa Seide, Employee Relations Manager
Steve Roeder, Manager of Feeder Dept. Maple Grove
Dennis Nelson, Feeder Driver
Jerry Flaherty, District Labor Manager

PRELIMINARY STATEMENT

The above matter came on for hearing on August 17, 2006 at the offices of the Federal Mediation and Conciliation Service in Minneapolis, Minnesota. The parties presented testimony and documentary evidence at that time. The parties filed written post-hearing Briefs dated September 15, 2006 at which time the record was considered closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from December 1, 2002 through February 28, 2009. Article VII provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the state of Minnesota Bureau of Mediation Services. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUES PRESENTED

Was there just cause for the termination of the grievant in this matter? If not what shall the remedy be?

COMPANY'S POSITION:

The Employer's position is that the grievant created a hostile working environment in violation of clear Company policy and contrary to several very clear messages he had been given by supervisory personnel when he verbally confronted another UPS employee on March 20 and 21, 2006. In support of this position the Employer made the following contentions:

1. The grievant, while a good mechanic, has at best a checkered disciplinary history for the Employer. Specifically he has been involved in several incidents in the past where he has threatened and argued with co-workers on matters well outside of his duties.

2. Moreover, the Employer introduced evidence that the grievant was specifically warned in February of 2005 after being repeatedly told by Ms. Todero, that one more instance of getting into arguments, threatening co-workers or creating a hostile working environment would result in his termination.

3. The Employer introduced evidence that the grievant and several co-workers had a running argument over the course of many days in February 2005 and that supervisory personnel had to go there to straighten things out. After the 5th such meeting Ms. Todero told both the grievant and a co-worker that one more allegation like this and they would both be let go.

4. The grievant signed a copy of the Company's Professional Conduct and Anti-Harassment policy on July 14, 2005 so he clearly knew what that policy said and he was told several times how it applied. He also signed a memo dated 2-7-05 entitled Prewrite Communications Meeting, (PCM) outline in which it is very specifically stated that "UPS has a zero tolerance policy on workplace violence, which applies not only to everyone at UPS, but also to those with whom we come in contact with during the course of our work." The employer alleged that the grievant was clearly warned that his behavior did not comply with these policies and that if he violated them again he would be fired. He was also told that one more allegation of him instigating a hostile working environment and he would be facing termination.

5. Despite these clear warnings and messages, on March 20, 2006 the grievant confronted a co-worker, Dennis Nelson and asked him simply, “Are you queer?” The Employer asserted that Mr. Nelson demurred to this conversation and told the grievant he was not interested in pursuing it. He then left.

6. The very next day, the grievant again confronted Mr. Nelson and made several threatening comments and gestures toward him. He called him derogatory names such as “woman” and “pussy” and made continuing threats and derogatory comments. Mr. Nelson again told him he was not interested in playing the game or words to that effect and continued to do his job. At one point the grievant slammed his fist and/or slammed the drawers to his tool cabinet shut and told Mr. Nelson “any time you’re ready, you and me, one on one whenever you are ready” and something to the effect that we should go outside and settle this.

7. The Employer introduced evidence that the grievant repeated and confirmed these statements during the investigatory interviews conducted following the report of this incident. The Employer also put on both written and oral evidence to suggest that the grievant admitted he violated Company policy.

8. The Employer asserted that when these allegations came to light they immediately investigated to determine what had happened. The Employer argued that the grievant was interviewed and told to stay away from Mr. Nelson. The Employer asserted however that despite these clear warnings the grievant still did not hear the message and the following day March 21, 2006, confronted Mr. Nelson as he walked down a flight of stairs near where the grievant worked. He made crying noises and gestures and said something to the effect that “you told your mommy.” The Employer asserted that this continual confrontation made it clear that the grievant simply does not “get it” and that his continued defiance of clear policies and even clearer specific directives spurts the grievant’s termination for the creation of a hostile working environment.

