

Title: EMPLOYER and UNION
Date: April 1, 2006
Arbitrator: [David Gaba](#)

CASE: GABA #1

Federal Mediation & Conciliation Service

UNION)
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 And)
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 EMPLOYER,)
)
 (Alex BLUE Termination))
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I. INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement (hereinafter the AGREEMENT) between the TEAMSTERS, LOCAL 760 (hereinafter the UNION), on behalf of Alex BLUE, and EMPLOYER (hereinafter the EMPLOYER), under which DAVID GABA was selected to serve as Arbitrator and under which his Award shall be final and binding among the parties.

A hearing was held before Arbitrator Gaba on February 9, 2006, at Someplace, Washington. The parties had the opportunity to examine and cross-examine witnesses, introduce exhibits, and fully argue all of the issues in dispute. No transcript of the proceedings was provided. Both parties filed post-hearing briefs on March 17, 2006.

APPEARANCES:

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On behalf of the Employer:

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ISSUE

Did the Company violate the collective bargaining agreement when it discharged Alex BLUE on July 20, 2005? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

ARTICLE 10: DISCIPLINE & DISCHARGE

- 10.1 The Employer may discharge or suspend an employee for just cause but no employee shall be discharged or suspended unless a written notice shall previously have been given to such employee and copy to the Union of a written warning notice against him/her concerning his/her work or conduct. The complaint specified in such prior warning notice shall be for similar type of misconduct as the cause for discharge or suspension. No such warning notice shall remain in effect for a period of more than twelve (12) months. A copy of any disciplinary action (except oral warnings) shall be sent to the Union at the time it is given to the employee. Otherwise, such disciplinary action (except oral warnings) shall be null and void. No such prior warning notice shall be necessary if the cause for discharge or suspension is for serious offenses such as dishonesty, selling (or distributing), using, or being under the influence of alcohol, illegal drugs, or a controlled substance, gross insubordination, fighting, or deliberately damaging Company product or equipment.
- 10.2 Any written warning notice, suspension, or discharge shall be issued to an employee within ten (10) working days of the date the violation becomes known to the Employer or said written warning notice, suspension, or discharge shall be null and void. Any employee having a grievance against a written warning notice, suspension, or discharge is to first discuss the issue with their immediate supervisor, to provide an opportunity for clarification and/or appropriate

adjustment, consistent with the terms of this Agreement. The employee shall have the option of being accompanied by the Union Business Representative or Shop Steward.

- 10.3 If the employee is not satisfied after the discussion described in 10.2 above, the employee may then request an investigation of his/her discharge or suspension or any written warning notice and the Union shall have the right to protest any such discharge, suspension, or written warning notice. Any such protest shall be presented to the Employer in writing within ten (10) working days, exclusive of Saturdays, Sundays, or holidays, after the discharge, suspension, or written warning notice, and if not presented within such period, the right of protest shall be waived.
- 10.4 The Union shall immediately take this protest up with the Employer or Employer representative and if it is not resolved within (10) days, the matter may be submitted by the Union under the Grievance Procedure of the Agreement.

ARTICLE 21: GRIEVANCE PROCEDURE

- 21.1 Definition of a grievance: A grievance is an allegation by an employee or the Union that the Employer has violated an express provision of this Agreement. All written grievances shall contain the following information:
1. The Nature of the grievance and the circumstance out of which it arose.
 2. The Article(s) of the Agreement alleged to have been violated, if applicable.
 3. The remedy or correction requested.
- 21.2 Step 1: No later than (15) calendar days after the event giving rise to the grievance, or fifteen (15) calendar days after the employee should reasonably have learned of the event giving rise to the grievance, which ever is later, the employee may discuss the grievance with his/her immediate supervisor. If the issue is not resolved within three (3) calendar days after the grievance is so presented, it shall be reduced to writing and presented to the field manager of Human Resources or other representative as designated by the Employer. While the Parties acknowledge that it is beneficial to resolve the dispute with the immediate supervisor, it is expressly understood that no language contained in this Article shall prohibit the employee or the Union from immediately filing a written grievance as outlined in Step 2.
- 21.3 Step 2: Such written grievances shall be presented to the Employer within fifteen (15) calendar days after the event giving rise to the grievance, or fifteen (15) calendar days after the employee should reasonably have learned of the event

giving rise to the grievance, whichever is later. The Employer and the Union shall discuss the grievance within seven (7) calendar days after receipt of the written grievance, and if not resolved, the Employer shall provide a written answer to the grievance within ten (10) calendar days after the discussion.

