

DEBORAH M. BRODSKY LLC

October 24, 2008

Employer Representative  
Employer Representative Firm  
Location 1

Union Representative  
Location 2

Re: Union  
-and-  
Employer

Gr: Discharge/Misconduct

Dear Messrs. Employer Representative and Union Representative,

Enclosed please find my opinion and award for the above-captioned case along with my invoice.  
I do not intend to submit this case for publication.

It was my pleasure to serve the parties.

Sincerely,

*Deborah M. Brodsky, LLC*  
By: Deborah M. Brodsky  
Enclosures

***DEBORAH M. BRODSKY, LLC***

**STATEMENT OF FEES AND EXPENSES**

EMPLOYER: Employer

UNION : Union

GRIEVANCE : Grievance #

HEARING DATE(S) : 9/8/08

HEARING LOCATION: Location 1

**FEES :**

HEARING DAYS : 1 + STUDY DAYS : 1.5 + TRAVEL TIME : *NIC* = 2.5 DAYS  
@ \$ 900 PER DIEM

**FEE TOTAL:** \$ 2250.00

**EXPENSES :**

TRANSPORTATION (mileage): \$ 143.42 + HOTEL: \$ 135.66 + MEALS: N/C + COPYING & POSTAGE : \$ 5.96 =

**EXPENSE TOTAL:** \$ 285.04

**TOTAL DUE:** \$ 2535.04

PAYABLE BY EMPLOYER: \$ 1267.52

PAYABLE BY UNION: \$ 1267.52

*DEBORAH M. BRODSKY, LLC*

By:

*Deborah M. Brodsky*  
DEBORAH M. BRODSKY, ARBITRATOR

**FEDERAL MEDIATION AND CONCILIATION SERVICE**

**VOLUNTARY LABOR ARBITRATION TRIBUNAL**

**In the Matter of the Arbitration between**

**Employer**

**Grievant/Discharge**

**-and-**

**Union**

**Hearing Date: 9/8/08**

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**APPEARANCES**

For the Employer:

Employer Representative, Attorney  
Director of Human Resources [Observer]  
Director of Operations  
Paint Department Employee (employee 1)

For the Union:

International Representative 1  
International Representative 2  
President [Observer]  
Vice President  
Paint Department Employee (employee 1)  
Grievant

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**INTRODUCTION**

The grievant was employed by Employer Material Handling Division (hereafter "Employer," or "Company") at its Location 3 facility. The grievant is a member of the Union. The Union and the Company are parties to a collective bargaining agreement. On October 31, 2007, Employer terminated the grievant's employment as a result of an incident that occurred on October 24, 2007. On November 2, 2007, the Union filed the subject grievance on behalf of grievant protesting his discharge and requesting reinstatement.<sup>1</sup>

The grievance was processed through the contractual grievance procedure and the Union appealed the grievance to arbitration. The parties selected Arbitrator Deborah M. Brodsky through the Federal Mediation and Conciliation Service. An arbitration hearing was held in hearing location on September 8, 2008. Employer Representative represented the Company and international representative 1 represented the Union. Both parties had the full opportunity to present testimonial and documentary evidence, examine and cross-examine witnesses, and present oral and written argument. The parties filed post-hearing briefs that were received by the Arbitrator by September

**ISSUE**

Did the Company possess just cause to terminate grievant's employment effective October 31, 2007? If not, what is the appropriate remedy?

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<sup>1</sup> The grievance also requested a letter of apology.

## **RELEVANT CONTRACTUAL PROVISIONS AND WORK RULES**

### **ARTICLE VIII EMPLOYER'S RIGHTS**

**Section 13. Employer's Rights.** The Management of the plant; the determination of all matters of management policy and plant operation; limiting the rights to hire, discipline, suspend or discharge, promote, demote, transfer or lay off employees ... provided, however, that they will not be used in violation of any specific provisions of this agreement...

**Section 14. Shop Rules.** The Employer shall have the right to establish reasonable shop rules ... which shall be prominently posted...

### **ARTICLE XII ACQUIRING SENIORITY, LAYOFF AND RECALL PROCEDURE, TRANSFERS AND LEAVES OF ABSENCE**

**Section 38. Loss of Seniority.** Any employee shall be stricken from the seniority list for the following reasons:

...

(b) If said employee is discharged for cause.

...

### **EMPLOYER SHOP RULES**

### **CONTROL PANEL & MATERIAL HANDLING DIVISIONS**

To assure the fair treatment and safety of all employees, the company has established the following work rules. Employees who fail to observe at all times proper standards of conduct or who violate any of the rules will be subject to disciplinary action as indicated below.