9. The Employer asserted that the grievant's credibility is severely undercut by several facts. First, he admitted to making these derogatory statements in the investigative interviews and again at the hearing. Second it strains credibility to the breaking point that the words he used were somehow simply innocuous. The grievant admitted asking Mr. Nelson if he was "queer" and that he used that word specifically on several occasions. He called him a "woman" and a "pussy" in a somewhat threatening manner and then asserted that he was simply trying to find out why Mr. Nelson was angry with him. This simply makes no sense, especially in light of the grievant's other statements that he also made that matters like this were settled by physical violence and fighting. He even alleged that in the schools he went to the teachers and students would settle disputes like this with fisticuffs in the school playground. The totality of these statements simply undercuts the grievant's truthfulness completely. The Employer asserted that his version of the story is just not true at all.

10. The Employer pointed to Company Exhibits 17 and 14, which were signed by the grievant, and Company Exhibit 15, which advised the grievant of the consequences of his continued failure to adhere to these directives. The Employer relied on Article VI, section to terminate the grievant and argued that in these circumstances it did not need to follow the progressive discipline a written warning first and then termination for continuing violations.

11. The Employer relied on Article VI, section 6, (g), which gives the Employer the right to discharge for "other serious offenses." The Employer argued that it was not the first offense and that if ever a person had been warned of the consequences of his actions it would be the grievant.

12. The essence of the Employer's case is that the grievant's conduct with regard to co-worker Dennis Nelson, the words he used, the tone of voice he demonstrated and the gestures and actions he took were all in violation of the Anti Harassment policy and exhibited an egregious level of defiance of clear directives to knock this kind of behavior off. The grievant, while a very good and competent mechanic, simply cannot continue to work for the Employer.

The Employer seeks an award of the arbitrator denying the grievance in its entirety..

UNION'S POSITION

The Union's position is that discharge is simply too harsh for the grievant's actions here, which amounted to a few minutes indiscretion in talking to Mr. Nelson and an unwitnessed allegation of making some crying noises toward him the following day. The Union asserted that it was a violation of just cause principles to discharge the grievant after his long service to the Employer. In support of this position the Union made the following contentions:

1. The grievant is a long time employee of UPS and is by all accounts a very competent mechanic. Moreover, except for this matter, he has had no other formal discipline or written warnings within the contractually required progressive discipline provisions.

2. The Union strongly objected to the presentation of evidence from the events of February 2005 where the grievant was accused of altercations with co-workers. The Union claimed that the grievant was not at fault for those either and that co-workers were in fact harassing him.

3. The Union asserted most strenuously that the grievant was not given a formal warning in February 2005 pursuant to the contract. While Ms. Todero spoke to him about the need to maintain a professional work demeanor she did not give him formal discipline or a written warning. The Contract requires that progressive discipline be given in Article VI section 6. The Union cited to the language of that Article, which provides in relevant part as follows:

Article VI - Disciplinary Action: (6) The Employer shall not discharge or suspend or discipline any employee without just cause. No employee shall be suspended or discharged without first being given one (1) written warning letter of a complaint relating to the same issue and also be given a local level hearing except for the following offenses:

... (g) other serious offenses

4. The Union asserted that none of the other listed items in Article VI, section 6 apply. Thus the Employer must rely on (g) since they did not give the grievant a formal written warning of the consequences of his actions for this offense. The Union pointed out that the Employer acknowledged that the documents given the grievant in February 2005 were not formal discipline and did not constitute a "written warning letter of a complaint relating to the same issue."

5. Moreover, the Union argued that the term “other serious offenses” is overbroad and could literally include anything the Employer wanted it to without any right of due process for the affected employee.

6. The Union argued most strenuously that the punishment simply does not fit the crime. The grievant is being discharged, the most serious of all industrial discipline, for a few minutes of indiscretion and the allegation that he made certain crying noises. The latter event was only witnessed by the alleged victim of this so the situation is one of the grievant’s word against the alleged victim.

