IN THE MATTER OF ARBITRATION BETWEEN

Brotherhood of Maintenance of Way Employes Division, International Brotherhood of Teamsters, Union,

and

VAE Nortrak North America, Inc., Employer.

OPINION AND AWARD

Grievance of Robert Huggins
NLRB Deferral Case 27-CA-20466

ARBITRATOR:	Gerald E. Wallin, Esq.
DATE OF AWARD:	June 11, 2008
HEARING SITE:	Cheyenne, Wyoming
HEARING DATES:	March 12, 2008
RECORD CLOSED:	April 17, 2008
REPRESENTING THE UNION:	William A. Bon, Esq. Suite 320 20300 civic Center Drive Southfield, MI 48076-4169
REPRESENTING THE EMPLOYER:	Elmer E. White III, Esq. Suite 340 600 University Park Place Birmingham, AL 35209

JURISDICTION

The hearing in this matter was held on March 12, 2008. The undersigned was selected to serve as arbitrator pursuant to the parties' collective bargaining agreement. The parties submitted a discipline issue to arbitration. No procedural issues were raised. The provision of the collective bargaining agreement providing for award issuance in less than sixty days after close of the record was waived. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The parties submitted post-hearing briefs, duly received on October 2, 1999, which closed the record, and the matter was taken under advisement.

ISSUES

The parties stipulated that the dispute presented a set of traditional just cause issues. Accordingly, the following is adopted as a fair statement of the issues:

> Did the employer have just cause to discharge grievant?
> If not, what should the appropriate remedy be?

RELEVANT CONTRACT PROVISIONS AND RULES

ARTICLE III
MANAGEMENT RIGHTS

> Section 1. Except as specifically abridged, delegated, granted, or modified by this Agreement, or any supplementary agreements that may hereafter be made, all the rights, powers, and authority the Company possessed prior to the signing of this Agreement are retained by the Company and remain exclusively and without limitation within the rights of management. Such rights of management include, among other things, but are not necessarily limited to, the right to ... discipline, suspend or discharge for just cause including the violation of a rule; to make and enforce reasonable rules for the maintenance of discipline; ...

* * *

ARTICLE X
DISCHARGE AND DISCIPLINE

> Section 1. The Union recognizes the right of the Company to make, enforce and modify work rules and to take appropriate disciplinary action.

* * *

Plant Rules[1]

As in society, a manufacturing plant needs to have a set of rules in place by which associates govern their behavior. In this way, order is maintained in interpersonal relationships and on the job conduct so that the goals of Nortrak may be collectively achieved.

The list below does not contain every possible type of inappropriate behavior which may result in disciplinary action, but, it does state many of those types of misbehavior which may be detrimental to other employees and Nortrak:

[List omitted]

The above actions and actions similar to them cannot be tolerated and will result in disciplinary action. Disciplinary action involving the above-listed matters will normally be of a progressive nature with the expectation that the behavior will not be repeated.

There are also certain actions, which because of their nature are so in conflict with the objectives and principles of this organization that their occurrence will result in immediate discharge. Conduct which displays disregard for the Company's or other employee's property, or which compromises basic citizenship responsibilities of truthfulness, honesty and common decency cannot and will not be tolerated and Nortrak has zero tolerance for these actions and will assign discipline up to and including termination are:

* * *

20. Abusive, inflammatory, or profane language toward fellow employees, supervisors, or management.

* * *

BACKGROUND AND SUMMARY OF THE EVIDENCE

Grievant received a termination letter dated October 25, 2006 that read as follows:

* * *

> On October 24, 2006, during a conversation with Chuck Trimble, Plate Shop Supervisor, and Pat Haley, 2nd Shift Supervisor, you began cursing at Pat Haley, saying "fuck you this is bullshit and fuck you" repeatedly. This was testified to by Chuck Trimble and Pat Haley.

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[1]Excerpted from the Company's unilaterally promulgated Handbook.

Nortrak Terms and Conditions of Employment for Hourly Paid Employees, Issued: June 1, 2005, Cheyenne Plant, Plant Rules state that "Abusive, inflammatory, or profane language toward fellow employees, supervisors, or management" is a "zero tolerance" violation of policy and will result in discipline up to and including discharge.

Thus your employment with VAE Nortrak North America Inc. is being terminated effective October 25, 2006.

* * *

The Company manufactures specialty rail products, such as track panels and switch panels, for the railroad industry at its plant located in Cheyenne, Wyoming. Most of the hourly paid employees at the plant are represented by the Union.

Grievant was hired in early 2006. A receipt signed by him on January 23, 2006 shows that he received the plant rules during his orientation as a new employee.

The date of October 24, 2006 was Grievant's second day working on the second or night shift in the Plate Shop. The hours of the shift ran from approximately 3:30 p.m. to 11:30 p.m. Chuck Trimble was the Plate Shop Supervisor and generally worked day-shift hours. He usually remained at the plant until at least 4:00 p.m. each work day and often gave Grievant his assignment for the shift. Pat Haley was the supervisor on duty during the second shift and also gave direction to the work force in the absence of Trimble.

According to Grievant's testimony, Haley gave Grievant an assignment that conflicted with the instructions previously received from Trimble. Grievant asked another employee a question to determine the proper line of authority for him to follow. The employee told Grievant to ask Trimble. At approximately 5:00 p.m. that day, Grievant asked Trimble. Trimble saw Haley walking by and called him over to join the discussion. When Trimble told Haley of Grievant's question, Haley became upset and said words to the effect that Grievant had only been on the shift for two days and already was starting trouble. Haley said, "This is fucking bullshit and I'm not going to listen to this shit." Haley walked away and then returned when Trimble called him back. Trimble then clarified the line of authority when both he and Haley were present as well as when he was gone and Haley was the sole supervisor present. During this same time, Grievant admits he became upset at Haley's response when Grievant was only trying to find out who his orders were to come from. He admits he was cussing and saying, "This is bullshit. All I was trying to do was the right fucking thing." He admits saying the "F-word" a few times but did not direct them at Haley or anyone else at any time.

The testimony of Trimble and Haley conflicts with that of Grievant concerning the content

of the conversation. The written statements they authored at the time also report Grievant repeatedly directing "F-bombs" at Haley. The written statement of a fourth employee who was present at the beginning of the incident and who departed the area quickly after Grievant asked his question says he did not hear anything said by Haley but did hear Grievant yelling.

Grievant went back to work. Haley went outside to cool off. Trimble walked down to the front office on other work related issues. While in the office about twenty minutes later, Trimble reported the incident to the Production Manager, Robert Burgin. Discussions ensued. Eventually Haley and Grievant were brought together for a discussion of the incident. During this meeting, Grievant explained that his reaction was what he did when he got mad. He apologized to everyone present and said it would not happen again. Haley described Grievant as being "... very apologetic." Nonetheless, Grievant was called in for another meeting the following day when he was informed his employment was terminated and he was given the discharge letter.

In addition to the testimony about the incident itself as well as the investigation meetings that followed, the parties presented various evidence about other considerations. This additional evidence included Grievant's use of a handicap parking space, Grievant's prior concerns about the training he received on a rail bending machine, his activities in the Union, the number of grievances he filed during his tenure as an employee, the lack of any prior discipline, and the assessments Grievant received on performance reviews.

The Union also presented evidence of three other violations of "zero tolerance" rules and the discipline imposed as a result. All three instances occurred after Grievant's discharge. None of the employees were discharged as a result of their conduct. One involved the use of a Company plasma cutting machine without authority. Another arose when an employee confronted his supervisor face-to-face with his fist balled up and said, "The next time you have a fucking attitude, don't come around me." The employee received only a five-day suspension plus a warning and two-year probationary period against further infractions. The third instance resulted from the use of profanity directed at an employee by the Plant Manager when he became upset at the employee about preparations to take a planned inventory of materials. The Plant Manager used comments like, "You fucking dummies," you have "... no fucking excuse ...,"and "If you don't want to do your job then get the fuck out of here we don't need you." The Plant Manager received a reprimand but no other discipline.

OPINION AND FINDINGS

At issue in this dispute is the question of whether the Employer had just cause to terminate Grievant's employment. This requires an analysis of both the nature of the conduct involved and the reasonableness of the disciplinary penalty imposed.

Given the conflict in testimony surrounding the altercation itself, an assessment of Grievant's

credibility is necessary. After careful consideration of the available evidence, the arbitrator finds that the accounts of Trimble and Haley are more accurate than the account provided by Grievant. Both Trimble and Haley corroborate each other. Moreover, the written statement of the fourth employee who was briefly present says that Grievant was the person who was yelling. Finally, Grievant's interest in the outcome of the arbitration is a factor that suggests he has a motive to place his misconduct in a more favorable light than it deserves.

In light of the foregoing considerations, it is determined that Grievant had asked essentially the same question of Haley during the previous work shift; as a result, Grievant was, for all practical purposes, asking the same question of Trimble on October 24, 2006, that he had asked the night before. Haley could naturally be upset that Grievant did not accept his answer from the previous night. Haley did not use any profanity in making the remark he did. Nonetheless, Grievant did direct a verbal tirade at Haley. Grievant removed his work gloves and hardhat and proceeded to direct profane remarks at Haley. Haley thereupon walked away to defuse the altercation. Grievant then returned to work as directed by Trimble. The entire matter was over in moments.