- 21.4 Step 3: If no settlement is reached in Step 2 above, and the Union desires to pursue the matter further, they may refer the grievance to Arbitration as provided below. If such grievance is not referred to arbitration within thirty (30) calendar days of the Employer's Step 2 response, the grievance shall be considered withdrawn.
- 21.5 Authority Limitations: The Arbitrator shall consider only the particular issue or issues presented by the written grievance and his or her decision shall be based solely upon his or her interpretation of the meaning or application of the terms of this Agreement, if applicable, to the facts of the grievance presented. The Arbitrator shall have no authority or power to add to, delete from, disregard, or alter any of the written terms of this Agreement or to award punitive damages.
- 21.6 Fees and Expenses: The fees and the expenses of the Arbitrator appointed hereunder shall be borne equally by the Employer and the Union. The expenses incidental to each Party's witnesses shall be borne by the Party calling the witnesses. The expenses incurred by each Party in connection with the grievance procedure, including but not limited to attorney's fees and other cost of representation, shall be borne solely by the Party incurring them.
- 21.7 Termination: The grievance procedure shall terminate on the expiration date of this Agreement unless the Agreement is extended by mutual written consent of the Parties. Grievances arising during the term of the Agreement shall proceed to resolution regardless of the expiration date. Grievances arising after the expiration date of this Agreement shall be null and void, and shall not be subject to this grievance procedure.
- 21.8 The Arbitrator shall be chosen by the Employer and the Union by requesting the Federal Mediation and Conciliation Service to submit a list of eleven (11) names of Arbitrators for the purpose of determining the dispute. Upon the furnishing of such list of Arbitrators, the Arbitrator to hear this particular dispute shall be selected by alternately striking names from the submitted list, the Party to strike first to be determined by coin flip.

The Employer-published Work Rules address the following behaviors:

1(b) Refraining from behavior or conduct that is offensive or undesirable, or which is contrary to the Company's best interests.

2(b) Physically fighting with or assaulting a co-worker.

2(c) Threatening or intimidating co-workers, employees of our suppliers or customers, or any other guests.

2(h) Stealing, destroying, defacing or misusing Company property.

2(i) Refusing to follow management's instructions concerning a job related matter or other forms of insubordination

2(m) Using profanity or other abusive behavior.

FACTS

Alex BLUE (BLUE) was terminated by EMPLOYER d/b/a COMPANY (Employer or COMPANY). COMPANY is a cooperative that buys milk from its dairymen-owners in the Yakima Valley of Washington. COMPANY'S, Washington Plant manufactures three milk-related products: 55 pound bags of whey, Monterey Cheese and Cheddar Cheese. The Plant employs 127 employees. Approximately one-hundred of those employees are represented by the UNION. The unionized employees work in production, warehouse and laboratory positions. The Plant has been open since November 1991. It began producing cheese in 1995. The Plant became unionized in 2000.

The Employer's Plant Manager is David APPLE. The facility is divided into two departments – the Whey Plant, which manufactures powdered whey, and the Cheese Plant, which manufactures Monterey Cheese and Cheddar Cheese. Assistant Plant Manager Tom PEACH manages the Cheese Plant. Rick ORANGE manages the Whey Plant. There are approximately 40 production employees working in each of the two departments of the Sunnyside Plant.