7. The Union asserted that when the grievant used the term “queer” he was merely repeating what he had heard on CNN radio and was engaging in shop talk with fellow workers to get their impression of the story. He asked Mr. Nelson if he was “queer” in order to avoid offending him by repeating the CNN story to him. He had however told the story to perhaps a dozen or more co-workers that day.

8. After Mr. Nelson seemed so offended the first day the grievant backed away from him and nothing more occurred. The following day, he merely wanted to straighten things out with Mr. Nelson, as they had had a cordial working relationship before and he wanted that to continue. He asked Mr. Nelson why he was so angry and asked if he could straighten things out. In no way was he threatening Mr. Nelson or inviting him to a physical altercation by any of the gestures actions or words he used. He asked only if he could “settle it” or words to that effect. He never used the word “fight” or anything of that nature.

9. The grievant denied making crying noises or using words to the effect that Mr. Nelson had “told his mommy” in reporting the incident on the following day, March 22, 2006. He claimed that he never even saw Mr. Nelson that day much less engaged in a conversation with him.

10. The essence of the Union's claim is that the grievant did not engage in harassing behavior at all in the March 2006 incidents. If anyone was the instigator it was Mr. Nelson, not the grievant, who used threatening and loud voices. Moreover, the Employer did not follow progressive discipline steps in the discipline article and did not give the grievant the required warning letter as set forth in the agreement. The catch-all "other serious offenses" language is too broad and simply cannot be applied here. Finally, the Union claimed that the punishment does not fit the crime and that the grievant should not be discharged for what was at worst a simple misunderstanding and perhaps an argument between co-workers. Discharge is just not the appropriate response to an incident like this.

The Union seeks an award reinstating the grievant to his former position as a mechanic for the Employer with full back pay and contractually accrued rights and benefits.

MEMORANDUM AND DISCUSSION

The grievant has worked for UPS for approximately 7 years. The evidence showed that he is a competent mechanic and is good at repairing and maintaining the equipment. The record also shows that he has had a somewhat troubled history of compliance with Company Anti-harassment policies in the past. As noted at the hearing, there was clearly a series of allegations in which the grievant became involved with several porters who also worked for UPS. The evidence from the February 2005 incidents was not considered in determining the proof of the allegations that led to the grievant's termination in March of 2006. Evidence of past discipline cannot be used to determine the truth or falsity of the instant matter. Rather they may be used to determine the penalty if the facts and other evidence show that the grievant was in fact guilty of the conduct with which he is charged now. They were considered to show that the grievant was warned of the consequences of his conduct and to determine the appropriateness of the remedy. This will be discussed more below.

Suffice it to say that the evidence showed that the grievant was warned in February of 2005 that any further conduct in violation of the Company's Anti-Harassment policies and work rules would be dealt with seriously and would lead to discipline up to and including dismissal. In fact the evidence showed that the grievant was told quite specifically that one more incident would result in his termination. It is of some significance that these events took place slightly more than one year before the incidents involved in this matter.

Turning now to the facts giving rise to the termination itself, there was great divergence in the stories as related by the grievant versus the one told by Mr. Nelson. Mr. Nelson have credible testimony that on Monday March 20th he was near the grievant's work station polishing his shoes when the grievant approached him and asked "are you queer." Mr. Nelson responded "No, are you." There was some divergence of stories but it was clear that the conversation ended at that point even though the evidence did show that the grievant walked away muttering about gays in the U.S. and how gays and government corruption were ruining the world. No further interaction occurred that day.

The following day, Mr. Nelson was again in the grievant's general work area polishing his shoes when the grievant approached him with a multitude of non-work related questions about his sexual preference, his marital status and the JFK assassination. Mr. Nelson gave credible testimony that he told the grievant he would perhaps talk about motorcycles or race cars but he clearly told the grievant he was not interested in the line of questioning the grievant apparently wanted to pursue.