The following listing does not preclude the Company from taking disciplinary action when an employee commits an act not specifically described below when such act is contrary to generally accepted rules of conduct for safe or efficient plant operation.

#### **A. The following will be cause for disciplinary action up to and including discharge for the first offense:**

...

11. Profane, abusive or threatening language directed towards other individuals on Company property.

...

13. Fighting, physical violence or threats to others on Company property.

...

## **BACKGROUND**

On or about October 23, 2007, the grievant's brother was terminated from his employment with Employer because he apparently failed a drug test. The following day, the grievant had a conversation with employee 1, another employee, at work. Employee 1 brought grievant a painted mast frame needed for assembly. At that time, the grievant remarked to employee 1, "If the same thing happens to me as happened to my brother, I'm going to borrow my brother's guns and shoot all you Mother Fuckers." The grievant was not smiling when he said this and employee 1 walked away. Either later that day or the next day, the grievant told employee 1 that if he (the grievant) gets called into the office about what he said, he will just tell them he was joking.

A few days later, employee 1 apparently reported the grievant's comments to other co-workers, who, in turn, reported the matter to Human Resources. Human Resources met with employee 1 and interviewed him about the incident. The Human Resources Director also informed the Director of Operations, of the investigation. The two members of management contracted the Local Police Department for guidance. The Police advised the Company to remove the grievant from the facility and to bring in security personnel.

The following day, the Company again spoke with employee 1 and then with the grievant and his Union representative. The grievant denied using any profanity, but did admit making a statement "along those lines." The grievant, however, maintained that he had been joking.

After reviewing the investigation and considering the grievant's length of employment and previous discipline, the Company decided that termination of the grievant's employment was appropriate.

## **THE COMPANY'S POSITION**

The Employer argued that it possessed just cause to discharge the grievant. Employee 1 and the Director of Operations testified on behalf of Employer. Employee 1 testified that once he thought about the grievant's comment, it bothered him. He said he had seen the grievant's brother at a gun show where the brother purchased an assault rifle that did not have a serial number on it. Employee 1 also said that he lives in a rural area where the nearest law enforcement is about five miles away. After thinking about it, he told a coworker about what the grievant said. Employee 1 also testified that the grievant told him the day after the comment, that if he (the grievant) got called to the office about it he would tell them he had been joking.

The Director of Operations for Material Handling testified that the grievant has worked for Employer since 2005 and that the grievant had been previously terminated by the Company in 2006 for falsifying a time card. The Director of Operations stated that the Company later converted that discharge to a three week suspension. The Director of Operations stated that when the grievant was interviewed about his subject statement, he denied using any profanity, but acknowledged that he said something to that effect. The Director of Operations stated that the grievant stated he does not own or touch guns. The Director of Operations testified that the grievant had signed an acknowledgment for the Company work rules and that the Company based the grievant's termination on his Group A violations in conjunction with his previous work record.

In its post-hearing brief, the Company applied the factors considered by the Arbitrator in *Wayne State University*, III LA 986 (Brodsky, 1998). Employer stressed that the grievant had short length of service, a previous discharge on his record, uttered a specific threat, and was less than honest about his actions. Moreover, the Company noted that it did not believe that employee 1's statement about the incident was an attempt to get back at the grievant for previous testimony about employee 1 (in another disciplinary case), since it was not employee 1 who initially reported the subject incident to management.

### **THE UNION'S POSITION**

The Union asserted that the Company's decision to terminate the grievant's employment was too severe and requested that he be reinstated. The Union argued that the alleged threat was conditional and that the conditions were not met. The grievant testified on his own behalf and the Union also called Union vice president and employee 1 to testify.

The grievant testified that his statement, which was regarding if the Company fired him for not passing a drug test, was not meant to be a threat because employee 1 purportedly knew that the grievant had no problem taking a drug test. The grievant stated that he would voluntarily take a psychological test and a polygraph. The grievant stated that he previously testified against employee 1 when employee 1 allegedly threatened other co-workers in 2006.

With regard to the October 24, 2007 threat, the grievant testified that he could not remember exactly what he said but it was "along the lines" of what employee 1 reported. He added that he wasn't distraught about his brother's termination. The grievant stated that he knows that threats and violence are against the rules and that he has never owned a gun.

