BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

UNITED PAPERWORKERS INTERNATIONAL
UNION, LOCAL 7889, AFL-CIO

and

NORDBERG, INC.

Case 5
No. 52365
A-5345

Appearances:
Mr. Donald O. Schaeuble, Region X International Representative, appearing on behalf of the Union.
Mr. James D. Grzeca, Operations Manager, appearing on behalf of the Employer.

ARBITRATION AWARD

United Paperworkers International Union, Local 7889, AFL-CIO, hereinafter referred to as the Union, and Nordberg, Inc., hereinafter referred to as the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the Employer, requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a warning letter. The undersigned was so designated. Hearing was held in Clintonville, Wisconsin, on October 12, 1995. The hearing was not transcribed and the parties made oral arguments after the presentation of the case.

BACKGROUND:

At the Employer's plant, an employe, Marvin Goddake, made some comments to another employe, Joey Awonohopay, a Native American, which were racial in nature. Awonohopay complained to his supervisor, Chris Bains, who in turn spoke to Goddake and informed him that Awonohopay did not like these comments and they were inappropriate. Some time thereafter Goddake again made some comments to Awonohopay which were racist and Awonohopay again complained to his supervisor on or about December 1 or 2, 1994. The Employer conducted an investigation and on December 7, 1994, Goddake was given a suspension without pay. 1/ During

1/ Ex. 5.

this investigation, it was brought to the Employer's attention that others had made racial comments to Awonohopay including the grievant, Don Frenche. The grievant did not deny that he made remarks to Awonohopay which were profane and racial in nature and inappropriate but that he and Awonohopay were having a conversation where the remarks were jokingly made and that Awonohopay made similar remarks to the grievant which were profane and racial in nature and inappropriate and both felt they could say what they wanted to each other. The grievant claimed these comments were not said in a racist manner. Awonohopay never complained about the grievant's remarks nor was Awonohopay disciplined in any manner. On December 16, 1994, the Employer gave Frenche a written verbal warning. 2/ The grievant filed a grievance over the warning letter 3/ and the matter was processed to the instant arbitration.

ISSUE:

The parties stipulated to the following:

> Did the Company have cause to give the grievant the letter of December 16, 1994? If not, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE XI (DISCIPLINARY PROCEDURE)

> Section 1. Discharge. The COMPANY reserves the right to discharge for cause. In all cases, where the discharge is not summarily for reasons of drunkenness, insubordination and physical assault on COMPANY property, the COMPANY agrees that before it terminates the service of an employee, the Bargaining Committee shall be notified of its intention to terminate the services of such employee and the reason therefore; and in all cases of summary discharge, the COMPANY will notify the UNION of such discharge, giving the name of the person discharged and the reason therefore.

2/ Ex. 2.

3/ Ex. 3.

Section 2. An employee who claims that his/her discharge under this Article is unjust or not for reasonable cause, shall have the same submitted as a grievance and arbitration under the terms of this contract. If, either under grievance or on arbitration, it is determined that the employee was wrongfully discharged he/she shall be restored to his/her former position without loss of seniority. The employee shall recover full pay for all time lost, less any pay earned from another employer while absent from the COMPANY, or as awarded by the arbitrator, not to exceed full pay.

. . .

ARTICLE XIV (MANAGEMENT)

Section 1. The management of the COMPANY and the direction of the working force, including the right to hire, suspend, discharge for proper cause, to transfer or lay off for lack of work or for any other legitimate reason, and all other functions of management, unless limited by this Agreement, is (sic) vested exclusively in the COMPANY.

. . .

EMPLOYER'S POSITION:

The Employer submits it had just cause for the letter of December 16, 1994. It asks three questions:

1. Were the comments made?
2. Were they inappropriate?
3. Was the discipline fair?

In response to the first question, the Employer points out that the grievant admitted he made the comments. With respect to the second question, the Employer notes that the comments were profane and racial and were inappropriate for its premises. As to question 3, the Employer insists that the discipline was appropriate. It agrees that the grievant is a good employe and it has tried to deal with him in an equitable manner. A written verbal warning is the first step, and

according to the Employer, it has to protect itself. It argues that if the employes want to make these comments outside of the shop when they are off work, then the Employer might take into account that these are mutual. It insists that these comments are inappropriate in the work place because the person to whom they are directed may not be offended but others who hear it may be offended and the Employer has a right to prohibit such comments. It maintains that if it allowed the comments, it could be subject to a lawsuit. It asks that the grievance be denied.