The evidence showed that the grievant became agitated at that point. At first he walked away mumbling something that was unintelligible to Mr. Nelson but soon returned and called Mr. Nelson names that can only be described as inflammatory such as "puss" or "pussy" and "you're a woman." Mr. Nelson responded by asking if the grievant was "trying to push his button."

The evidence showed that the grievant then said something to the effect of, “anytime are you ready.” Mr. Nelson asked if this was a threat. The grievant then walked to his tool box and slammed the drawer shut in a somewhat violent way and said again, “any time you’re ready pal, me and you, one on one, whenever you are ready.” The grievant claimed that he merely said that he and Mr. Nelson should go outside and “settle this” or something to that effect.

Mr. Nelson reported this incident to supervisors. He gave credible testimony that he did not report anything from the interaction with the grievant on Monday but that after the events on Tuesday he felt that he had been threatened in a very real way and needed to report this as a violation of the anti-harassment and workplace violence policies in place with the Company

Management representatives spoke to Mr. Nelson and to the grievant about this. The evidence showed that the grievant was told to stay away from Mr. Nelson and not to retaliate in any way. The grievant did not take this admonition to heart. The very next day, Mr. Nelson again reported that as he was walking down a flight of stairs, he heard the grievant make a crying type of noise like a child might and say something to the effect of, “I’m going to tell mommy.” The evidence showed that even though Mr. Nelson did not actually see the grievant, it was he who made these statements. The grievant denied making the statements and denied even being near Mr. Nelson on the 23rd but the evidence suggested otherwise. Mr. Nelson gave credible testimony that he knew the grievant’s voice, as the two had worked together for a year or more, and that he recognized it as that of the grievant. Taking the evidence as a whole, it was clear that the grievant did make the statements on March 23rd as alleged by Mr. Nelson.

The Employer showed by a clear preponderance of the evidence that the grievant was made well aware of the need to comply with the work rules relative to workplace conduct and harassment. Whether the allegations of January and February 2005 were true or not, i.e. the incidents regarding the porters, the evidence showed clearly that the grievant was told that any further violation of the workplace violence and harassment policies would result in his termination. He signed the policy. He signed the PCM Memo referenced above. The evidence showed that he was told repeatedly that his conduct in the workplace was unacceptable and that he was essentially “skating on thin ice.” The bottom line here is that irrespective of whether he had been given a formal written warning or not; he knew that his conduct was unacceptable and that further conduct of this nature was going to get him into serious trouble.

The grievant claimed that Mr. Nelson became angry and that he, not the grievant, was the aggressor in the events of March 20 and 21, 2006. The evidence showed quite the contrary.

The grievant claimed that his statement that he and Mr. Nelson should “go outside and settle this” was merely an invitation to sit down and discuss their differences of opinion. The grievant further alleged that saying to someone, that they should go outside and settle things and “any time pal whenever you are ready” were merely invitations to sit down and talk about things in order to get them resolved and that they could “mean anything.”

As a general arbitral proposition it is never a good idea to assume the arbitrator was born on Mars. It was more than abundantly clear what the grievant meant and that Mr. Nelson’s version of the story was quite accurate indeed. The grievant acknowledged much of it was accurate and for those portions he did not Mr. Nelson’s version was found to be more credible and more inline with the statements the grievant made during the interviews following this incident and at the hearing itself.

The record of the grievant's version of this was reviewed extensively including the credible statements made by Employer witnesses of the things the grievant said during the investigation. Simply stated, it strains credibility beyond the breaking point to assume that the grievant meant they should only sit down to discuss these matters after he called the co-worker a "queer," a "woman" and a "pussy." If that were not enough, his statements that years ago men simply took their differences out to the streets where they engaged in physical fights until things got settled, provide a very different picture of what he clearly meant by this.

Moreover, the allegation that he would ask someone if they were "queer" in order not to offend them by engaging in a conversation about "queer" nearly shocked the consciousness. It is drastically inconsistent with the standards of conduct in the modern workplace.