Alex BLUE was employed as an HTST Operator at COMPANY. He had been employed in a production capacity since March 1992. BLUE worked in the Employer's Cheese Plant. He

worked 12-hour shifts: 3 days one week and four days the next. His shift hours were 6:00 a.m. to 6:30 p.m. He reported to Cheese Supervisor Paul PINK until 2:00 p.m.; and he reported to Cheese Supervisor Roger BLACK from 2:00 p.m. to 6:30 p.m.

Between 1:00 p.m. and 2:00 p.m. each day the COMPANY Plant begins pumping liquid whey product from its holding tanks (vats) which are located in the Whey Plant through a series of pipes and valves to its destination in the Cheese Plant. This process of transferring whey through the Whey Plant into the Cheese Plant occurs for approximately 18 hours. While the liquid whey is transported through the plant it produces cheese by-products which must be captured and removed from the whey stream. This product is known as “cheese fines.” As the cheese fines collect they begin to solidify into small clumps of cheese.

The cheese fines are trapped by a screen in a “Finesaver Machine” which allows the liquid whey to pass through. The cheese fines are then pumped by the Finesaver Machine down a metal funnel and deposited into metal “cones” which look like food strainers. The metal cones fill with cheese product and are then transferred by hand to rest atop of plastic buckets so that the liquid whey can drip off the cheese into a bucket. When the whey drips off, the cheese is salted and placed into plastic bags. The cheese bags are then vacuum sealed and sold as cheese product.

If the “Finesaver” becomes jammed with cheese fines, the funnel backs up with cheese product. If the funnel becomes jammed, the screen which filters out the cheese breaks. The cheese then flows with the whey stream and destroy the whey membranes downstream. The result is a shutdown of the Plant downstream to repair the whey flow membranes. Thus, as the

Finesaver funnel deposits the cheese into the cones, the cones must be changed by hand every 20 minutes or so.

July 10, 2005 was a Sunday. Mr. BLUE reported for work at 6:00 a.m. The production day was largely uneventful. At 1:42 p.m., Mr. BLUE pressed a button that began the pumping of liquid whey from Vat #3 through the pipes and into the Employer's Cheese Plant. At this point, Mr. BLUE was expected to have prepared the Clarifier Room. This entailed placing four plastic buckets in the room; placing at least four clean metal cones near the buckets for use when the cheese fines were discharged; and readying at least two white plastic buckets with plastic bags for vacuum sealing.

Mr. BLACK's shift began at 2:00 p.m. By this time the liquid whey product was being pumped from Vat #3 through the Employer's pipes. At approximately 2:45 p.m., Mr. BLACK entered the Clarifier Room. There was only one cone and one bucket in the room – under the "Finesaver" spout and the funnel was clogging with cheese. Mr. BLACK unclogged the funnel by hand so that it did not jam any further. He found extra buckets in the Clarifier Room. He located clean cones in a wash tank located in a room adjacent to the Clarifier Room. Mr. BLACK set up the buckets and the cones in the Clarifier Room, so that the cheese product could be transferred from beneath the Finesaver funnel to the buckets.

BLUE was not in this room. Mr. BLACK located BLUE in the Cheese Shipping area, visiting with warehouse worker Rudy CATT. Mr. BLACK approached BLUE and advised him that the Finesaver funnel had backed up, and that he had unplugged it and set up the Clarifier Room with cones and buckets. BLUE offered no explanation, nor any excuse for why

he hadn't done his job. BLACK did not reprimand BLUE for his non-performance. BLACK left the work area and made his rounds to other areas in the Cheese Plant.

BLUE's other duties may well have prevented him from going to the clarifier room as often as he would like as he had a number of other job duties for which he was responsible. Further, as Employer Exhibit 2 reflects, BLUE was responsible for a work area spanning several hundred feet in either direction. In addition, the camera in the clarifier room, which is supposed to permit BLUE to monitor that room from the control room (where he spends most of his time), was out of order. This malfunction may have prevented BLUE from knowing the precise condition of the clarifier room.

