BEFORE JOSEPH
V. SIMERI
ARBITRATOR
Simeri #4

THE ARBITRATION	**)**
	) FMCS Case No. 12-01413-6
Between	**)**
	)
EMPLOYER	**)**
	) S_____, Grievant
And	**)**
	)
UNION	**)**

ARBITRATION AWARD

This dispute was arbitrated on May 9, 2012 in Port Clinton, Ohio. The Company was represented by C_____, Esq. The Grievant ("the Union") were represented by L_____, International Union Representative. The Company and the Union presented witnesses and introduced evidence. The parties submitted post-hearing briefs on May 24, 2012. This Award is issued within 30 days from the submission of the Post-Hearing Briefs.

RELEVANT CONTRACT PROVISIONS

Master Contract (Joint Exhibit 1)

ARTICLE I
Recognition

The Company recognizes the Union as the sole and exclusive representative of all its production and maintenance employees employed in its plant at _____, Ohio but excluding Superintendents, Foremen, Assistant Foremen, Guards, Office Employees and all other Supervisory personnel, as certified by the National Labor Relations Board, for the purpose of collective bargaining in respect to wages, hours, working conditions and all other conditions of employment which may now exist, or which may arise during the life of this agreement.

ARTICLE III
Representation

Section 1. The Union shall have the right to be represented by a Shop Committee composed of three (3) members who shall be employees of the Company. The size of the Shop Committee may be increased by one committee person for each fifty (50) or more increase over one hundred (100) employees in the Company's employ during the time such increases exist. The Committee shall be selected in any manner determined by the Union, and the Company shall negotiate with said Shop Committee as the representative of its employees. The Union shall also have the right to have two (2) Company employees serve as alternates on the Shop Committee in the absence of the Shop Committee members.

Section 2. There shall be no discrimination against any employee or any applicant for employment because of membership in the Union, any office held in the Union or any services rendered the Union.

ARTICLE VI
Management Rights

Section 1. The Union recognizes that except a specifically delegated, abridged, granted or modified by the terms and provisions of this Agreement, the Company shall have the right to manage its business and direct the working force. That right shall include but is not limited to rights involving all decisions on the products to be manufactured, schedule of production, methods and processes of manufacturing and assembling, together with designing and engineering and control of raw material, finished or otherwise which may be incorporated into the products manufactured; to maintain order and efficiency in the plant; the right to hire, layoff, promote, assign, train, transfer, discharge or discipline for just cause.

ARTICLE VIII
Grievance Procedure and Arbitration

Section 3. If a settlement is not effected pursuant to the Step 4 procedure, either the Company (in case of a Section 5 dispute only) or the Union may cause the grievance to be submitted to arbitration by serving written notice of a desire to arbitrate upon the other party within five (5) working days after the final meeting between the International Regional Director or his representative and the representative of management under the Step 4 procedure. The parties shall thereupon endeavor to select a mutually acceptable person to serve as arbitrator. If they fail to make a selection within ten (10) working days following the date of service of the request for arbitration, the Company and the Union shall jointly request the United States Mediation and Conciliation Service to supply a panel of arbitrators, and the parties agree to follow its procedure in the selection of an arbitrator.

Section 4. The decision of the arbitrator shall be binding upon the Company, the Union and the aggrieved employee or employees. The expenses and fees of the arbitrator shall be borne by the losing party. The arbitrator shall have no power to add to or subtract from or modify any of the terms of this Agreement or any Agreements made supplementary hereto, or to substitute his or her discretion for the Company's discretion in cases where the Company is given discretion by this Agreement or by any Supplementary Agreement.

FACTS

P_____ is a picturesque community, resembling a Norman Rockwell painting, with a little over 6,000 residents, nestled next to Lake Erie. It is the unchallenged walleye capital of the world. It is also home to the Company, a closely-held family corporation reputed for its for machining of precision parts. All of the Company's production and maintenance employees are represented by the Union. The terms and conditions of their employment are set forth in a Collective Bargaining Agreement ("the Contract") which is in effect until at least November 1, 2013.

