In the Matter of the Arbitration between	)	
	)	
SHELL CHEMICAL COMPANY	)	
NORCO PLANT	)	Discharge
	)	Grievant: Michael Bares
and	)	FMCS 06-52163
	)	
UNITED STEELWORKERS OF AMERICA	)	
LOCAL UNION 750	)	

BEFORE : Mark I. Lurie, Arbitrator

APPEARANCES

SHELL CHEMICAL COMPANY : Chris Butler, Esq.
UNITED STEELWORKERS OF AMERICA : Louis L. Robein, Esq.

HEARING LOCATION : Hilton Hotel
Kenner, Louisiana

DATE OF HEARING : September 1, 2006

This is a grievance arbitration decision issued pursuant to the collective bargaining agreement effective February 1, 2002 to January 31, 2006 and year-to-year thereafter (the "Agreement") between the Shell Chemical Company, Norco Plant, (the "Company") and the United Steelworkers of America, Local 750 (the "Union"), successor to PACE Local 4-750, representing all hourly-paid operating, maintenance, warehouse and laboratory employees at the Company's Norco, Louisiana Chemical Plant. Upon due notice, the parties convened at the prescribed arbitration hearing time and place: 9:00 a.m. on September 1, 2006, at the Hilton Hotel in Kenner, Louisiana. The advocates presented their respective positions and the evidence in support thereof; and were afforded the opportunity to cross-examine and rebut the testimony of the opposing party's witnesses. A transcript of the hearing was made and constitutes the official record. The parties timely submitted written closing arguments, that were received by the Arbitrator on Wednesday, October 19, 2006, as of which date the hearing was declared closed.

ISSUE

The parties stipulated that the issue was whether the discharge of Michael Bares (the "Grievant") was for just cause and, if not, what the remedy should be.

FACTS

The Company utilizes water, steam and compressed air in its chemical plant and refinery. Its Utilities Department provides those utilities. The Grievant is an *Instrument Technician* assigned to the Utilities Department. At the time of the events in this case, he had been employed by the Company for 25 years. He was discharged for his conduct on July 15, 2005; the intervening delay in bringing this grievance to arbitration was caused by factors beyond the parties' control. The parties agreed that the dispute was arbitrable and properly before the Arbitrator. The Agreement does not contain an explicit *just cause* provision, but the parties stipulated that they had historically applied a *just cause* standard for discipline, and that the Arbitrator should do so in this case. The parties also stipulated that it was their practice to extinguish prior disciplinary actions after two years, if there has been no recurrence. The discharge of the Grievant was not effectuated in writing, but the Company stipulated that it was based solely upon his conduct on July 15, 2005, and not upon any prior misconduct. Among the charges against the Grievant was that he had violated the Company's published policy against harassment entitled *Respecting our Differences, Preventing Harassment in the Workplace* (the "*Harassment Policy*"). The *Harassment Policy* was first published in 1995 and states, in relevant part, the following:

> Shell's Equal Opportunity policy, which is posted on bulletin boards, states that harassment on the basis of an individual's race, color, religion, sex, national origin, age, physical or mental disability, citizenship, or status as a special disabled veteran or veteran of the Vietnam era is a prohibited form of discriminatory activity.
>
> Harassment and the creation of hostile work environments... will not be tolerated by the Company and should not be tolerated by Shell employees.
>
> Anyone found responsible for creating a hostile work environment or harassing another individual will be subject to corrective action up to and including termination of employment.
>
> A key in identifying workplace harassment often rests on the EFFECT of the behavior on the recipient, not necessarily on the INTENT of the sender.
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> The circumstances regarding alleged offensive behavior must be examined to determine whether a hostile work environment has been created. Determining factors may include the frequency of the offending conduct, its severity, whether it is physically threatening or humiliating, or whether it unreasonably interferes with another's work performance or

psychological well-being. Any of these factors alone or in combination can constitute harassment.

On July 15, 2005, outside contractors were brought into the plant to repair an air compressor that had been off-line for the prior 9 months. Both the Grievant and Mr. Trevor Taylor, an Instrument Technician whose duties included overseeing the work of the outside contractors, testified that they were under duress to return the compressor to operational status as soon as possible, because other production machinery depended upon the compressed air it furnished. After making repairs, the compressor was started up, but functioned erratically. Mr. Taylor requested and was granted a permit from Operations to again take the compressor off-line and make additional repairs.