UNION'S POSITION:

The Union contends that the Employer's discipline of the grievant was a knee-jerk reaction. It points out that the Employer merely talked to Goddake after he made his initial comments to Awonohopay but here the grievant was immediately disciplined without any investigation by the Employer. It claims that the grievant was not given equal treatment and should have been warned. It notes that Awonohopay complained two or three times before discipline was given to Goddake but here Awonohopay never complained and the Employer disciplined the grievant. The Union maintains that this is not equal treatment and the grievant was disciplined because Goddake was disciplined. It seeks removal of the letter from the grievant's file.

DISCUSSION:

The instant contract uses the term "for cause" in Article XI and "proper cause" in Article XIV as a basis for discharge. Arbitrators have held that there is no significant difference between these terms and equate them with "just cause." 4/ Additionally, arbitrators have held that a contract giving the right to discharge for cause and making no reference to other forms of discipline does not deprive management of the right to impose forms of discipline less severe than discharge. 5/ The right to discharge for cause includes lesser forms of discipline for cause.

The Employer has the burden of proving the elements of just cause for the letter to the grievant dated December 16, 1994. These elements include proving: the employe engaged in the conduct which is the basis for the discipline; the employe was aware of the employer's rules, which must be reasonable and evenly applied; the Employer fairly investigated the matter; and the penalty must be appropriate to the offense and applied in a similar manner to all employes in the same circumstances.

4/ Huntington Alloys, Inc., 74 LA 176 (Katz, 1980); Huntington Alloys, Inc., 73 LA 1050 (Shanker, 1979).

5/ Elkouri & Elkouri, How Arbitration Works, (4th Ed. 1985) at p. 653.

It is undisputed that the grievant engaged in the conduct which is the basis for the discipline. The grievant admitted that he made profane racist remarks to another employe, Awonohopay. Thus, this element has been established. The Employer's Employee Handbook contains Work Rules and Number 10 clearly prohibits the use of abusive and profane language. 6/ Although the grievant denied reading the Handbook, the rule is based on common knowledge that such comments are inappropriate and the grievant knew or should have known that such comments at work could subject him to discipline. Is the rule reasonable? It is eminently reasonable in this day and age for an employer to proscribe racist or profane comments to a fellow employe. The papers report lawsuits and awards against employers all the time for not preventing such conduct. The Employer not only has a right but a duty to prohibit such conduct at its work place. It should be clear to all employes that such conduct cannot be tolerated in the work place. It is easily concluded that the rule is reasonable on its face.

The next issue is whether the rule has been evenly applied. The rule was applied against Goddake and although the Union argued that Goddake's remarks were racist and the grievant was just joking with a fellow employe, the undersigned does not find that this is a distinction which would merit a conclusion that discipline is not warranted. Was the investigation fair? There appears to have been little investigation and the Employer relied on the admission by the grievant. A full investigation could have been made but it does not affect the outcome of this case. The penalty seems appropriate but the problem here is that it has not been applied in a similar manner. Here, the Union has asserted that Goddake was merely warned by his supervisor before being written up, whereas the grievant was immediately written up. The undersigned does not find that this is disparate treatment because there was a difference in what Goddake initially said and the profane racist statement of the grievant. However, there is a problem in this case with similar application of discipline. It is undisputed that Awonohopay also made profane racist comments to the grievant and the incident put in the best light was a mutual name calling. The Union reported to the Employer that Awonohopay made these comments at the same time as the grievant and the Employer felt it made no difference because Awonohopay is a minority. Merely because Awonohopay is a minority does not permit him to flout the Employer's reasonable work rule and make profane racist remarks to non-minority employes with impunity. On the contrary, he is subject to the same rules and consequences for work rule violations as any other employe. Here, Awonohopay was not disciplined for the very same conduct engaged in by the grievant. This is not even application of the rule nor a similar penalty and therefore, for this reason alone, the Employer lacked just cause to discipline the grievant for similar conduct.

On the basis of the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

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6/ Ex. 4.

AWARD

The Company did not have cause to give the grievant the letter of December 16, 1994. The Employer is directed to immediately remove the letter from the grievant's file.

Dated at Madison, Wisconsin, this 9th day of November, 1995.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator