LABOR ARBITRATION TRIBUNAL
FEDERAL MEDIATION & CONCILIATION SERVICE
WASHINGTON, D. C.

IN THE MATTER OF	**:**	
ARBITRATION BETWEEN	**:**	
	:	**DECISION IN**
EAST SIDE JERSEY DAIRY, INC.	**:**	**EMPLOYMENT**
	:	**TERMINATION:**
-AND-	**:**	
	:	**(DENNIS HARRIS)**
INTERNATIONAL BROTHERHOOD OF	**:**	**GRIEVANCE 5362-A**
TEAMSTERS, LOCAL NO. 135	**:**	

FMCS CASE NO.: 130624-56845-3

GRIEVANCE:

The Grievance protests the employment termination, for alleged threatening behavior toward Supervision in violation of the Company's Zero Tolerance Policy for Violence in the Workplace, as lacking just cause.

AWARD: The Grievance is denied.

HEARING: February 26, 2014; Anderson, Indiana

ARBITRATOR: David W. Stanton, Esq.

APPEARANCES

FOR THE COMPANY:

Andrew J. Martone, Attorney
Harold Papen, HR Director
Tom C. Stramer, Plant Manager
Mark Cobb, Supervisor
John A. Lewis, Supervisor
Troy L. Haga, Supervisor

FOR THE UNION:

Fred O. Towe, Attorney
David T. Vlink, Attorney
Mike Gillespie, Business Agent
Steve Moore, Steward
Dennis Harris, Grievant

ADMINISTRATION

By correspondence dated September 18, 2013, from the Federal Mediation and Conciliation Service, Washington, D. C., the undersigned was notified of his mutual selection to serve as impartial Arbitrator to hear and decide Grievance No. 5362A concerning the employment termination of the Grievant, Dennis Harris then in dispute between the Parties. On February 26, 2014, at the Hampton Inn located at 2312 Hampton Drive, Anderson, Indiana, a transcribed Arbitration Hearing was conducted wherein each Party was afforded a fair and adequate opportunity to present testimonial and/or documentary evidence supportive of positions advanced; and, where the Grievant appeared and testified in his own behalf. The evidentiary record of this proceeding was subsequently closed upon the Arbitrator's receipt of each Party's Post-hearing Brief filed in accordance with the arrangements agreed to at the conclusion of the presentation of evidence and subsequently modified per agreement between the Parties. Accordingly, this matter is now ready for final disposition herein.

GRIEVANCE AND QUESTION TO BE RESOLVED

The following Grievance, Joint Exhibit-3, was filed on or about May 28, 2013, and contains the subject matter for disposition herein as follows:

Grievance
Chauffeurs, Teamsters, Warehousemen and Helpers
Local Union No. 135
(Affiliated with the International Brotherhood of Teamsters)

Name: Dennis Harris
Date Filed: 5-28-2013

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Employed by: Prairie Farms
Supervisor: Troy Haga

Job Classification: Filling Department

State the Nature of the Grievance, including dates, names and places. Specify Contract Violation by Article and Section Number. In order to assist in the processing of this Grievance, the Grievant agrees to furnish evidence, witnesses, and documentation in support of this Grievance.

Contract Violation: Article 13.1 and all that applies

Grievance:

I disagree with my termination on 5-24-13. I request reinstatement with full continuation of seniority and to be made whole in all ways.

I understand and agree that the Local Union has the final authority in processing, presenting and adjusting any Grievance, complaint or dispute in a manner that the Local Union or its Officers and Business Representatives consider to be in the best interest of the Local Union. I also understand and agree that the Local Union and its Officers and Business Representatives may decline to process a Grievance, dispute or complaint if it lacks merit.

Steward's Signature: /s/ Michael S. Moore
Member's Signature: /s/ Dennis Harris
Date Received by Steward: 5-28-13

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The Company frames the issues before the Arbitrator as follows:

I. Was the Grievant discharged for just cause? If not, what is the remedy?

   A. Did the Grievant violate the Zero Tolerance Policy?

      1. Did the Grievant's conduct constitute threatening behavior?

      2. Should the Grievant's self-serving denial be credited over the other witnesses?

   B. Is the Zero Tolerance Policy enforceable?

      1. Is the zero tolerance policy unenforceable because it was not negotiated with the Union?

2. Do the "Rules and Regulations" prohibit the Company from discharging Employees without progressive discipline who violate its zero tolerance policy?

C. Would re-employing the Grievant be contrary to the law?

The Union frames the issue before the Arbitrator as follows:

> Did the Company have just cause to discharge the Grievant Dennis Harris? If not, what is the appropriate remedy?

CITED PROVISIONS OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT

The following provisions of the Parties' Collective Bargaining Agreement, Joint Exhibit-1, were cited and/or are deemed relevant herein as follows:

ARTICLE 1
UNION RECOGNITION

Section 1.1

The Company, in compliance with the provisions of the National Labor Relations Act and pursuant to the certification of the National Labor Relations Board in Case No. 25-RC4814, recognizes the Union as the exclusive bargaining representative of all Production and Maintenance Employees of the Company at its Anderson, Indiana establishment, including Fuel and Dock Employees and Tester (one (1) Employee) for the purpose of Collective Bargaining in respect to rates of pay, wages, hours and other terms and conditions of employment.

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ARTICLE 9
GRIEVANCE-ARBITRATION PROCEDURE

Section 9.1

Should differences arise between the Company and the Union or any Employee of the Company covered by this Agreement, as to the meaning, application or interpretation of such differences shall be settled in the following manner:

STEP 1

The aggrieved Employee or Employees shall record their Grievance on a Grievance form and present this form to the Steward. The Steward shall present the Grievance to the Plant Superintendent or his Representative and attempt to

settle the Grievance. The Plant Superintendent or his Representative will give his written answer within five (5) working days after submission.

STEP 2

If no satisfactory adjustment is agreed on in STEP 1, the matter shall be taken to Conference between the Steward, an official of the Union and a representative of the Company within thirty (30) days of STEP 1. Answer to be issued at the meeting unless mutually agreed otherwise by the Parties.