According to Mr. Taylor, the Grievant asked him why the compressor repair work had not been done earlier, and Taylor said that he did not know. The Grievant then asked Taylor whether he – Taylor – was the person who had recommended that the repair be done that day, to which Taylor replied "yes". The Grievant, who is white, then said to Mr. Taylor, who is African American, "Abraham Lincoln really fucked up when he freed you all." There ensued a silence between the two, estimated by Mr. Taylor to have been about 30 seconds duration. (Mr. Taylor testified that he did not respond because he thought the Grievant was frustrated with the process of bringing the compressor back on-line, and he – Taylor – did not want to aggravate the situation.) After the interval of silence, the Grievant said "I'm joking." When asked, during the arbitration hearing, why he had made this comment, the Grievant stated that he had just been "messing with" Mr. Taylor, and that he would not have made the statement had there been other witnesses around.[1]

The Grievant carries a knife, which he utilizes in the course of his work to cut lock-out tags and for other purposes. When advised by the contractors that their repairs were completed and the compressor could be brought back on line, the Grievant used his knife to cut lock-out tags of the valves, so that the valves could be re-opened. However,

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[1] The Grievant's testimony was the following:

> "And I was still doing the same thing, just messing with him. There was no other witnesses around. I wouldn't have done it in front of a bunch of people. And I made the comment about Abraham Lincoln... 'Abraham Lincoln messed up when he freed you all.'"

he also used the knife in a manner that contributed to his discipline: While standing 10 to 12 feet from Mr. Taylor, making eye contact with Mr. Taylor, he drew the knife and slid the blade down his left arm, removing the hair from his arm, thereby demonstrating the blade's sharpness. The Grievant's description of his conduct, in his testimony before the Arbitrator, was the following:

> "And I pulled knife like this (indicating)... My sleeves were already rolled up to the top... [the] thing with my arm. It was not to alarm him. Just to shock him.... Banter. Horseplay... I was just messing with Trevor at the time. A lot of people did. And a just normal, ongoing thing. Some people know that I do that. I think I get along good with him. And certain people, I don't."

Asked what he had intended to convey by shaving his arm, the Grievant responded "Nothing, really." Mr. Taylor also testified about the gesture:

> "And he took his knife out of his pocket and shaved his arm. I guess he was just showing me how sharp his knife was."

Mr. Trevor testified that, after the Grievant shaved the hair of his arm, he made two gestures with his knife. With the first, he mimed cutting off his own tongue. With the second, he mimed slitting his own throat; this was done by drawing the back of the blade across his neck. The Grievant then used the knife to cut a lock-out tag from a valve. The Grievant does not deny having made the gesture of slicing his tongue; he asserts that he does not recall (1) having done so[2] or (2) having admitted that he had done so during an investigative interview conducted by Human Resources Representative Rusty Donaldson. (Mr. Donaldson testified that the Grievant made the admission.[3])

Mr. Taylor testified that he was "positive" that the knife gestures came after the Grievant made his "Lincoln" statement. The Grievant testified that the knife gestures came before the "Lincoln" statement.

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[2] The Grievant's testimony was the following:

> "Sir, I don't recall making that gesture with my tongue. But if I did – I can't -- I don't remember doing that... I don't recall specifically doing a tongue gesture."

[3] Mr. Donaldson testified as follows:

> "I asked him if he had made the gesture with his tongue and the sliding motion with the knife. And Mr. Bares actually took the lead at that point and said, 'You mean like this?' He stuck his tongue out and made a swiping motion against his tongue. And I said, 'Yes.' He said, 'Yes, I did that.' And I asked him at that point why would you do that and do you perceive that as being a threatening or intimidating gesture to someone. He said, 'No, not if you know me, because I do that all the time.'"

After the Grievant removed the lock-out tags, the Grievant went to the control panel to start up the compressor, and Taylor remained in the vicinity of the compressor to make certain that the contractor's crew performed the requisite site cleanup. The two did not speak, but went about their work.

There were no other witnesses to the incident. Later that same day, Mr. Taylor reported the Grievant's racial slur to the Grievant's foreman, Mr. Donald Gauthe, but did not report the Grievant's knife gestures. Mr. Gauthe asked Mr. Taylor whether he wanted action taken against the Grievant; Mr. Taylor answered that he did not. Mr. Taylor subsequently prepared a written statement about the incident, from which he omitted reference to the Grievant's knife wielding.[4] Asked, during the arbitration, why

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[4] July 15, 2005, the date of the incidents, was a Friday. Mr. Taylor testified that he wrote his statement the following Monday. The text of his written follows; with corrections (for comprehensibility) but no material substantive alterations by the Arbitrator:

> On Friday July 15, 2005 air compressor 5532 was taken out of service to secure loose/dangling vibration lead wires into trays. Some of the trays were pre-mounted in order to minimize the down time. At approximately 1:00 PM I informed the operations foreman (Daniel Gauthe) that we were finish and it was OK to restart the compressor. I also told him that we had some house keeping to do and it could be done while the machine up and running. I was assisting the Turner's instrument mechanic Charles Garton who was assigns to the job with the area clean up when Michael Bares appeared. Apparently Mike was there to start the compressor but he had some questions before he did, questions and answers as follows:
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> Mike: What did you have to do to the compressor?
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> Trevor: Secure loose/dangling vibration lead wires into cable trays.
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> Mike: Did you have to stop the compressor to do your work?
>
> Trevor: Yes! The compressor vibrates as it shuts down and I did not want to take the risk of its shutting down while I was disconnecting and re-connecting the lead wires.
>
> Mike: I didn't have to block in the steam for the work you had to do.
>
> Trevor: No comment.
>
> Mike: The compressor was down for over eight months; why didn't you do that work while it was down?
>
> Trevor: Mike I really don't have an idea why it wasn't done before now, but I am trying to do the thing.
>
> Mike : What is the right thing'?
>
> Trevor: Securing the instrumentation because they can cause an unscheduled shutdown if they are not properly secured.
>
> Mike: Did you asked have the compressor shutdown?
>
> Trevor: Yes!
>
> Mike: Abraham Lincoln fucked up when he freed you all. *[continued]*