As a result of his misconduct, Grievant violated "zero tolerance" Rule 20 from the Employer's Handbook. The violation constituted serious misconduct of a kind which the Employer is entitled to prohibit. That said, however, it is also undisputed that while Grievant was loud and somewhat animated during the altercation, at no time did he exhibit any overt action to constitute a threat of physical harm to Haley. While Haley was concerned about the aggressive nature of Grievant's outburst, Grievant did not make any physical contact with him nor display a balled fist or exhibit any other gestures that might have suggested that a physical blow was imminent. It is also clear that Grievant was very contrite in the meeting which followed and he apologized to everyone present. He also committed that the outburst would never happen again. Grievant's employment records do not reflect that he had ever engaged in similar misconduct conduct before. Indeed, his record was clear of disciplinary entries. Finally, his performance evaluations show that he had twice received the highest possible ratings for cooperation with his supervisors. The latest such performance evaluation was dated October 23, 2006, just one day prior to the incident in question.

Having ascertained the nature of Grievant's misconduct, the analysis turns to assessing the reasonableness of the disciplinary penalty. A traditional just cause standard of review recognizes two categories of misconduct. The first category encompasses those forms of misconduct, such as theft, for example, that are so inherently egregious that the employee perpetrating such misconduct can be conclusively presumed to be incorrigible. Being thus presumptively beyond correction, the employee may be terminated for the first offense of this egregious kind. The doctrine of progressive discipline does not require the employer to give the employee a second chance.

The other forms of misconduct that do not fall into the inherently egregious category call for corrective discipline that comports with the doctrine of progressive discipline. This doctrine requires

that the employer undertake reasonable corrective measures before termination of the employment relationship may be imposed. Such corrective measures must also be applied even-handedly for similar kinds of misconduct, thus they may not be applied in a disparate manner.

According to the evidence and testimony, the Employer's "zero tolerance" rules do not automatically warrant termination of an employee who violates them. This is confirmed by the very terms of the Handbook itself, which states that such violations warrant "... discipline up to and including termination ..." The proper application of discipline, therefore, depends upon the precise nature of the misconduct.

In addition to the instant dispute under review, the evidentiary record contains three examples to show how the Employer has treated "zero tolerance" violations. Two of them have particular relevance in that they involve profanity directed at another employee. Neither of them resulted in termination. One of them involved an employee who directed profanity at his supervisor while demonstrating a balled fist. That employee received only a five-day suspension, warning, and was placed on a probationary period of two years for recurrences of serious violations. While the Employer notes that all of the Union's comparison examples occurred after Grievant's discharge, it is clear that the examples are not after-acquired evidence sought to prove guilt. Rather, they are found to be valid examples to show how the Employer has applied its own rules to similar situations. Thus, they are appropriate considerations for assessing the reasonableness of the instant discipline.

After careful consideration of the relevant circumstances, the arbitrator finds that the instant disciplinary penalty of termination is disparately harsh and severe. Grievant's misconduct is not found to be significantly more egregious than that of the employee who confronted his supervisor with profanity and a balled fist. Given these findings, the Grievant's termination must be overturned and a more appropriate form of discipline must be substituted.

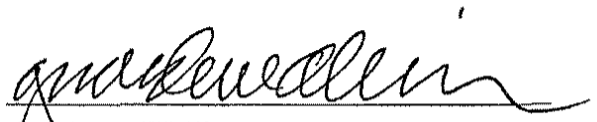
In light of the foregoing, the following remedy is ordered:

1. Grievant's termination is converted to a thirty (30) day suspension without pay for just cause.
2. Grievant must be offered reinstatement to his former employment status with seniority and other features of that status unimpaired but without back pay or other economic benefits for the period of his thirty-day suspension. Grievant is only entitled to back pay for the time he has been out of the Employer's service in excess of the thirty-day suspension. In determining the back pay amount, if any, that may be due and owing to Grievant, the Employer is entitled to offset any earnings Grievant received while out of service in excess of the thirty-day suspension.
3. The arbitrator retains jurisdiction for the purpose of resolving any disputes

that arise over the implementation of the above remedy.

AWARD

The employer did not have just cause to discharge the Grievant. Accordingly, the Grievant is entitled to the remedy set forth in the Opinion and Findings.



Gerald E. Wallin, Esq.
Arbitrator

June 11, 2008