At approximately 3:30 p.m., BLACK returned to the Clarifier Room and encountered the same situation he had previously encountered. The "Finesaver" funnel was completely jammed and the cone beneath it was stuffed with cheese. The cones placed in the buckets were already full of cheese product and had not been bagged. There was no backup cone ready for use to replace the full cone under the Finesaver funnel.

Fearing a jamming of the funnel and a breaking of the Finesaver screen, BLACK scraped enough cheese away from the cone under the Finesaver funnel to loosen the funnel. He then reached his arm up the funnel to dislodge the jammed cheese product. This prevented the screen inside the Finesaver from breaking. After unclogging the funnel and dealing with the cheese product, BLACK went to find BLUE. Again, he located BLUE visiting with Rudy CATT in the Cheese Shipping area.

BLACK called BLUE over to speak with him, away from CATT. BLACK advised BLUE that the Finesaver funnel was completely clogged. He said he had to clean it out and dump the cheese into a bucket, and clean a cone and replaced it. BLUE then used a number of profanities directed at BLACK. He angrily berated BLACK: “Keep your fucking hands off my equipment. Don’t touch my shit. Stay away from my stuff.” BLACK explained that the Finesaver was clogged and that he had no choice but to unclog the funnel. BLACK advised BLUE that BLUE had not been doing his job. BLACK did not use any profanity toward BLUE.

BLACK then accompanied BLUE back to the Clarifier Room to show BLUE the gravity of the problem. Upon their arrival, BLUE’s diatribe continued. BLUE was furious that BLACK had removed cheese product from under the funnel without adding salt. He was extremely angry at BLACK told him: “keep your fucking hands off my equipment.” He said: “If you’re going to do my job, don’t do it half-assed.”

BLACK again explained that he had no choice but to do the job because BLUE had not done it himself. Again, BLUE used profanity towards BLACK so he decided to remove himself from the situation. As he turned to walk away and took three steps, BLACK felt cheese product hit him in the back of his head, neck and shoulders. He also saw cheese fines “flying 8 – 10 feet past my head in front of me.” BLACK paused, turned to BLUE and said: “You can’t throw product at me.”

BLACK left the room and immediately contacted the manager on call – Rick ORANGE. He told ORANGE that BLUE had been angrily swearing at him and threw cheese product at him. ORANGE directed BLACK to send BLUE home and to direct BLUE to report to the Plant at noon on Monday, July 11, 2005, for a meeting to discuss the allegations.

BLACK and Supervisor Dave HOUSE went to find BLUE to send him home. They found BLUE again visiting with Rudy CATT in the Cheese Shipping Room at 4:00 p.m. BLACK advised BLUE that he was to immediately leave the Plant. BLUE wanted to know why. BLACK replied that BLUE had angrily sworn at him and threw product at him. BLUE then apologized, was genuinely remorseful for his conduct, and asked to speak with BLACK and HOUSE upstairs. As soon as that meeting began, BLUE offered an unsolicited apology. BLUE stated that he didn't think he should be sent home, but ultimately agreed to do so.

POSITION OF THE UNION

The Union believes that the Employer must prove by clear and convincing evidence that there was just cause for BLUE's discharge, and that BLUE committed "gross" insubordination. Further the Union posits that Alex BLUE is an outstanding employee, who has been an asset to the EMPLOYER for 14 years and believes that he could continue to be an asset in the future. The Union also believes that BLUE's written job evaluations are impressive for a long-time employee.

The Union argues that Article 10.1 of the Collective Bargaining Agreement establishes that committing a cardinal sin (gross insubordination) only eliminates the written warning requirement; it does not relieve the Company of the burden of proving that the discharge penalty fits the crime and that some lesser penalty would not have been sufficient. Thus, the Union believes that while committing a cardinal sin is sufficient, in and of itself, to eliminate the need for a written warning, it does not automatically justify a discharge.

Further, the Union argues that the Employer has the burden of proving by clear and convincing evidence that BLUE's insubordination was "gross," and believes that even if committed, a cardinal sin obviates BLUE's right to a written warning, it does not preclude a finding that discharge was too extreme a penalty.

