Nevins #2

IN THE MATTER OFARBITRATION BETWEEN:

Employer

AND

Union

PRELIMINARY STATEMENT

David C. Nevins, Arbitrator: This proceeding involves a dispute between the Union and the Employer. A hearing was held on August 13, 1996, before the parties' System Board of Adjustment, where the parties participated, presented evidence, and put forth their respective arguments.

The general question to be resolved in this proceeding is the following:

ISSUE:

Was the Employee discharged for just and proper cause, and, if not, what should be the remedy.

BACKGROUND

The Employee had been a storekeeper for the Employer since November 29, 1967. Since 1968 he worked at the Employer's base in City 1. He was discharged for conduct occurring on September 2, 1995, a Saturday overtime day. That day he was operating a delivery cart on an outside route, picking up and delivering parts from and to various maintenance locations. By the time the incident in question began in building 15, at about 9:15 a.m., he had already made four

or five trips with his cart, including a trip to pick-up some priority parts in warehouse 68 that had been specially mentioned to him by Leadman Person 1.

As the Employee walked by the Team Coordinator, Person 2, who was then talking with another storekeeper, Person 3, Person 2 asked him whether he had retrieved the parts from warehouse 68 (which Person 2 had earlier told Leadman Person 1 about). The Employee suggested they speak in another area, as he did not want to talk in front of "that meathead" or "that fucking meathead" (referring to Person 3, apparently). Person 2 and the Employee went to another area, apparently out of anyone else's sight, and Person 2 again asked about the parts from warehouse 68 (which the Employee recalls as being the third time Person 2 asked whether those parts had been retrieved). The Employee began loudly ranting about the workload he had been left with from the graveyard shift, the work he had been doing that morning, the lack of work done by others, and, in the process, was waiving his arms at the parts bins. The Employee (who was then a Union steward) also mentioned another employee, who he described to Person 2 as claiming that Person 2 was harassing storekeepers. At that point, Person 2 said something to the Employee about the Employee showing him a lack of respect, and the Employee countered this by saying Person 2 showing the Employee a lack of respect.

The two then disagree about what immediately followed. Person 2 says he patted the back of the Employee's right arm, trying to calm him down, and suggested he calm down, and that he take it easy. Person 2 recalls they were not face to face, but the Employee was standing sideways to him. According to the Employee, he had begun to leave, to return to work, and Person 2 grabbed his arm, halting the Employee's progress, and he then turned around to look at Person 2.

What then followed is essentially undisputed, although various versions of it have been offered. The Employee began walking away, saying, “This fucking asshole touched me (or put his hands on me). Did anyone see him touch me (or that he grabbed me)? Don't you ever touch me.” The Employee was yelling and repeating himself, using profanity, drawing the attention of others in the large facility, as he headed for his cart, with Person 2 following him, trying to calm him down. The Employee then got in and out of his cart, and with Person 2 having come up close to him, pointed his finger at Person 2 and yelled, "Nobody fucking touches me." He got in his cart, still yelling and swearing and drove out of the building. Some thirty to forty feet or so out of the building, the Employee jumped out of his moving cart, the seat cushion came out, along with a soft-drink can, and, as he looked back at building 15, with Person 2 and several others in the doorway looking at him, again pointed at Person 2 and yelled, "Don't you fucking touch me" (or "you fucking asshole, keep your fucking hands off me"), "I am pissed."[1] The Employee recalls in connection with his yelling about Person 2 not touching him, repeating what he had said earlier, inside the facility, "I got five for that."

The Employee's reference to getting "five for that" and his behavior are put into some perspective by a previous disciplinary incident. On January 7, 1993, a Level 5 discipline, discharge, was issued against the Employee (effective back to December 22, 1992) pursuant to the investigative review process. While the details of the underlying incident are sketchy, the ensuing investigative review decision claimed that "a heated conflict" took place between the Employee and another employee, that the Employee once or twice put his hand on the other

[1]Person 2 perceived the Employee to have jumped out of his cart, throwing his seat cushion out on the ground along with a soft-drink can. The Employee says that when he drove off, the soft-drink can fell in his lap, he then jumped out of the cart, with the seat cushion and can falling out after him. Person 4, who also witnessed that part of the incident, says only that the Employee jumped out of the cart and that the seat cushion fell out. In any event, the Employee had to reach back in the cart with his foot to apply the brake to stop it. He acknowledges that jumping out of a moving cart was not a safe practice.

employee's shoulder, though this was repelled by the other employee, and that the Employee employed a racial epithet as the conflict broke up. The Employee's resulting Level 5 discharge, which the Employee felt was unfair to him, was converted by a settlement agreement two months later. His discharge was converted to an "illness status" (retroactive to December 22, 1992) and to a two-year Level 4 discipline if the Employee returned to work (which he obviously did).[2] Person 2 says he knew on September 2, 1995, that the Employee had been previously discharged, but he did not know the reason behind it.

After the Employee drove away from building 15 on September 2, Person 2 called the Employer's security personnel, who subsequently located the Employee and escorted him away from work. Person 2 later proposed a Level 5 discharge for the Employee for violating 3 work rules:

1. Rule 5 (which calls for discharge "unless mitigating factors are considered applicable"), which prohibits actual or attempted
    a. threatening
    b. assaulting
    c. intimidating a Supervisor or other member of management

2. Rule 30 (which, along with Rule 36, commences discipline at the levels indicated in the particular rules, though such discipline can include discharge, "depending on the circumstances involved and the employee's record"), which prohibits
    a. Any negligent or unsafe action which results in or has the potential of resulting in, injury to the employee or others, or damage to Employer property or the property of others [Level 1 to discharge]"

3. Rule 36, which prohibits "[u]sing abusive or offensive language to any employee or members of supervision [Level 1 to discharge]."

[2] The investigative review decision in 1993 noted that another letter of agreement had been entered into with the Employee in March of 1991, which had placed him for two years in "a last chance Level 4" disciplinary posture. What led to that discipline is not noted, but the investigative review decision refers to another subsequent incident involving another employee, which also occurred within that two-year period and which supposedly reflected the Employee's "uncontrolled temper and [a] disturbance in the work place . . . ." It was, in significant part, based on that existing last chance agreement that the Employee was then discharged in 1993

Person 2's proposed Level 5 discharge was considered in an investigative review hearing by Person 5, the manager of supply and distribution. Article 17-B of the parties' collective bargaining agreement (the "Agreement") provides, in part, that "[n]o employee shall be discharged without a prompt, fair and impartial investigative hearing ..." In her report of September 20, Person 5 affirmed the proposed discharge. She concluded that the Employee violated Rules 30 and 36, and violated Rule 5 by virtue of the claims by Person 2 and other observers of the incident that they felt "fearful" or "intimidated" by the Employee's conduct.[3] On November 9, a third grievance step decision was issued by the Employer, also affirming the Employee's discharge. This decision found the Employee's conduct had created an atmosphere of "fear, intimidation, and uncertainty." The decision found a violation of Rule 5 by the Employee engaging in threatening and intimidating conduct towards Person 2, and, in particular, his "obscenities voiced in a loud voice accompanied with the finger pointing directed at Person 2…addresses the intent of intimidation…towards a member of management."

ANALYSIS AND CONCLUSIONS

I. The Parties' Basic Contentions.

The Employer says that just cause existed for discharging the Employee. No employee, it claims, can be allowed to threaten and verbally assault and try to provoke a supervisor, all of which the Employee did. The Employee has a problem in keeping his volatile temper in control, and the Employer has given him numerous chances to correct his behavior. The Employee crossed the

[3] Prior to conducting the investigative review hearing, Person 5 looked into and reached conclusions regarding the claim (apparently put forward by the Union, based on the Employee's assertion) that Person 2 had breached the Employer's "Zero Tolerance Policy" which bans touching of others at the work place. Without having spoken with the Employee, but after discussing the claim with Person 2, Person 5 concluded that Person 2 had not broken the Zero Tolerance Policy because the ban on touching others pertained essentially to sexual touching and because Person 2 had only patted the Employee's arm in a calming and supportive manner.

line "when he verbally assaulted and intimidated a Supervisor," and where violations of Rule 5 have occurred past arbitrators have consistently upheld the Employer's discharges. Contrary to the Union's assertion, the Employee received a fair and impartial hearing from Person 5, and through various stages the Union had the opportunity to prove that Person 2 grabbed the Employee, though no supporting evidence can be seen to support that claim. The discharge should be upheld.