The regular workweek for the Company's employees is Monday through Friday. All time worked on Saturday is paid for at time and one-half. Double-time is paid for all work performed on Sunday. S_____, the Grievant, works for the Company. She has worked at a grinding machine for almost seven years. In addition to her work duties, she is also a chairperson of the Union's Shop Committee. In that capacity, she represents the Union to the Company and, in her words, "helps with any issues in the workplace." Consistent with this, the Contract provides that the Union has a right to be represented by three Company employees and the Company must negotiate with the Shop Committee as a representative of the Company's employees.

Despite this provision in the Contract, sometime during the week of November

6, 2011, the Company's Plant Manager and Director of Operations, Mr. David Courtright, met with three bargaining-unit employees to discuss with them a change in the work schedule. As a result of the meeting, the Company, and these individual employees, tentatively agreed that for a limited time, the second shift would begin on Sunday and run through Thursday, thus giving the employees Friday off. In return, work on Sunday would be paid at straight time, rather than double-time.

This discussion and tentative agreement occurred in the absence of S_____. When S_____ returned to work on Tuesday, November 15, 2011, she was met by some bargaining-unit members who were upset at the proposed schedule change. S_____ was also upset. She believed that the Company should have addressed this matter directly with the Union Shop Committee, as required by the Contract. The issue festered until late in the day. It was then that S_____ confronted Mr. Courtright over the proposed work-schedule change. S_____ and Mr. Courtright argued. The argument was "heated." Finally, S_____ informed Mr. Courtright that the Union would not agree to any schedule change. Case closed.

Now, with that as background, the next workday dawns. It is November 16, 2011 and the events of that day would ultimately bring us to the arbitration table. S_____ reported to work. Around 10:00 a.m., Mr. Courtright went to her workstation to ask her about another employee who had a workers compensation claim. She was

not there. He was told by Jim Anders, a leadman, that she was in the restroom. About five minutes later, S_____ returned to her workstation and she and Mr. Courtright discussed issues concerning the employee on workers compensation.

Around 10:15 a.m., Mr. Courtright again came back to S_____'s workstation. She was not there. Questioning where she was, Jim Anders told Mr. Courtright that S_____ was in the bathroom "making phone calls like she always does." Mr. Courtright asked Mr. Anders to tell S_____ to call Mr. Courtright when S_____ returned from the restroom.

Around 10:25 a.m., S_____ called Mr. Courtright using the Company's inter-office phone system. Mr. Courtright asked S_____ whether she was in the restroom twice in 15 minutes. S_____ became upset that she was being accused of being in the women's restroom twice within 15 minutes and, further, that any man needed to know what any woman was doing in the women's restroom. Mr. Courtright told S_____ that the Company was not paying her to use her cell phone. S_____ ended the verbal confrontation by abruptly hanging up on Mr. Courtright immediately after issuing a farewell salutary message of "Dave, you're full of shit" (the "s-word").

The Company has in effect a six-step written progressive discipline policy called the "Port Clinton Manufacturing Company Hourly Employee Shop Rules" governing the Company's hourly employees. Offenses are initially categorized as

minor, major, and intolerable. Except for intolerable offenses, which permit the immediate discharge of the employee, it is at Step 3, or Point 3, that the employee receives one day of disciplinary layoff. When the employee's oldest in time violation is over one year old, the employee will regress one step in the disciplinary progressive level. Under the Company's Shop Rules, "profanity towards a supervisor" is a minor offense. As a result of her parting comment to Mr. Courtright, S_____ was disciplined because, in the Company's view, she used profanity towards a supervisor. This alleged violation, coupled with S_____'s disciplinary status at the time, moved her to Step 3 on the disciplinary ladder of descent, resulting in a one-day suspension without pay.

ISSUE

The issue, which I have framed, is whether the Greivant's one-day suspension without pay was for just cause. If not, what is the proper remedy?

ANALYSIS

The Company understandably and cogently says that the Company Shop Rules are clear. Profanity toward a supervisor is expressly prohibited. S_____ used profanity toward Mr. Courtright, her supervisor. She admits it. What is there

to arbitrate? Well, we shall see.

All profanity is not created equal. There is venial profanity, there is something more than venial profanity, and there is mortal profanity. And all profanity lists are not even the same. Benjamin Franklin, in *Poor Richard's Almanac*, 1741, wrote:

> Beauty, like supreme dominion
> Is but supported by opinion.