STEP 3

If no satisfactory adjustment is reached in STEP 2, the matter shall be referred to Arbitration. The Parties shall endeavor to agree upon an Arbitrator, but if such agreement is not reached (*sic*) within a reasonable time, the matter shall be referred to the Federal Mediation and Conciliation Service for a panel of seven (7) Arbitrators from which will be selected an Arbitrator by each Party alternately striking off a name, and the remaining name shall be the Arbitrator. The Party requesting Arbitration shall strike first. The decision of the Arbitrator shall be final and binding on all Parties.

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Section 9.3

The expenses of Arbitration shall be borne equally by the Company and the Union.

Section 9.4

The Arbitrator may interpret the Agreement and apply it to a particular case, but shall have no authority to add to, subtract from, or in any way modify the terms of this Agreement or any agreements made supplementary hereto.

Section 9.5

The decision of the Arbitrator shall be final and binding on all Parties.

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ARTICLE 10
MANAGEMENT

The management of the Company's operations and direction of the working forces, including but not limited to the right to employ, promote, demote, train,

transfer, lay off, retire, discipline, suspend, discharge, to assign work and the number of hours to be worked, to increase and decrease the working force, to establish production methods to determine what is to be produced, manufactured or sold, to determine sources of supply, to subcontract work in accordance with this Agreement, and to schedule production is vested exclusively in the Company, subject to such limitations as are contained in this Agreement.

ARTICLE 13
DISCIPLINE AND DISCHARGE

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Section 13.2

(a) The Company shall not discharge or discipline any Employee without just cause and shall give at least a warning notice of a complaint against such Employee for violation of the Company's posted rules, provided such rules have been approved by the Union. No warning notice need be given to any Employee before he is discharged or disciplined if the cause of discharge or discipline is dishonesty, drunkenness while on duty, use of drugs, gross negligence resulting in serious accident, or any other cause for which prescribed discharge or disciplinary lay off for the first offense under Company posted rules.

(b) Discharge or discipline must be by proper written notice given to the Employee on Company premises during the Employee's working hours. Any Employee may request an investigation as to his discharge or discipline; and should such investigation prove that an injustice has been done an Employee, he shall be reinstated and compensated in such amount as the Parties agree upon or as the Arbitrator may direct. Appeal from discharge or discipline must be taken within ten (10) days of service of notice on the Employee in accordance with the Grievance –Arbitration procedure. In the event any Employee is not warned, disciplined, or discharged within ten (10) days after receipt of knowledge by the Company of the alleged infraction, the Company shall have no right to warn, discharge or discipline any Employee. The said ten (10) day period for taking disciplinary action against an Employee shall start running the first (1st) day after the Employee starts to work on Company premises after the alleged violation which caused the disciplinary action to be taken occurred. Any Employee who receives a disciplinary layoff or discharge shall not be entitled to any weekly pay guarantee, but shall only be paid for time actually spent on Company premises at Company direction. None of the provisions of Article 13 shall apply in the case of a voluntary quit, as set forth in Article 8, Section 8.7.(a) and (c). If disciplinary time off is issued, the time off must be started prior to the expiration of the ten (10) days that discipline can be issued unless extended by mutual agreement between the Company and the Bargaining Unit or the discipline will be considered void.

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Section 13.3

In the event an Employee is discharged or receives any disciplinary action he shall be given a written notice and a copy is to be given to the Steward and a copy mailed to the Union. Any Employee given disciplinary action shall be provided a Union Steward or alternate before any discipline is issued. Said Employee shall have the right to decline any representation in writing and a copy of same shall be forwarded to the Union Hall.

ARTICLE 23
MISCELLANEOUS PROVISIONS

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Section 23.3 Health and Safety

(a) The Company shall continue to make reasonable provisions for the safety and health of its Employees at the Plant during the hours of Employment. Protective devices on equipment necessary to properly protect Employees from injury shall be provided by the Company.

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RULES & REGULATIONS

The following Rules and Regulations and the penalties to be charged for violation of same are placed in effect with the approval of your Union so that all the Employees of the Company will know what duties are required of them in the general conduct of the Company's business.

The Company reserves the right, upon proper notification and approval of the Union, to revise the Rules and Regulations listed herein.

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3. **CONDUCT**

a. Drinking or drunkenness on duty, drinking of alcohol on Company property (Failure to submit to an alcohol test when requested by the Company shall be considered as an admission of guilt and the Employee shall be considered as in violation of this particular rule.).

First Offense – Subject to Discharge

(NOTE: Employees will not be requested to take such a test unless there is cause to believe he or she has violated this rule. Examples of what reasonable cause could be are abnormal behavior, slurred speech, unsteady walk, unusual smell, glassy eyes, or possession of alcohol or a controlled substance. The foregoing list are just examples of what reasonable cause may consist of and are not necessarily exhaustive.)

b. Punching time card of another Employee or having your time card punched by another Employee with intent to defraud the Company.

First Offense – Subject to Discharge

c. Failure to comply with State and Federal codes provided the codes are properly posted.

First Offense – Reprimand
Second Offense – 3 day layoff
Third Offense – 5 day layoff
Fourth Offense – Subject to Discharge

d. Disobeying of reasonable orders from direct supervisor.

First Offense – 3 day layoff
Second Offense – Subject to discharge

e. Failure to exercise proper care in the performance of job duties and requirement.

First Offense – Reprimand
Second Offense – Reprimand
Third Offense – 3 day layoff
Fourth Offense – 5 day layoff
Fifth Offense – Subject to discharge

f. Falsification of Employment application.

First Offense – Subject to discharge

g. Fighting on Company property (Aggressor only)

First Offense – Subject to Discharge

h. Deliberate destruction of Company property

First Offense – Subject to Discharge

i. Illegal use or possession of narcotics while on duty or on Company property or prior to duty making the Employee unfit for duty. (Failure to submit to drug test when requested by the Company shall be considered as an admission of guilt and the Employee shall be considered as in violation of this particular rule)

First Offense – Subject to Discharge

(NOTE: Employees will not be requested to take such a test unless there is reasonable cause to believe he or she has violated this rule. Examples of what reasonable cause could be are: abnormal behavior, slurred speech, unsteady walk, unusual smell, glassy eyes, or possession of alcohol or controlled substance. The foregoing list are just examples of what reasonable cause may consist of and are not necessarily exhaustive.)

j. Solicitation for any cause during work time without permission.

First Offense – Reprimand
Second Offense -- 3 day layoff
Third Offense – Subject to discharge

k. Posting, removal or tampering with bulletin board notices without Company approval.

First Offense – Reprimand
Second Offense – 3 day layoff
Third Offense – Subject to discharge

l. Unauthorized smoking.

First offense – Reprimand
Second Offense – 1 day layoff
Third Offense – 3 day layoff
Fourth Offense – Subject to discharge

m. Leaving job without proper notice to supervision.

First Offense – 3 day layoff
Second Offense – 5 day layoff
Third Offense – Subject to discharge

n. Sleeping during working hours.

First Offense – 3 day layoff
Second Offense - 5 day layoff

Third Offense – Subject to discharge

o. Failure to comply with posted restricted work area

First Offense – Reprimand
Second Offense – 1 day layoff
Third Offense - 3 day layoff
Fourth Offense – Subject to discharge

p. Insubordination (Includes malicious use of improper language addressed to supervisor.)

First Offense – 5 day layoff
Second Offense – Subject to discharge

q. Failure to treat customers in a courteous manner.

First Offense – Reprimand
Second Offense - 1 day layoff
Third Offense – 3 day layoff
Fourth Offense – Subject to discharge

r. Conviction of a Class A Felony.

First Offense – Subject to Discharge

s. Possession of firearms at any kind on Company property.

First Offense – Subject to Discharge

t. Failure to wear provided safety apparel which may lead to personal injury.

First Offense – Reprimand
Second Offense – 3 day layoff
Third Offense – 5 day layoff
Fourth Offense – Subject to Discharge

u. Employees who abuse their rest period by not being at their assigned place and cannot show a valid cause.

First Offense – Reprimand
Second Offense – 3 day layoff
Third Offense – 5 day layoff
Fourth Offense – Subject to discharge

v. Failure to punch a time care (more than one (1) time per month)

First Offense – Reprimand
Second Offense – Reprimand
Third Offense – 1 day layoff
Fourth Offense – 3 day layoff
Fifth Offense - Subject to discharge

w. Witnessed and verified aggravated threats to other persons.

First Offense – 3 day layoff
Second Offense – 5 day layoff
Third Offense – Subject to discharge

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5. **MISCELLANEOUS**

a. Penalty for three minor offenses in a 60-day period (See Note 1)

Subject to 3 day layoff.

b. Penalty for three major offenses in a nine (9) month period (See Note 2)

Subject to Discharge

NOTE 1: A minor offense is defined as one for which the penalty is a reprimand.

NOTE 2: A major offense is defined as one for which the penalty is disciplinary time off or a final warning. (The final warning is in reference to the disciplinary procedure of the attendance policy – Phase 2 with six (6) instances.

Each offense against an Employee's record that is over nine (9) months old shall be forgiven and the Employee's record marked cleaned.

For those Employees who enter into Phase II of the attendance policy after ratification of this Agreement, the following goes into effect. Disciplinary action will be based on an Employee's record over a consecutive working period up to, but not to exceed nine (9) months.

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Additionally, Company Exhibit-3 is a two-page document, the first page with Employees' signatures (Grievant's herein) acknowledging the Employee's receipt of the "Violence in the Workplace Policy for Prairie Farms Dairy." That document also indicates it is the Employee's ("my") responsibility to read this Policy and to seek clarification of anything they ("I") did not fully understand. That Policy at page 2 thereof indicates:

November 15, 2012

NOTICE: TO ALL EMPLOYEES

RE: VIOLENCE IN THE WORKPLACE

The purpose of this Policy is to set forth procedures and guidelines for all Prairie Farms Employees as well as Employees of all Prairie Farms subsidiaries and joint ventures to reduce and hopefully eliminate any and all occurrences of violence in the workplace and the impact on the workforce of any such acts of violence that occur on Prairie Farms property or in the course of actively performing any and all job duties for Prairie Farms Dairy Farms, Inc.

Prairie Farms, Inc. will not tolerate acts of violence in the workplace perpetuated by or against any Employee while in the Company offices, facilities, work sites, vehicles or while performing any business on behalf of Prairie Farms Dairy, Inc. This includes the display of any violent or threatening behavior by a perpetrator (verbal or physical) that is likely to result in injury or which otherwise places a victim's safety or productivity at risk.

Any Employee, who threatens, harasses or abuses someone in the workplace or while on Company business will be subject to disciplinary action up to and including termination of employment. All Employees are strongly encouraged to adhere to this Policy at all times. Prairie Dairy Farms, Inc. will take all reasonable measures to maintain a safe working environment for all Prairie Farms Employees.

If you have any questions regarding this Policy, please contact me at your earliest convenience.

/s/ Harry Carter, General Manager

FACTUAL BACKGROUND

The operative facts which gave rise to the filing of this Grievance challenging the employment termination of the Grievant, Dennis Harris, are, except where otherwise indicated, essentially undisputed. East Side Jersey Dairy, Inc., hereinafter referred to as the "Company" and/or the "Employer" is part of the Prairie Farm's family of dairies, which at its Anderson, Indiana, facility, processes and packages dairy and other products such as milk, yogurt, ice cream, orange juice, tea, baby formula, and the mix for McDonald's smoothies. The International Brotherhood of Teamsters, and its affiliated Local 135, hereinafter referred to as the "Union", is the exclusive Bargaining Representative of the Company's Bargaining Unit Employees with respect to rates of pay, wages, hours, and other terms and conditions of employment. Joint Exhibit-1 is the Collective Bargaining Agreement between the Parties which sets forth the terms and conditions of employment and the rights, responsibilities and obligations of the Parties thereto. The Grievant in this matter, Dennis Harris, began his employment with the Company in March 2009 and was terminated on May 15, 2013. The position he held at the time of his termination was in the Filling Department operating the tea gallon filling machine. He worked the 2:30 p.m. until 11:00 p.m. shift and was under the direct supervision of Troy Haga. The record demonstrates Supervisor Haga had only recently started working for the Company and had been the Grievant's supervisor for approximately one and one-half months.

The record demonstrates that on May 15, 2013, at approximately 6:00 p.m., Supervisor Haga summoned the Grievant to the Plant Office for the purpose of issuing him disciplinary action based on what Supervisor Haga indicated was the Grievant's

"failure to properly clean his work area", the Tea Gallon room, on May 14, 2013. Moreover, he alleged the Grievant had improperly assembled the machine attendant therewith. During the course of the interaction between Supervisor Haga and the Grievant, Supervisor Haga handed the Grievant a write-up for violation of Rule 3 (e) - failure to exercise proper care in the performance of his job duties and requirements as set forth in Company Exhibit-1. The Grievant protested the issuance thereof based on his belief Supervisor Haga was retaliating against him for his declining to work overtime on May 14 which resulted in Supervisor Haga having to stay and work said overtime. Article 25, Section 8, of the Parties' Agreement requires the Company to provide Employees at least one-hour notice before that Employee can be forced over at the end of their shift. Had the Grievant received this one-hour notice he would have been required to work the overtime in question; however, according to the record he was not, thereby requiring Supervisor Haga to perform the work in question. The Grievant contends he did not raise his voice in the office and simply advised Supervisor Haga he did not agree with the discipline.

After the Grievant left the office and returned to the Tea Gallon Room, he remembered that coworkers Bob Taylor, Demarius Terrell, and "D. J." had actually helped him clean the Tea Room on May 14. This prompted the Grievant to return to the office to state his explanation regarding the cleaning of the Tea Room. The facts and circumstances relative to this exchange and interaction between Supervisor Haga and the Grievant were depicted on surveillance cameras and submitted to the Arbitrator via DVD at the Arbitration proceeding. That depiction indicates that as the Grievant approached the door to enter the office, Supervisor Haga was exiting the office into the production

area of the Plant. During a site inspection conducted with the Parties the production area proved to be very loud. On the day in question, the record suggests production was not occurring; however, cleaning was and that requires cleaning products being flushed through the pipes utilized for the actual production of the products in question. The cleaning process is not quite as loud as production but is still a loud process. Motors are operating the machinery including flushing fluids through these pipes. The testimony of record demonstrates that having a normal conversation in this area of the Plant is difficult at best.

The Grievant testified that when he observed Supervisor Haga exiting the office he called out to him and that he would not turn around and acknowledge him. He continued to follow the supervisor, continuing to call out to him, but the supervisor either did not hear him or was ignoring him. Supervisor Haga testified the Grievant eventually screamed at him, "Turn around and face me like a man or you'll regret it." The Grievant contends he did ask Supervisor Haga to turn around because he kept walking away without acknowledging him and he could not conduct a conversation unless he spoke to him face-to-face. He contends he was not "screaming" at Supervisor Haga but was raising his voice due to the noise in that area of the Plant. The testimony of record and the DVD depiction of the events in question indicate Supervisor Haga did indeed turn around and acknowledge the Grievant wherein the Grievant explained he remembered the Tea Room was not a mess and he could verify that from the three (3) coworkers that assisted in cleaning it.

The DVD depicts the Grievant being active with his arms and expressing his "position" utilizing his arms and hands as he spoke. The Union contends the Grievant

did not make any hostile or intimidating gestures toward the Supervisor and did not physically touch or verbally threaten him. Union Steward, Russ Castor and Production Supervisor, John Lewis were present in the Office when the disciplinary action was issued. Following the issuance of the written reprimand to the Grievant, he exited the Office. Following certain administrative steps regarding the Grievance document, Haga and Castor exited the Office when the Grievant approached him in the doorway. Over objections based on Hearsay, Supervisor Haga testified Union Steward Castor advised him he felt it was necessary to follow the Grievant and the Supervisor based on the Grievant's state of mind at the time. Steward Castor was unavailable to testify due to him being off on disability leave. The entire incident of this matter took approximately 43 seconds based on that depicted in the DVD.

Following the incident, the record demonstrates Supervisor Haga reported this matter to Tom Stramer, the Company's Plant Manager, who on May 17 suspended the Grievant without pay pending investigation. That investigation included statements from Supervisor Haga, the Grievant, and an observer Eric Ogle, who was in the vicinity of the incident when it occurred. The Union objected to the Statement of Eric Ogle, who did not testify at the Arbitration Hearing, based on Hearsay grounds and the fact Supervisor Haga's statement consisted of questions provided by Stramer to which Haga typed his answers. The Union also objected based on the fact the statement was prepared four (4) days after the incident and contains subjective opinions and editorial comments rather than the factual events in question. The Grievant's statement was provided to Plant Manager Stramer on May 23. Upon obtaining these statements Stramer testified it was his

decision to terminate the Grievant based on what he believed to be threatening behavior in violation of the Zero Tolerance Workplace Violence Policy.

The record demonstrates the Violence in the Workplace Policy was promulgated by the Company and was not negotiated like the work rules set forth in the Collective Bargaining Agreement. That Policy defines violence in the workplace as, "the display of any violent or threatening behavior by a perpetrator (verbal or physical) that is likely to result in injury or which otherwise places a victim's safety or productivity at risk." It also indicates that any Employee found to have violated this policy will be "subject to disciplinary action up to and including termination of employment."

Company Exhibit-7 represents the May 24, 2013, termination letter Plant Manager Stramer mailed to the Grievant referencing another incident that occurred in 2010 which resulted in the Grievant being suspended for five (5) days. During the course of the Arbitration proceeding the Parties disagreed as to the appropriateness of the Company relying upon and referencing this incident given the "amnesty clause" contained in the negotiated Work Rules indicating an Employee's disciplinary action over nine (9) months old shall be forgiven and the Employee's record wiped clean. The incident in this matter occurred in October 2010, but the Grievant did not receive disciplinary action until August 2011 based on him being off work resulting from a Worker's Compensation injury. The Company takes the position the amnesty clause only applies to the issuance of discipline under one particular Work Rule - Rule 5 (b) - to which the Union vehemently disagrees.