The Union, conversely, argues that just cause did not exist for discharging the Employee. The Union says he did not threaten Supervisor Person 2 and did not violate Rule 5. Nor did he act unreasonably, as Person 2 had grabbed him and had violated the Employer's Zero Tolerance Policy against touching others. The Union faults the Employer for maintaining a double-standard. The Union also says that Person 5 did not conduct a fair and impartial investigative review hearing, since she had already exonerated Person 2 of any wrongdoing regarding the Zero Tolerance Policy, without even speaking to the Employee about his claim. Other instances of discipline noted in the evidence show that the Employer treated the Employee disparately. The Union asks that the Employee be reinstated and made whole for his losses.

II. Discussion.

As a general proposition it can be said that a part of this disciplinary case is clear, and a part of it is not. It is clear, without question, that the Employee violated Rules 30 and 36, which can result in anything from a Level I discipline to a Level 5 discharge. Thus, it is undisputed that the Employee used abusive and offensive language toward and about Supervisor Person 2, calling him an asshole and repeatedly shouting other profanity in connection with the Employee's

objection to Person 2's touching him. No doubt such conduct violated Rule 36. Also, it is undisputed that the Employee jumped out of his electric cart while it was still moving and thereby engaged in an unsafe act, in violation of Rule 30. The Employee, himself, recognizes that this proposition is true, even if he was reacting to a spilled soft-drink, as he claims he was. He has exhibited contrition for both his unsafe act and his use of profanity.

A far more difficult and serious question is whether he also violated Rule 5. As indicated by our evidence and the Employer's own rules, the most serious charge against him is that he violated Rule 5 by threatening, assaulting, or intimidating Supervisor Person 2. It is the prohibition against such misconduct toward supervisors which is designated as warranting summary termination, unless applicable mitigating factors pertain. The special severity attached with Rule 5 makes sense, because it concerns conduct going to the heart of the employment relationship. For one thing, it bans conduct which seriously undermines the ability to supervise an employee and to maintain discipline and decorum at the workplace. For another thing, it seeks to protect members of supervision from the kind of fear and revulsion experienced when threatened, assaulted, or intimidated by those they must supervise and direct. Finally, it seeks to clarify a line that employees may not cross, even though in the day-to-day work-world strains and conflicts between supervisors and their subordinates can and do arise.

But, it is important to remember that Rule 5 addresses specific conduct--namely, that which is threatening, assaultive, or intimidating. It does not, for example, sweep within its reach other disrespectful or disruptive acts, or acts such as "[u]sing abusive or offensive language" toward a supervisor, as is specifically addressed under Rule 36, a rule whose violation is consigned more to progressive discipline, not summary discharge. As a long-time employee, indeed a 28-year employee, the Employee is entitled to a full, careful, and objective evaluation of whether he

breached the serious prohibitions found in Rule 5. While one should not be overly technical or abstract in performing such an evaluation, one also should not ignore what Rule 5 is essentially aimed at or incautiously or inadvertently convert disruptive, profane, insulting, or unnerving conduct into threatening, assaultive, or intimidating conduct.

Going to the core of the matter, it is difficult to objectively find, despite the Employer's contrary conclusions, that the Employee violated Rule 5 by his conduct. Clearly, he made no effort to assault Person 2 or physically manhandle him. Neither did he touch Person 2, nor did he make any verbal or physical gesture suggesting an assault. Nor does our evidence indicate with any meaningful persuasiveness that the Employee threatened Person 2. Our evidence shows that no verbal threats or suggestions or implications concerning bodily harm or physical abuse were uttered by the Employee, and even Person 2 describes none.[4] In this connection, the Employee's conduct must be viewed within its overall context, as we now look to.

What the Employer seems to most depend upon is an assertion that the Employee's conduct was generally intimidating to Person 2 (and to others who observed it). One should, however, be a bit careful here. One cannot simply look to how those involved in an incident responded to it in order to evaluate whether the protagonist's conduct was intimidating (or threatening). Some greater degree of objectivity regarding the conduct in issue is necessary, for the observers of conduct can react in many individual ways, from being oblivious to being devastated. The degree of individual sensitivity of the observer is neither a precise barometer of another's conduct, nor what Rule 5 seems to focus on. Indeed, many observers might well call somebody else's conduct

[4] While Person 5's investigative review hearing decision states that "Person 6 testified he heard [the Employee] threaten" Person 2, Person 6 has not testified in our arbitration. Not only does Person 5's decision fail to indicate what this purported threat was, but no other employee who overheard the incident has described an actual threat to Person 2, including the supervisor himself. The third step grievance decision, without seeking to factually describe any specific threat actually made toward Person 2, substituted a vague and conclusory finding that the Employee's conduct "was threatening and intimidating."

threatening or intimidating, without carefully or accurately drawing any particular distinction to their reactions, when what they really experienced was a sense of strong discomfort, embarrassment, or astonishment.