With humble deference to Mr. Franklin, I can say that profanity, like supreme dominion, is but supported by opinion. Is what the Grievant said to Mr. Courtright, her supervisor, profanity? If it is, should not final judgment be tempered by not only what she said, but also to whom she said it, why she said it, where she said it, and when she said it?

Just cause requires that I examine all of the events leading to the November 16, 2011 incident. There were already heavy storm clouds in Emerald City that morning and S_____ and Mr. Courtright were in battle gear. S_____, less than 24 hours earlier, had expressed in no uncertain terms, her outrage that the Company would attempt to bypass the Union, and negotiate directly with the bargaining-unit employees over work schedules. Mr. Courtright, acting for the Company, believed that a change in the work schedule for a limited time, agreed to by some of the employees, would be a win/win because in exchange for giving up double-time

pay, employees would be getting a Friday off. As this was acceptable to the employees he talked with, why should the Union care?

S_____ came into work and was working. She was accused, initially, by one of her fellow employees, of abusing the need to use the restroom. When she spoke with Mr. Courtright by telephone, doing what she was instructed to do, she was accused of using Company time for her own business. She testified she was using her cell phone in the restroom to talk to a union committee person. In her mind, her obligation as Shop Committee Person required her to deal with her fellow employee's workers compensation problem.

In *PQ Corp*. 106 LA 381 (Cipolla 1996), the grievant was a local union officer who, during a grievance meeting, shouted to the site manager that this is a f---ing joke and you don't know how to run the f---ing plant. The arbitrator differentiated between employees making such statements, and union stewards making such statements in the course of their representational duties. The arbitrator found the grievant was wearing the hat of a union advocate.

> While I am not condoning the language used by the Grievant, it does not constitute such outrageous conduct that it may be said that he crossed over a line between vigorous advocacy and gross conduct. Id. at p.384.

In that case, the Company's one-day suspension without pay was not upheld.

S_____'s position as Union Committee Person must be considered. That position does not insulate her from the Shop Rules that apply to all bargaining-unit employees, including S_____. It does, however, mean that she must necessarily interact with management on a regular basis on matters involving the Contract, and in the interests of all bargaining-unit employees. This interaction, more often than we would like to admit, creates conflict. For example, if during a Contract bargaining session, a Union representative would say to a management representative that the management representative was "full of s---," I cannot imagine that statement would be a cause for discipline. I do not mean to say that it is appropriate conduct. I also do not say that what might be allowed at the bargaining table, should be allowed during working hours. What I emphasize, however, is that S_____'s duties as Shop Committee Person led her to the outer limit of acceptability.

So, when was the "s-word" used here? The Grievant, feeling attacked because men were not questioned about their activities in the restroom, and because the accusation came from the very supervisor with whom she was at odds, used the "s-word." It was used in an exasperated response resulting from all that had happened between her and her supervisor within less than 24 hours.

Next, I consider where the "s-word" was said. It was said over the

telephone in a private conversation between Mr. Courtright and S_____. The "s-word" directed to Mr. Courtright was not uttered on the Shop floor. The "s-word" spoken by S_____ was not heard by anyone other than Mr. Courtright. This is significant. The purpose of the Rule that prohibits profanity toward a supervisor is to maintain respect for management in the workplace. Management has the right and the obligation to maintain order and efficiency in the plant. Profanity toward a supervisor in the presence of other bargaining-unit employees diminishes respect for management and can affect order, efficiency, and production in the plant. But that did not happen here. This was a private one-on-one. In fact, were it not for S_____'s honest admission that she directed the "s-word" to Mr. Courtright, this case would be a "you said it, no I didn't say it" case.

All of this assumes that the "s-word" in this context is profanity. The Union argues that the "s-word" is not profanity, but merely an opinion, just shop talk. The Union presented evidence that the "s-word" is used commonly on the Plant floor. But the Shop Rules do not prohibit all profanity. The Shop Rules only prohibit profanity towards a supervisor. So the fact that bargaining-unit employees use the "s-word," as posited by the Union, is not a defense.

On the issue of profanity toward supervisors, the Union did offer evidence through a bargaining-unit employee that she had heard Union leadmen tell

supervisors to get the f--- out of the department. The Union also presented testimony from Richard Keller, a machine operator in the Screw Department. He testified that profanity was used regularly on the Shop floor, and that he personally used profanity toward a supervisor arising out of an incident where he had been accused of theft. It was proven there was in fact no theft, and that he had no involvement. After he was vindicated, he testified he confronted Mr. Courtright and told Mr. Courtright that he was full of "s---", and used even more colorful language including the "f-word." I find no useful purpose in inserting all of Mr. Keller's language in this Award. On rebuttal, Mr. Courtright testified that Mr. Keller did use profanity, but the profanity was not directed to Mr. Courtright, but rather at the incident itself.