The grievant stated several times in his investigative interview and again at the hearing that it was his right as an American to state his opinion on anything. The grievant needs to understand that being an American means having to temper the inherent right to free speech against the inherent right of other Americans not to be threatened and insulted by the statements one might make. More importantly, it is tempered by the legitimate needs of American employers, both large *and* small, to set reasonable rules and standards for the conduct of its employees. An American employer has the right to establish reasonable work rules to avoid workplace violence, threats and other offensive behavior. Co-workers cannot "go outside and settle things" like they may have in the wild west of the 1800's.

Here there is little question that the rules established by UPS were reasonable and well understood by the grievant. There is also little question that the grievant continued to push a non-work related conversation about non-work related subjects on a co-worker who had told the grievant to leave him alone. He did not leave the co-worker alone. Instead he continued to verbally assault the co-worker and eventually called him several derogatory names. The evidence as a whole showed that this verbal harassment was followed by an unmistakable threat of physical violence in contravention of the Employer's policy.

Finally, the evidence showed that the grievant learned nothing from the warnings and the interviews. He continued to harass the co-worker with his comments and gestures made the very next day as noted above. One of the essential elements of the determination of whether to sustain a discharge or not is whether there is any sense that the person so disciplined could be returned to the workplace having learned from the experience and become productive and also remain in compliance with the rules laid down by the Employer. Here there was little evidence of the grievant's remorse for his actions or that he would be able to stay away from this conduct in the future.

Contrary to the assertion made by the Union, the grievant was not therefore terminated for a few minutes indiscretion. He approached a co-worker with a conversation the co-worker clearly did not want to have on a subject that was almost exactly that which is prohibited by Company policy. When the co-worker rebuffed the conversation, the grievant became angry, banged his tool box in what the evidence showed was a threatening manner and essentially threatened the co-worker with physical violence. After being confronted with this the grievant re-started the dispute by making sophomoric crying noises toward the co-worker. This coupled with his statements about these events made to investigators does not measure up to the above referenced standard.

The Union claimed that the Employer did not follow progressive discipline. This was a somewhat troubling point. The discipline language requires a written warning prior to discipline unless there is shown evidence of a "serious offense." It is somewhat disturbing that there is no definition of this and that this could in fact mean virtually anything. Here however two things mitigate against that. First, this is the language negotiated between the parties. Presumably, there was some thought given as to the implications of such broad language. It is not for the arbitrator to re-craft the parties' agreement.

Second, whether something is a serious offense or not is subject to the grievance procedure. There is therefore a check and balance on any potentially arbitrary action taken by the Employer. Here given the nature of the incident, the grievant's actions in this matter and his statements made both at the hearing and during the investigative process there is little question that this falls squarely into the serious offense category.

Finally, there is the notion that the grievant's conduct, even if proven true, did not rise to the level of discharge. If it could be shown that the grievant had made some effort at reconciliation with Mr. Nelson during these events the result may have been different. At no point did the evidence suggest that the grievant ever expressed remorse or sorrow for the statements he made. In fact the evidence showed quite the contrary. To be sure, this conclusion is based on more than the absence of those comments at the hearing but rather during the March 2006 incident itself. If one is truly remorseful that they may have said or done something to offend a co-worker it is far more likely that they would simply say something to the effect that they "were sorry" they may have said something to offend. Here the evidence did not support the grievant's claim that this was his intent.

In making the determination of whether to sustain a discharge it is appropriate to determine if there is any hope of rehabilitating the person so charged to see if their conduct can be changed in some way as to be in compliance with the Company's rules. Here, given the evidence of the grievant's history and the statements he made in the course of this matter there does not seem to be. It is not for the arbitrator in this type of circumstance to substitute his judgment for that of the Employer on these unique facts. Accordingly, the grievance must be denied and the discharge sustained.

AWARD

The grievance is DENIED. The parties shall bear the costs of the arbitrator's fee equally as set forth in statement attached to this Award.