What factually happened, exactly? The Employee responded to Person 2 touching him with strong profanity, calling him an asshole and using the term "fucking" repeatedly in association with Person 2 having touched him. He was shouting. But, he made no effort to come after or toward Person 2, physically approach him in a menacing manner, or physically gesture in a menacing manner (e.g., with a clenched fist). In fact, throughout virtually all of the encounter, the Employee was moving away from Person 2, first toward his electric cart and then in his electric cart outside of the building. It was Person 2 who pursued the Employee, who kept following him, albeit Person 2's pursuit was understandably one aimed at calming the Employee. While Person 2 was certainly not at fault for following the Employee, the Employee cannot be faulted for attempting to withdraw from the scene, to leave it and return to work.

The only time that the Employee and Person 2 came close to one another, after the incident began, was when Person 2 followed him to his cart, the Employee got in and then out of his cart, pointed at Person 2, and yelled (according to Person 2's written statement), "Nobody fucking touches me." No verbalized threat took place, no warning, no ominous undertone was conveyed. No touching of Person 2 took place. It is not even clear just how close the two were to one another. And what did the Employee do then? Rather than pursue or press toward Person 2, he withdrew into his cart and drove off.

In addition, it is not fair in our case to attribute some menacing undertone to the Employee's repeated and profane shouts about Person 2 touching him, that he should not touch him, that no one should touch him. In another circumstance, a protagonist's repeated references to being

touched might well imply some future response or threat to that person. Such repeated references, in other words, might be a cloaked way of uttering a threat. But, in our case it seems abundantly clear that the Employee's emphasis on having been touched contained no implicit threat, but reflected his exaggerated sensitivity and disturbance to something he saw as having caused his own discharge a little over two years before. (It will be remembered that he had been discharged for a confrontational incident in which he had placed his hand on another employee's shoulder.) In fact, it appears that the Employee made two or more references about getting "a five" (i.e. discharge) for having done that (touching someone else).[5]

Person 2 (and other observers) was undoubtedly unnerved by the Employee's loud, continuous, and profane reaction to Person 2 having touched him. And, to be sure, such a reaction placed an obstacle in Person 2's ability to smoothly and dispassionately supervise the Employee's work. And, perhaps the Employee's exaggerated and persistent reaction caused Person 2 embarrassment and personal discomfort. All of these results are regrettable and out of place. But, they occur in life from time-to-time, and are not the real focus of Rule 5, which addresses far more serious misconduct that warrants summary termination.

In sum, an objective appraisal of what took place, what was actually said, where the participants were and how they physically interacted with one another, leads this Arbitrator to the conclusion

[5] As indicated, the Employee's past discipline is important in putting into perspective his utterances to and about Person 2. It also appears to have heightened his sensitivity to Person 2's touching, and it perhaps explains why he describes or believes the touching amounted to Person 2's grabbing him.
Of course, we will never truly know whether Person 2's touching was something more than a simple pat on the arm. But, there is no compelling reason to believe that Person 2 tried to really grab or physically detain the Employee. Person 2 is convincing that he was seeking to only calm the Employee and that his touching sought to accomplish that end.

that the Employee's misconduct did not violate Rule 5. He did not engage in or attempt to engage in threatening, assaultive, pr intimidating conduct toward Person 2.[6]

III. The Remedy.

Although the Employee is not found to have violated Rule 5, he certainly violated Rules 30 and 36. Thus, while he could not have been summarily discharged for a Rule 5 violation, the question remains as to what discipline is appropriate for his violation of Rules 30 and 36.