At the final Grievance meeting prior to the Arbitration Hearing, Union Business Agent, Mike Gillespie, objected to the Company's consideration of the five-day

suspension in support of its discharge of the Grievant on the grounds the discipline was outside the scope of the nine-month period provided in the Contract. Business Agent Gillespie testified Stramer was present at this meeting and he agreed with the Union's position relative to the amnesty clause. The record fails to demonstrate Plant Manager Stramer expressed any disagreement with the testimony of Business Agent Mike Gillespie relative to the amnesty clause.

As previously indicated, the Employer effectuated the employment termination of the Grievant via the termination letter set forth in Company Exhibit-7. Such resulted in the Grievant filing a Grievance challenging the employment termination as lacking just cause, thereby culminating in this Arbitration proceeding. When the Parties' efforts to resolve this matter through the course of the negotiated Grievance Procedure proved unsuccessful, the employment termination of Dennis Harris was appealed to Arbitration hereunder.

CONTENTIONS OF THE PARTIES

COMPANY CONTENTIONS

The Company contends the Grievant was indeed discharged for just cause based on his threatening behavior toward Supervisor Troy Haga. In support of this contention the Company notes Arbitrators universally recognize that threatening a supervisor is a dischargeable offense based on Management's ability to direct the workforce being undermined when an Employee threatens violence to intimidate a Supervisor. It notes that Employees are assumed to have a certain level of common sense to understand that workplace violence can, and should in this matter, result in termination. In support of this matter it cites *Pretzels, Inc. v Teamsters Local 414*, wherein the Grievant was issued

a reprimand, became loud with his female supervisor, got into her face and yelled at her. While he did not directly threaten violence his behavior constituted threatening conduct. The Grievant was discharged as a result thereof. It notes the Union filed a Grievance and arbitrated that discharge asserting the Grievant should have been subjected to progressive disciplinary action and not discharged. In upholding the termination the Arbitrator dismissed the Union's contention and held that summary discharge is indeed appropriate for such threatening and intimidating conduct.

The Company emphasizes that in November 2012 it distributed and posted a "zero tolerance policy" indicating "any Employee who threatens, harasses or abuses someone in the workplace or while on Company business" will be subject to discharge for a first offense. It notes the Grievant admitted that he had received and read this policy and understood the content requiring termination for a single violation thereof. The Company argues the Grievant did indeed violate the zero tolerance policy subjecting him to termination when he engaged in the threatening behavior on the day in question. On May 15, 2013, the Grievant's immediate supervisor, Troy Haga, issued the Grievant a written reprimand for failing to keep his work area clean. The Grievant refused to accept this reprimand and began yelling at him and stormed out of the office. The Grievant acknowledged even though he was aware the Grievance Procedure was the proper recourse, he waited for the supervisor to leave the office, followed him outside the door and was observed by the Shop Steward threatening, yelling and screaming at him. The Grievant stated to Supervisor, Troy Haga as he got closer, "…he threatened me to turn around and face him like a man or you'll regret it." Haga described the incident as

being 12 to 18 inches away from him and the Grievant insisting he and John Lewis "had it out for him."

The Company also notes Supervisor Haga stated he "…was absolutely 100% afraid for his personal safety thinking that he was going to get hit". Haga noted that he and the Shop Steward discussed the matter afterwards and the Shop Steward said the only reason he came up behind Mr. Harris, i.e., the Grievant, was because he thought I (Supervisor Haga) was going to get hit. The Company notes the Union Shop Steward confirms Supervisor Haga's version of the events.

Moreover, the Company contends the Grievant's self-serving denial of the events in question should not be credited since the aggrieved Employee has an incentive to make such self-serving comments. It notes that Arbitrators have found a Grievant's continued job tenure is sufficient motivation in and of itself to fabricate circumstances. The Company also notes the Grievant's threatening behavior is consistent with earlier acts of threatening conduct directed toward a different supervisor, *i.e.,* Supervisor Mark Cobb, wherein the Grievant left a threatening message concerning a work-schedule change in October 2010.

Additionally, in October 2010 the Grievant again threatened Supervisor Cobb after he was instructed to get back to his work area. Supervisor Cobb testified the Grievant gestured toward him took off his coat and he described the incident as likely going to result in him being struck. When asked what he believed that was meant to be by him taking off his coat, he stated that, "he wanted to fight me, or he was going to strike me, or something was going to happen."

Despite the Union's objection relative to the Grievant's questioning over subject matters other than the incident at issue, the testimony of record clearly demonstrates the Grievant has no remorse for his actions and he holds his supervisor in contempt as he describes their need for him to have his work area clean as "childish". The Company notes that even though the 2010 incident demonstrates a pattern of such conduct; that event was not considered when it decided to terminate the Grievant's employment. The Company emphasizes that although the Grievant acknowledged he was aware of the proper avenue to express his disagreement with a written reprimand, he failed to return to his work station and instead laid in wait for Supervisor Haga. He attempted to justify his yelling at the Supervisor by claiming that production was occurring and the Plant was noisy; however, the record of evidence demonstrates there was simply cleaning going on that day and the Plant was not in full operation.

The Company insists that its zero tolerance based policy for violence in the workplace is indeed enforceable based on the Management's Rights Article to ensure a safe work environment for all Employees. Despite the fact this policy was not negotiated by the Union, it is nonetheless enforceable based on its reasonable objectives to maintain a safe and healthy workplace. It provided the Union with notification of its implementation and gave to each Union Shop Steward a copy thereof. That policy was posted on the bulletin board in the Employee break room, and the Union did not file any Grievance or dispute the policy or the manner in which it was implemented. That policy was in effect for approximately six (6) months prior to the Grievant's termination, and the Union cannot now be heard to complain that it is not enforceable. It notes Union

Business Agent, Mike Gillespie indicated he was not going to challenge the zero tolerance policy in Arbitration.

With respect to the Union's insistence the Arbitrator ignore the Grievant's prior threatening behavior because such occurred more than nine (9) months prior to the incident which led to his discharge, the Company notes the Union's reading of Article 5 of the Parties' "Rules and Regulations" is overly broad in that the nine-month limitation of consideration of prior offenses is only applicable to General Rule 5. Such does not apply to other Rules and Regulations. There is no overall nine-month limitation contained in the Rules and Regulations, and this limitation only applies to specific rules on a rule-by-rule basis when it is explicitly incorporated. It is not an overall limitation on the disciplinary or Arbitration processes and does not appear in the Zero-tolerance Policy. To read the Rules and Regulations in the way suggested by the Union leads to a ridiculous and unlawful result wherein Employees may repeatedly and perpetually threaten to kill supervisors and/or members of Management provided they are mindful of the calendar and time their threats appropriately.

The Company contends it had a legal duty to discharge the Grievant and by continuing to employee him based on his history of threatening behavior would place the Company in jeopardy of violating the Occupational Safety and Health Act and make the Company potentially liable under Indiana State Law relative to negligent retention. The Grievant's conduct creates a significant risk to Employees and the only effective means available to protect the Employees from this Employee was to discharge him. His repeated threatening conduct created a significant risk to Employees, and if the Grievant were to continue to carry out his threats his supervisors and coworkers would face some

significant risk of serious physical injury. Supervisor Haga advised the Company that if the Grievant were to return to work via this Arbitration, he would resign his employment. The Grievant posed a safety risk to his supervisors and coworkers, and any remedial measure short of termination, as that previously issued, have failed to prevent the Grievant's threatening conduct herein.

It emphasizes that Employers have a legal obligation to prevent foreseeable risks of harm presented by Employees based on a negligent retention theory and when this Company became aware of the Grievant's threatening conduct toward a supervisor in October 2010 and issued a five-day disciplinary suspension, that remedy proved to be insufficient to change the Grievant's behavior. He threatened his supervisor again on May 15, 2013, after he acknowledged he received, read and understood, the Zero-tolerance Policy.

The Company emphasizes the International Brotherhood of Teamsters recognizes the Company's obligation under these circumstances and has published documentation as set forth in Company Exhibit-9 requiring a Company to protect against known risks of workplace violence. Despite the Union's assertions that it was not a Local 135 document, it nonetheless sets forth the responsibility of the Company to maintain a safe environment for its Employees. Because the Grievant posed a foreseeable risk of harm to Company's Employees and its supervision, the Company had an obligation under the law to eliminate that risk. Because less severe remedial measures proved ineffective, termination of the Grievant's employment was the only effective and absolute solution.

For these reasons, the Company requests the Grievance be denied.

UNION CONTENTIONS

The Union contends the Grievant did not violate the Company's Violence in the Workplace Policy because the Company did not establish its burden of proof that he committed any act of violence as defined in that Policy. While the Union acknowledges the Grievant was emotional, he was not verbally or physically threatening and certainly his conduct was not likely to result in Supervisor Haga's injury or place his safety or productivity at risk. In this regard, the Company failed to meet its burden to establish the Grievant committed the act for which he was discharged. Even assuming arguendo his conduct was threatening, such did not rise to the level of a summarily dischargeable offense and should have been dealt with under Rule 3 (w) of the negotiated Work Rules. That negotiated Work Rule provides that the offense of "witnessed and verified aggravated threat" is subject to a three-step progressive disciplinary procedure. The Union contends the Company is simply not permitted to disregard the contractual Work Rules and apply its own unilaterally promulgated policy.

Additionally, the Union, as was evident during the Arbitration proceeding, objects to the Company's utilization and consideration of the 2010 five-day suspension as being beyond the amnesty clause of the negotiated Work Rules. That language indicates, "Each offense against any Employee's record that is over nine (9) months old shall be forgiven and the Employee's record wiped clean." This amnesty clause is very clear and unambiguous providing that discipline over nine (9) months shall be forgiven. The Parties' selection of the word "shall" indicates it is mandatory and prohibits discipline more than nine (9) months old being considered for subsequent disciplinary matters. Moreover, it cannot be used to support the Company's discharge decision in any way since it is over nine (9) months old.

The Union emphasizes the Company claimed at the Arbitration Hearing for the first time this language referred to Rule 5 (b) of the negotiated Work Rules which indicates Employees who receive three "major offenses," suspensions or final warnings for a Phase II attendance infraction in a nine-month period are "subject to discharge." The language of the amnesty clause does not suggest it only applies to Rule 5 (b). It states it applies "to each offense against any Employee's record," and is not limited to "major offenses." In this regard, this language applies to all of the rules of the Rules and Regulations negotiated by the Parties. Rule 5 (b) relied upon by the Company, contains its own nine-month limitation, so for the Company to claim that the amnesty clause only applies to a 5 (b) infraction is superfluous. The amnesty clause is not necessary to limit the application of Rule 5 (b) to offenses occurring within a nine-month period. To interpret that language that way would render the amnesty clause meaningless. Such forfeitures are recognized by long-standing Arbitral principles as being avoided by Arbitrators. The Union emphasizes the Amnesty clause applies to all the rules contained within the Rules and Regulations. The Company recognized this prior to the Arbitration proceeding as evidenced by Business Agent Gillespie's unrebutted testimony that Mr. Stramer concurred at the Second Step Grievance meeting that the 2010 incident should not have been considered because it was beyond the nine months provided in the amnesty clause.

With respect to the merits of this matter, the Union contends the Grievant did not violate the Violence in the Workplace Policy because his conduct toward Supervisor Haga was not violent or threatening either in the office or on the Plant floor. Indeed, the Grievant was agitated and frustrated and spoke with his hands as he commonly does and

there is nothing threatening about someone speaking with his hands. Given the circumstances evident on the Plant floor as observed by those who took the site visit, it is clear that this is a very loud workplace and as such the Grievant was not screaming at Mr. Haga, but he had to raise his voice because while production was not occurring in the Plant at that time, the cleaning process was occurring which utilizes the same pipe systems for the production process. The Grievant did not touch Supervisor Haga, verbally threaten him with physical harm, nor make any intimidating gestures toward him. While he was passionate in pleading his case contesting the discipline he received, he did not do so in a threatening manner. During the entire 30 second interaction on the Plant floor, Supervisor Haga stood still and listened to the Grievant. The depiction as noted in the video indicates he did not back away or take any defensive maneuvers that might be expected if he was truly intimidated of if the Grievant was truly threatening him.

Assuming arguendo the Grievant engaged in threatening behavior, the Violence in the Workplace Policy requires that that conduct "likely to result in injury" or "otherwise place a victim's safety or productivity at risk." The Union emphasizes it has not been suggested the Grievant's conduct was likely to result in Supervisor Haga's injury or that it placed his safety or productivity at risk. He simply did not commit an "act of violence" as that term is defined in the Violence in the Workplace Policy. As such, he could not have violated that Policy.

The Union insists summary discharge was not the appropriate remedy under the terms of the Contract. Assuming the Grievant had engaged in threatening behavior, such misconduct would fall under Rule 3(w) of the negotiated Rules and Regulations

providing that the Employee who commits a "witnessed and verified aggravated threat to other persons" will be subject to a three-step progressive disciplinary procedure consisting of a three-day suspension, followed by a five-day suspension, and then followed by possible termination. These are the contractually agreed upon penalties for engaging in threatening behavior. The Company is not permitted to establish and enforce disciplinary policies that conflict with the negotiated rules provided for in the Parties' Collective Bargaining Agreement. Rule 3 (w) is indeed part of that Collective Bargaining Agreement, and even if the Arbitrator were to find the Grievant threatened Supervisor Haga, the mutually agreed upon level of discipline for that violation would be a three-day suspension pursuant to Rule 3(w). It certainly would not rise to termination under the Violence in the Workplace Policy.

Moreover, the Union contends the Company's reliance on Pretzels Inc. and Teamsters Local 414 Decision is simply misplaced in that the Pretzels Inc. case is distinguishable from this matter wherein the male Grievant in that matter uttered obscene and sexually offensive statements to his female supervisor while he was screaming at her, red in the face, yelling and waving his arms in the air. That matter involved different Parties, different Contract provisions, and different Company policies, notably an Anti-sexual Harassment Policy. In this regard, it has no precedential or persuasive value in this matter.

Moreover, given the Company's reliance on the "Teamsters' Safety and Health Facts" wherein it claims it somehow supports the termination of the Grievant, the Union acknowledges it has no reason to disagree with that document; however, such was disseminated by the International Brotherhood of Teamsters not Local 135. The

International is not a Party to this Collective Bargaining Agreement or to this Arbitration. While this Union agrees that violence in the workplace is a problem that must be addressed when it occurs, violence did not occur here. The Grievant did not engage in workplace violence. In this regard, there must be leeway for impulsive behavior in this industrial setting. The Grievant did not deserve to be terminated for what occurred.

For these reasons the Union requests the Grievant be reinstated to his prior position as a Filler Operator with uninterrupted Seniority and that he receive a make-whole remedy for all contractual losses.

DISCUSSION AND FINDINGS

The disposition of this matter hinges upon the determination of whether indeed the Grievant was terminated for just cause as required under Article 13 of the Parties' Collective Bargaining Agreement. The Company contends that indeed the Grievant was properly discharged under its Zero Tolerance Workplace Violence Policy. It notes the Grievant on two occasions has acted in a threatening manner, once leaving a threatening voice message for a supervisor regarding his disagreement with a schedule change and following the receipt of a written reprimand for failing to properly clean his work station. On both occasions, the Grievant's conduct clearly constitutes behavior addressed/prohibited in the Zero Tolerance Workplace Violence Policy. That Policy was distributed on November 15, 2012, and the Grievant acknowledged receipt and understanding of its content. The Company contends on May 15, 2015, the Grievant, after receiving a reprimand for failing to properly clean his work station, refused to accept the reprimand, stormed out of the office and waited for the supervisor at the door upon his return; and, when the Supervisor left the office and kept walking the Grievant

followed him yelling, screaming and demanding that he "turn around and face him like a man or else he would live to regret it." The Company emphasizes Union Steward Russ Castor witnessed this conduct exhibited by the Grievant and stayed nearby because he was "worried" the Grievant would strike the supervisor.

The Union contends the Company has failed to meet its burden of proof to establish the Grievant engaged in violent behavior in violation of the Company's Violence in the Workplace Policy because he did not commit any act of violence as defined therein and while his conduct may have been emotional, as was depicted on the DVD submitted into evidence, he did not engage in any physical or verbal threatening behavior that was certainly not likely to result in the Supervisor's injury or place his safety or productivity at risk as required under the Policy. Assuming arguendo his conduct is deemed threatening, it did not rise to the level for his summary discharge and should have been dealt with under Rule 3 (w) of the negotiated Work Rules providing that the offense of "witnessed and verified aggravated threats" is subject to a three-step progressive disciplinary procedure. These are contractual work rules agreed to by the Parties that must trump that contained in the unilaterally promulgated Zero Tolerance in Workplace Violence Policy relied upon by the Company.

Initially, the Company has raised an incident that occurred in 2010 wherein the testimony of record demonstrates Plant Manager Stramer agreed with Union Business Agent, Mike Gillespie, was not properly in the Grievant's personnel file based on the nine-month amnesty clause set forth in the negotiated Work Rules. That language as set forth in the Collective Bargaining Agreement at page 85 indicates, "Each offense against any Employee's record that is over nine months old shall be forgiven and the Employee's

record wiped clean." This language, in the opinion of the Arbitrator, is clear and unambiguous indicating disciplinary action over nine months old is to be forgiven and the Employee's record relative thereto be wiped clean. That language is mandatory in nature and indicates the Parties have contemplated some type of timeframe upon which prior disciplinary matters can be considered when assessing subsequent disciplinary action. That language contained at pages 84 and 85 of the Parties' negotiated Agreement falls under the titled section of "Miscellaneous" wherein the penalties for "Minor" and "Major" offenses are set forth with the definition of each. It is clear to the Arbitrator the Parties contemplated and intended that that "Miscellaneous" provision apply to all negotiated Work Rules as set forth beginning at page 79 of the Collective Bargaining Agreement titled, "Rules and Regulations."