POSITION OF THE EMPLOYER

The Employer in its Brief puts forth several arguments to support its contention that termination was the appropriate remedy but mostly relies on a recitation of the facts and arguing that they support termination.

DECISION

The Applicable Standard is Just Cause.

Where there is no contractual definition, it is reasonably implied that the parties intended application of the generally accepted meaning that has evolved in labor-management jurisprudence: that the "just cause" standard is a broad and elastic concept, involving a balance of interests and notions of fundamental fairness.^{1[1]}

Described in very general terms, the applicable standard is one of reasonableness:

...whether a reasonable (person) taking into account all relevant circumstances would find sufficient justification in the conduct of the employee to warrant discharge (or discipline)^{2[2]}

As traditionally applied in labor arbitrations, the just cause standard of review requires consideration of whether an accused employee is in fact guilty of misconduct. An employer's good faith but mistaken belief that misconduct occurred will not suffice to sustain disciplinary action. If misconduct is proven, another consideration, unless contractually precluded, is whether the severity of disciplinary action is reasonably related to the seriousness of the proven offense and the employee's prior record. It is by now axiomatic that the burden of proof on both issues resides with the employer.³[3]

The just cause standard has been seminally defined by Arbitrator Carroll Daugherty, and incorporates the following seven tests:

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

If one or more of these questions is answered in the negative, then normally the just cause requirement has not been satisfied.^{5[5]}

The Applicable Burden of Proof is Clear and Convincing Evidence.

In a case involving the discharge of an employee, the burden is on the employer to sustain its allegations, and to establish that there was just cause for the termination. As the leading treatise in the area noted:

Discharge is recognized to be the extreme industrial penalty since the employee's job, seniority and other contractual benefits, and reputation are at stake. Because of the seriousness of the penalty, the burden generally is held to be on the employer to prove guilt of wrongdoing, and probably always so where the agreement requires "just cause" for discharge.^{6[6]}

In this context, it is appropriate for an arbitrator to demand clear and convincing evidence. As Arbitrator Richman explained:

The imposition of a lesser burden than clear and convincing proof fails to give consideration to the harsh effect of summary discharge upon the employee in terms of future employment.^{7[7]}

Only if misconduct in the instance that led to the termination is proven can an arbitrator go on to address the question of appropriateness of disciplinary action.

Has the Just Cause Standard Been Met?

There is no question that just cause exists to discipline the Grievant, the decision in this case hinges on the question of whether there was a reasonable relationship between the degree of discipline imposed on Mr. BLUE and the seriousness of the offense.

The Penalty

In the instant case the Employer has chosen to terminate Mr. BLUE. As stated by Elkouri:

Where the Agreement fails to deal with the matter, the right of the arbitrator to change or modify penalties found to be improper or too severe may be deemed to be inherent in the arbitrator's power to decide the sufficiency of cause, as elaborated by Arbitrator Harry H. Platt: In many disciplinary cases, the reasonableness of the penalty imposed on an employee rather than the existence of proper cause for disciplining him is the question an arbitrator must decide.... In disciplinary cases generally, therefore, most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe, under all the circumstances of the situation. This right is deemed to be inherent in the arbitrator's power to discipline and in his authority to finally settle and adjust the dispute before him.⁸[8]

The Supreme Court has long agreed with statement of Elkouri above. As stated in *Paperworkers v. Misco*:

Normally, an arbitrator is authorized to disagree with the sanction imposed for employee misconduct. In *Enterprise Wheel*, for example, the arbitrator reduced the discipline from discharge to a 10-day suspension. The Court of Appeals refused to enforce the award, but we reversed, explaining that though the arbitrator's decision must draw its essence from the agreement, he "is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies." 363 U.S., at 597 (emphasis added by the court).^[9] Where an employer seeks to impose a penalty against an employee, the penalty must be consistent with other penalties imposed for similar offenses, under similar circumstances.