Particularly in connection with Rule 36, his use of abusive and offensive language was persistent, repeated, loud, and sufficiently exaggerated that others in the general area were forced to take note of it. While the Employee can perhaps be commended for backing off, continually withdrawing from a confrontation, it is also clear that his loss of temper was extreme, out of control, and undoubtedly a serious disruption to his co-workers. In other words, we have something more serious than a simple, spontaneous loss of temper, a momentary loss of control, a singular use of profanity or name-calling; rather, we have an extended, extreme, profane outburst, which distinguishes it from any of the incidents against which the Union seeks comparison. The seriousness of that outburst should not be minimized, and, indeed, it should not be rationalized away by the Employee by thinking he had been so wronged by Person 2 that it somehow justified or explained his severe response.

What kind of punishment was deserved for this 28-year employee, whose current disciplinary record was then clean but who, our record shows, has had previous problems restraining his loss

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[6] As indicated by the arbitration awards presented by the Employer, arbitrators in general, including this Arbitrator, have sustained discharges when employees engage in threatening, assaultive, or intimidating conduct toward supervisors.

However, with the possible exception of the Milani case involving Northwest Airlines (which involved a male employee aggressively using sexually-connected, derogatory profanity in close proximity toward a female employee), the other cited cases all involved conduct that was physically threatening or menacing (even in the Luis Gravina discharge a very short-term employee was found to have engaged in improper language and physically advanced toward two supervisors).

of temper and civility? [7]Our record also, it should be noted, favorably indicates that the Employee has been seeking professional help for his temper-control problems. (He should continue to do so.)

Because the Employee's response was so extreme, and because he needs to be impressed that such misconduct is highly inappropriate in the work setting and seriously unfair to both his supervisors and co-workers, some significant discipline is more than appropriate. However, withholding almost an entire year's pay and benefits, in effect imposing a year's suspension on him, is too extreme, particularly in view of his obvious effort to withdraw from his confrontation with Person 2.[8]

Accordingly, it is decided that the Employee is entitled to reinstatement to the job he was discharged from, or other mutually suitable position, without loss of seniority. The Employee's reinstatement is conditioned on his making a full apology to Person 2 for his outburst on September 2. The Employee is also entitled to a restoration of his pay and benefits going back to April 1, 1996. Upon such reinstatement, he will be considered to have been on a Level 4 suspension from September 2, 1995, to March 31, 1996.

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[7] By its own terms, the 1993 Settlement Agreement, imposing a two-year Level 4 discipline on the Employee, expired. In addition, Article 17-D of the Agreement says that discipline "will be removed from the employer's file after a period of two (2) years…from the date…issued." It is, of course, significant to the consideration of this case that the Employee had no active discipline on his record as of September 2, 1996, and no previous discipline was relied on by the Employer in justifying his current discharge. It would, of course, be entirely improper to now resurrect such lapsed and expired discipline in evaluating the seriousness of the Employee's misconduct. On the other hand, it is difficult to ignore the fact that the Employee has previously displayed a loss of control or temper while at work, since one naturally hopes against any such future displays of anger or upset on his part.

[8] In addition, the Union makes a convincing case that the Employee was not given the "fair and impartial investigative hearing" he was entitled to under Article 17-B. While there is no reason to doubt Person 5's personal effort at fairness, the pertinent circumstances portray her investigative hearing as falling short of what would normally be considered a fair and impartial hearing. Prior to the investigative hearing, Person 5 had already listened to only one side of the incident, that put forward by Person 2, and had already reached conclusion, that Person 2 had engaged in only a calming gesture toward the Employee, not the grab that was reported to her through the Union. Hearing from only one of the participants and having already reached a significant conclusion regarding the disputed incident, on its face, would render any subsequent hearing as outwardly suspect regarding its impartiality. Another management representative should have been designated to conduct the investigative hearing. Nonetheless, it does not seem warranted under the circumstances to find that this outward failing in impartiality renders the Employer's discipline null and void, although in arriving at the remedy to be imposed it has been considered

AWARD

The grievance is sustained. The Employee's discharge was not for just cause. The Employee is to be reinstated to the job he was discharged from, or other mutually suitable position, without loss of seniority. The Employee's reinstatement is conditioned on his making a full apology to Person 2 for his outburst on September 2. The Employee is also entitled to a restoration of his pay and benefits going back to April 1, 1996. Upon his reinstatement, he will be considered to have been on a Level 4 suspension from September 2, 1995, to March 31, 1996.