It is clear based on the construction of this Appendix to the Collective Bargaining Agreement that the nine-month "amnesty clause" apply to "…each offense against any employee's record…" . That language, as drafted, indicates "each offense" that is contained in an Employee's personnel file that is "over nine months old" shall be forgiven. As such, it cannot be considered for subsequent disciplinary action. It is clear to the Arbitrator the Parties intended there be some type of "wipe-out clause" or "amnesty clause" which affords Employees to have their respective "employment slates" wiped clean of any prior infractions that are older than nine months and cannot therefore be taken into consideration when subsequent disciplinary action is considered/issued. That language applies to all Rules and Regulations based on the manner in which the Rules and Regulations Appendix is constructed and the fact it is titled "Miscellaneous" suggesting to the Arbitrator it indeed applies to all minor and major offenses as addressed

in that provision. If indeed the Parties had intended otherwise, they could have easily made that provision read in the manner relied upon by the Company. Clearly it is meant to be applicable to both minor and major offenses, thereby providing Employees an opportunity to improve their personnel files with respect to disciplinary action. To hold otherwise would render that provision, negotiated by the Parties, meaningless and adversely impact any Employee, who may have encountered disciplinary action, to improve their personnel record.

* * * * *

The determination as to whether the Grievant engaged in conduct addressed/prohibited in the Zero Tolerance Workplace Violence Policy is depicted in the DVD of the footage caught on video cameras strategically placed within the office/facility. Based on this extensive evidentiary record, the Grievant is a victim of his own demise. He chose to engage in self-help rather than to exhaust his claim through the Grievance Procedure. In doing so, he allowed his agitated emotional state to cost him his job. He has no one to blame but himself.

It is clear the Grievant was issued disciplinary action relative to cleanliness of the workstation for which he had received prior disciplinary action and that he took exception to on the day in question. After exiting the office after he was issued his disciplinary action the Grievant is depicted returning to the door of the office and then viewed following the supervisor who issued that disciplinary action. The Union Steward, who was called to be present and represent the Grievant during the issuance of the disciplinary action of the written reprimand, indicated to the Supervisor, it was his belief that indeed the Grievant was in such an angry and emotional state a physical encounter

would have likely ensued. He is depicted following the Grievant and Supervisor Haga until such time Haga turned to hear the Grievant's concerns relative to the disciplinary action. Haga indicated he reluctantly turned to listen to the Grievant and purposely failed to make eye contact with him – he indicated, "I was absolutely 100% afraid for my personal safety. I thought I was going to get hit". Clearly, no one should be expected to be treated in this regard for simply discharging their respective job duties with which the recipient disagrees. Instead of filing a Grievance challenging the discipline, the Grievant engaged in prohibited workplace conduct and only he can accept the attendant consequences.

Indeed, while not negotiated with the Union herein, such workplace violence policies have been deemed reasonable in light of their intended objective and overall scope of application to curtail, and hopefully eliminate, instances of workplace violence perpetuated by or against Employees while on Company property. That Policy indicates that the Company will not tolerate any acts of violence in the workplace of a verbal or physical nature that are likely to result in injury or which otherwise places a victim's safety or productivity at risk. The conduct engaged in by the Grievant was viewed by the Supervisor and the Shop Steward as threatening in nature; otherwise, he would have had no reason to follow the two men from the Office. Clearly, the Grievant has no one but himself to blame.

It is clear based on this evidentiary record that the Employer engaged in proper steps to place the Union on notice that indeed it was promulgating, distributing and implementing its Violence in the Workplace Policy dated November 15, 2012. The Grievant's conduct herein can best be summarized based on the depicted actions of Shop

Steward Russ Castor, who followed the Grievant and the Supervisor from the Office after his "official" Union business had concluded, as that prohibited under the Workplace Violence Policy. The Shop Steward had no obligation to follow the two men except, as relayed through the Company's investigation of these events, to hopefully ensure that no physical altercation would occur. It is clear based on the site inspection engaged in by the Arbitrator and the Parties that the workplace is indeed loud even during the cleaning process and would require louder than normal communications. You would have to raise your voice to engage in any type of communication whether it is passionate, emotional or otherwise. Nonetheless, the louder than normal, communications of the Grievant coupled with his depicted emotional state and the Steward's recognition thereof, indicates the Grievant's conduct rose to the level contemplated under and prohibited in, the Violence in the Workplace Policy.

The concept of the intent of an individual relative to what is observed and/or acted upon can oftentimes be determined by their actions – the Grievant's clearly agitated/angry state; the Supervisor, who elected not to make eye contact with the Grievant; and, the presence of the Shop Steward, whose "official" Union business had ceased, but who followed the two men from the Office based on the Grievant's obvious state of mind. Based on these actions, the Grievant's egregious conduct exhibited on the day in question is found to have violated the Violence in the Workplace Policy for which the penalty of termination was warranted. Safety in the workplace is of tantamount importance requiring at times extreme measures to ensure that events such as those involving this employee are not repeated. To return this employee to this workplace would run counter to the very objective being sought through the Policy – a safe work

environment where employees can have disagreements; but, have those disagreements resolved through civilized measures and avoid at all costs the conduct engaged in by this individual. The Company's decision to terminate the Grievant, for this lone offense, was for just cause.

As previously indicated, the prior instance(s) of disciplinary action relative to the Grievant's conduct however characterized are not subject for consideration based on a nine-month amnesty clause set forth in the negotiated Rules and Regulations applicable at this facility. As such, his employment status must be assessed based on his conduct depicted during the incident that occurred May 15, 2013. The Company's Violence in the Workplace Policy is deemed to be reasonably related to an otherwise viable and necessary objective. The Grievant's conduct is simply that which that cannot be tolerated in this or any other employment setting. In this regard, termination of employment is warranted and was for just cause. As a result thereof, and in consideration of the record as a whole, there are no mitigating circumstances which can be considered to temper the penalty as imposed. Accordingly, the Grievance must be, and is, denied.

AWARD

The Grievance is denied.

David W. Stanton

David W. Stanton, Esq.
NAA Arbitrator

January 12, 2015
Louisville, Kentucky