Union vice president testified that he has worked for the Company for 23 years and is Vice President of the Union. He stated that a few weeks after the grievant was discharged, employee 1 told him "an eye for an eye." He said he believed this regarded the grievant's previous testimony against employee 1. He said that employee 1 had been suspended as a result of his 2006 statement. Union vice president noted that he is the Union Safety Representative and he would not fight for someone he thought was a danger. He said he believed that the grievant did not pose a danger.

When the Union questioned employee 1, he replied that he did not think that the grievant had been joking. Employee 1 said he did not go to Human Resources to report the incident because he did not want to "make waves." Employee 1 said he was worried at home after the termination. He did not deny making the "eye for an eye" comment to union vice president. Employee 1 said he did not blame the grievant for his own October 2006 discipline, that included counseling. Employee 1 added that the grievant did not say anything specifically about drug testing to him on October 24th.

In its post-hearing brief, the Union argued that because 7 days passed between the alleged threat and the grievant's discharge, employee 1 could not have been overly concerned about his safety. The Union suggested that a penalty less than discharge for the grievant would have been more appropriate.

### **DISCUSSION AND FINDINGS**

In a just cause analysis, the Company must first show that the grievant committed the offenses with which he was charged, then it must prove that the meted penalty was appropriate. In the instant case, the grievant admitted to making a statement "along the lines" of "If the same thing happens to me as happened to my brother, I'm going to borrow my brother's guns and shoot all you ..." The grievant denied using profanity, but his testimony was somewhat disjointed and although he alleged that he could not remember specifically what he said, he maintained that he did say something about drug testing. The grievant's "just joking" defense does not fly, since he apparently told employee 1 he would allege that he was only joking, if he was later asked about it. Moreover, the close proximity in time between his brother's discharge and his statement, increases the likelihood that the grievant was upset about his brother's predicament. Factor in the knowledge that employee 1 had regarding the grievant's brother's purchase of an assault rifle at a local gun show, and the threat seems even more realistic. Thus, the Company proved that the grievant used threatening language on the job in violation of the work rules.

On the other hand, the Union made the Arbitrator aware of employee 1's own credibility issues (based on a May 2008 written reprimand concerning alleged falsification of production records). Moreover, the Union pointed out that employee 1 may have had his "own axe to grind" with the grievant concerning employee 1's discipline in 2006 and that he even made the "eye for an eye" comment.

The fact that employee 1 did not initiate the report of the subject threatening comment to management and that he even waited several days before mentioning it to coworkers makes it appear unlikely that he intended retribution toward the grievant. Moreover, employee 1 had no say in the discipline that what ultimately issued to the grievant and there was no guarantee that the grievant would still not be working side by side with him after the October 24 incident.

While the Arbitrator believes that the Company could have presented a stronger case at hearing regarding the appropriateness of the discharge penalty for the grievant,<sup>3</sup> it did weigh the relevant factors in determining the severity of the penalty. The grievant only had a few years of service, so length of service was not a mitigating factor here.<sup>4</sup> In addition, the grievant did not have an unblemished previous disciplinary record. His discharge that was converted to

suspension happened in the Fall of 2006. He was already spared the discharge penalty the previous calendar year, what makes him entitled to another reduced penalty for his latest serious infraction? The grievant's threat was sufficiently specific and was not as conditional as the Union argues. The grievant did not refer to his own guns (which he was known not to have) but to his brother's guns (which were known to exist). Statements about guns and shooting others are not joking matters and the Company cannot be faulted for taking such statements seriously. Threats of violence are classified as dischargeable offenses and one cannot say that the Company lacked just cause to institute the discharge penalty in this case.

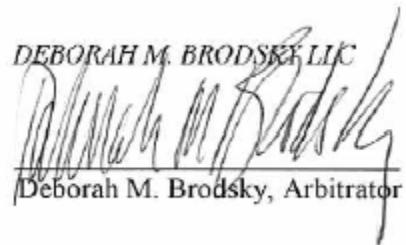
The grievant testified that he has been working for another employer. He is young and he made some critical mistakes in his employment with Employer. Hopefully, he will fare better at his current job. Employer did not violate the collective bargaining agreement when it decided to terminate the grievant's employment after the October 24, 2007 incident considering the circumstances surrounding the incident, the grievant's previous disciplinary record, and his short service time.

### **AWARD**

Based on the above analysis and the record as a whole, this grievance is denied.

**Dated: October 24, 2008**

By:

DEBORAH M. BRODSKY, ARBITRATOR  
  
Deborah M. Brodsky, Arbitrator

<sup>3</sup> No one from Human Resources testified.

<sup>4</sup> Unlike the apparent length of service consideration (approximately 18 years) when employee 1's 2006 discipline was pending.