Where an employer imposes different disciplinary treatment for similar offenses, the arbitrator must examine whether the employer had a valid reason for treating the employees differently.

Where disciplinary distinctions cannot be accounted for, just cause is lacking.^{9[10]} In this case neither party provided evidence to show that the penalty imposed was either appropriate or disparate. The arbitrator speculates that the behaviors that occurred on the date in question had never before occurred in the plant.

This is truly a close case: both parties provided well-written briefs with a number of cases on point cited to support their positions. The Union was correct in its analysis of the contract provisions in question and the weight of arbitral authority. Unfortunately for Mr. BLUE, this case turns on a number of factual findings.

Was BLUE an Exemplary Employee?

The Union argues that BLUE was an excellent employee. However, Mr. BLUE's work record shows a long history of verbal and written warnings. There was no evidence presented to indicate that the number of warnings received by BLUE was less than would be received by an average employee. BLUE was issued verbal warnings in 2001 and 2003 for failure to follow COMPANY's operating procedures. He was issued a verbal warning in 1999 for eating sunflower seeds on the production floor. BLUE was issued written warnings in 1998 for possessing open beer cans on Company property, and in 2003 for poor performance as an HTST operator. BLUE's history includes a verbal warning in 1998 for failure to follow procedures in not operating the "Finesaver" machine correctly. (Ironically, BLUE's reaction to this verbal warning was to state: "If I'm not wanted as an HTST operator let me know and I'll quit.")

BLUE was also issued a written warning in 2004 for failure to abide by the Employer's "on-call procedures." While I did not consider any of the warnings generated by the Employer's "no-fault" attendance policy or those predating the representation of the workforce, it is clear that Mr. BLUE was no more than an adequate employee.

Most troubling was the verbal warning that was issued on July 8, 2005, when BLUE received a verbal counseling from BLACK for his second incident of failing to wear his safety glasses. This was two days before the event in question. The "Corrective Action Report" written by BLACK states: "Alex was observed without safety glasses on 7/4/05 and was prompted to wear them by supervision. He then proceeded to prompt this author [BLACK] on 3 different occasions to wear my safety glasses even though I was already wearing them." While I don't view this verbal warning as constituting progressive discipline or a warning, it is evidence that Mr. BLUE had little respect for the authority of Mr. BLACK and felt free to mock him.

Was the Insubordination "Gross?"

The labor agreement (Section 10.1) admonishes the employees that offenses "such as gross insubordination and damaging Company product" will lead to serious discipline including suspension or termination. The question in this case is whether the insubordination was "gross" and whether a reasonable person in BLUE position would know that he cannot repeatedly and angrily swear at his supervisor and throw cheese product at him and expect not to be terminated.

The applicable standards for contract interpretation are well established. Where the language in a collective bargaining agreement is clear and unambiguous, the arbitrator must give effect to the plain meaning of the language. This is so even when one party finds the result unexpected or harsh. Words are to be given their ordinary and popularly accepted meaning,

unless other evidence indicates that the parties intended some specialized meaning.¹⁰[11] As stated by Elkouri and Elkouri:

Arbitrators have often ruled that in the absence of a showing of mutual understanding of the parties to the contrary, the usual and ordinary definition of terms as defined by a reliable dictionary should govern. The use of dictionary definitions in arbitral opinions provides a neutral interpretation of a word or phrase that carries the air of authority.¹¹[12]

The Union in its brief did an excellent job of arguing that termination is too serious a penalty in the instant situation because the insubordination was not “gross.” I would be tempted to agree with the Union’s position if it were supported by the facts. Gross is usually described, as of something bad or wrong; extreme or obvious. As stated by a reliable dictionary:

gross

Pronunciation:

1 a *archaic* : immediately obvious b (1) : glaringly noticeable usually because of inexcusable badness or objectionable ness <a *gross* error> (2) : OUT-AND-OUT, UTTER <a *gross* injustice> c : visible without the aid of a microscope.¹²[13]

In the instant case there can be no question that the insubordination engaged in by Mr. BLUE was “gross.” It should have been immediately obvious to any reasonable person that his conduct in using profanity towards his supervisor for an extended period of time was unacceptable. The conduct of Mr. BLUE was also glaringly noticeable because of its inexcusable badness or objectionable ness.