Yet, even if the "f-word," which is a "no doubt about it" profanity, had been used toward a supervisor sometime before this incident, it does not allow me to cavalierly disregard the Shop Rule prohibiting profanity toward a supervisor. In this case, it does allow me to find, however, that the "s-word," as used here, should not have shocked anyone's sensibility. We are fortunate to live in America, but this country is losing its civility at an alarming rate. Watch television or listen to what is still called music, if you can bear it. The "s-word" is used often, even in casual conversation. For some, it is an adjective, not a noun. In an attempt to

define profanity, my 1991 Random House Webster's College Dictionary is of some help. It defines profanity as irreverent or blasphemous speech. The "s-word" is not blasphemous, but it surely is irreverent. I am not willing to accept that supervisors in the workplace must tolerate the "s-word" as acceptable speech. But the "s-word" is not the "f-word." It is not mortal profanity. While the Company's Shop Rule makes no allowance for degrees of profanity, those degrees do exist, and any just application of the Shop Rule prohibiting profanity towards a supervisor must consider the temperature of the actual word used and its context.

FINDINGS

Based upon the testimony of the witnesses, the Contract, the Shop Rules, and all of the other exhibits introduced at the arbitration hearing and, considering the positions of the Company and the Union, ably presented by their representatives, and weighing applicable arbitral precedent, I make the following findings:

1. S_____'s statement to Mr. Courtright, the Company's Plant Manager and Director of Operations, that he was "full of s---" can be broadly defined as a profanity.

2. When making this statement, S_____, in her mind, believed she was acting in her capacity as Shop Committee Person.

3. The "s-word" was made in a private conversation between S_____ and Mr. Courtright, and was not heard by any other bargaining-unit employee, or management representative.

4. The "s-word" has been used many times on the Shop floor, and most Company production employees do not consider the word to be profane.

5. The incident resulting in the "s-word" used by S_____ was the culmination of two days of conflict resulting from her representation of the Union's interest and Mr. Courtright's representation of the Company's interest.

AWARD

Acts have consequences. Like the events giving rise to this grievance, my Award will have a consequence. In this case, like Odysseus, I am between Scylla and Charbydis. I must choose which hazard to confront. If I sustain the grievance in its entirety, the Company may be faced with a precedent authorizing the use of the "s-word" throughout the plant and even in conversations between management and bargaining-unit employees. Even a modicum of civility demands more. Yet, if I deny the grievance in its entirety, the Union will feel a chilling effect on its right and duty to fairly and vigorously represent the bargaining-unit employees. And, the Grievant will suffer a punishment greater than her offense.

> When an arbitrator is commissioned to interpret and apply the Collective Bargaining 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. There, the need is for flexibility in meeting a wide variety of situations. *Steel Workers v The Enterprise Wheel and Car Corp.*, 363 US 593 (1960), at p.597.

Therefore, I make the following Award:

1. The grievance is sustained in part, and denied in part.

2. The Company must reimburse the Grievant for the wages and any benefits lost as a result of the disciplinary day off received on November 17, 2011.

3. Nevertheless, the disciplinary point assessed against the Grievant as a result of the November 16, 2011 incident is not removed, but must be deferred and then assessed as one point on May 31, 2013, as if it had occurred on that date. The effect of the assessment will depend on Grievant's disciplinary record as it exists on May 31, 2013.

4. The Contract provides that the expenses and fees of the Arbitrator shall be borne by the losing party. There is no losing party in this case. The Union and the Grievant did not lose because the Grievant's loss of one day's pay is restored. The Company did not lose because it retains the right to impose the disciplinary point upon

the Grievant, albeit one year from the date of this Award. Therefore, both the Company and the Union must pay the Arbitrator his fee and expenses, each side to pay one-half of the fees and expenses.

5. The Arbitrator retains jurisdiction over this case for implementation of the remedy.

Dated: May 31, 2012

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Joseph V. Simeri, Arbitrator