Of course it is not the goal of the arbitrator to be overly pedantic, but rather to interpret the language in the manner the parties intended. “Arbitrators must strive to determine what the

parties were attempting to accomplish by the contract language used and to effectuate that intent.”¹³[14] All employees have bad days and make mistakes. What sets this case apart are three factors. First, the length of time that in which the incident took place. This is not a simple case of an employee telling his boss to “fuck-off.”¹⁴[15] If it were, Mr. BLUE would be coming back to work. In this case it appears that Mr. BLUE ignored his supervisor and then engaged in a lengthy profane soliloquy directed at him. This case does not involve a momentary lashing out, but rather represents a lengthy course of conduct. While some arbitrators would up-hold the termination based solely on the profanity, I am not one of them.¹⁵[16]

The second factor leading me to find for the employer is the throwing of cheese by BLUE. While it is clear that the cheese is light-weight and not dangerous, the presence of any physical contact initiated by BLUE is a strong factor in upholding a penalty of discharge. As Arbitrator Morgan opined:

In the majority of arbitrations examined by this Arbitrator, it appears that most cases where a discharge under circumstances similar to this case [use of extreme vulgarity] has been sustained, have been situations where there was physical contact, whether minimal or otherwise.¹⁶[17]

Physical contact is not always about an attempt to injure; often it concerns an attempt to intimidate.¹⁷[18]

Third, BLUE’s dereliction of his job on the day in question created the possibility of a serious disruption to the Employer’s production and a concomitant loss of revenue. By not

attending to the “fine saver” BLUE created the possibility of the fine saver screen clogging, which would have required the shutdown of the entire cheese line. This case is not about the use of profanity which often occurs regularly on a shop floor. Rather it is about an employee who for whatever reasons seemed to stop caring about his employer’s rules.

While I agree with the legal arguments made by the Union’s counsel, I don’t believe that the facts support his argument. The facts show that the grievant had been made aware of the Employer’ work rules which included:

- 1(b) Refraining from behavior or conduct that is offensive or undesirable, or which is contrary to the Company’s best interests.
- 2(b) Physically fighting with or assaulting a co-worker.
- 2(c) Threatening or intimidating co-workers, employees of our suppliers or customers, or any other guests.
- 2(h) Stealing, destroying, defacing or misusing Company property.
- 2(i) Refusing to follow management’s instructions concerning a job related matter or other forms of insubordination.
- 2(m) Using profanity or other abusive behavior.

Most troubling to me was the verbal warning that Mr. BLUE received two days before the event in question, which stated: “Alex was observed without safety glasses on 7/4/05 and was prompted to wear them by supervision. He then proceeded to prompt this author [BLACK] on 3 different occasions to wear my safety glasses even though I was already wearing them.” What is clear in this case is that Mr. BLUE had little respect for his supervisor. In this instance the altercation ended with Mr. BLACK being hit with some wet cheese; next time it could be far worse. While I feel badly for Mr. BLUE, I feel that it would be irresponsible for me to send him back to work given his course of conduct in July of 2005. While I am aware of the dismal job

market in Sunnyside, I don't see how Mr. BLACK could effectively manage other employees if Mr. BLUE came back to work.

CONCLUSION

The burden is on the Employer to show by clear and convincing evidence that just cause existed to terminate the Grievant, Alex BLUE. The totality of the evidence shows that the grievants conduct rose to the level of "gross insubordination." The Employer has met its burden of proof.

AWARD

The grievance is denied. All fees and expenses charged by the Arbitrator shall be borne equally by the parties, as provided for in Article 21(6) of the Agreement.

David	Gaba,	Arbitrator
April	1,	2006