he had not mentioned the Grievant's knife gestures when he initially reported the incident, Mr. Taylor testified that he had been aware of people having been discharged for using knifes; that he had not wanted to see the Grievant lose his job; and that he thought that the Grievant would instead receive counseling from the Employee Assistance Program. (He testified that he had thought that his reporting of the racial slur alone would engender the counseling.)

An investigative interview conducted by Human Resources Representative Donaldson was attended by the Grievant, Union Representative Aaron Gordon, and Utilities Foreman John West, the latter two men being African Americans. The Grievant asserted, during the meeting, that he had not made the "Lincoln" statement. After the meeting concluded, he acknowledged to Mr. Donaldson that he had made the statement. Mr. Donaldson reconvened the meeting, and the Grievant acknowledged making the statement and apologized to Gordon and West for wasting their time and not being completely truthful with them.[5]

Instrument Mechanic Curtis W. Spears Jr. testified that he had previously seen the Grievant demonstrate the sharpness of his knife by shaving his arm. He did not testify that he had seen the Grievant mime slicing his tongue or throat. Rockne J. Hymel, an Operator in the Utilities Department, testified that his fellow employees often use racial references when jesting with one another, and that Mr. Taylor had often used the term "nigger" and "nigger-rig" in a joking, self-deprecating fashion. Mr. Spears testified that, subsequent to the events in this case, he had heard Mr. Taylor use variations of the term "nigger" in jest. On the other hand, Mr. Taylor testified that, while there had been a day,

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Trevor: No comment, nothing was said for approximately 30 seconds.

Mike: I am joking.

The conversation ended at that point and he proceed to line up steam to the machine. I stood by until he started the compressor and lined it up to process. I told Charles to continue with his house keeping and I went back the control room and explained to his foreman what had happened. His foreman asked if I wanted him to take actions and I told him no.

[5] The Grievant testified as to the reason he had not admitted to the "Lincoln" statement during the meeting:

> "I felt uncomfortable offering about coming clean at first because even though those comments were directed at Mr. Taylor, and while I didn't think he would have took offense to that because we had a good working relationship, I felt that they might be taking offense to that. And I didn't want to risk offending them. I'm sure they would be sensitive to comments like that."

20 years earlier, when he and other employees had engaged, off-site, in humorous mutual racial deprecation, no similar exchange had since occurred.[6] Mr. Taylor added that while, prior to adoption of the *Harassment Policy*, employees had often used the term "nigger-rig" to indicate something jury-rigged, they had become more circumspect since its adoption and now use the term "less and less"; and that he had not used the term "nigger-rig" in the past 10 years.

Mr. Taylor has been with the Company for 24 years. He testified that he has known the Grievant for 15 years and that, although the two have never socialized outside of the workplace, inside the workplace they have gotten along; that the Grievant can be temperamental and, for that reason, is not someone that can be joked with, but that he is "a good person." Mr. Taylor opined that the Grievant is not a racist, and that he is a "good friend."

In the arbitration hearing, Mr. Taylor was asked whether he had felt threatened by the Grievant's knife gestures and answered that he had but that, despite the events of July 15th, he still did not want the Grievant to lose his job, but only to obtain help from the Company's Employee Assistance Program. He testified that the Grievant had previously shown him respect and had not previously acted in a racist manner, and that the Grievant had seemed to apologize for the "Lincoln" statement – by saying he was joking – but had then made the knife gestures.

The Grievant was discharged for his conduct on July 15, 2005. Industrial Relations Manager Jaunty Rutter testified that the Company took the action because it could not tolerate an employee's making threatening gestures with a knife. Quoting Mr. Rutter, "We have a policy that is clear about creating an environment that is free of harassment and Mr. Bares' behavior doesn't fit [the Policy]."

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[6] Mr. Taylor testified that, on that day, he had made the following statement about himself:

> "When I was in Jamaica, I was an islander. But now that I've come to the States, I'm considered a nigger."

THE UNION'S POSITION

There is no evidence that the knife gestures were related to the racial comment; the Grievant had, in the past, made similar gestures in jest, in the presence of other employees. Taylor's testimony about the timing of the gestures – that they came after the racist remark – should not be credited over the testimony of the Grievant that they preceded the remark: the Grievant's testimony on this point was specific and detailed while Taylor's testimony was vague. Taylor's assertion that he had been intimidated is inconsistent with his failure to have immediately reported the knife gestures to Management, and is also inconsistent with the facts that the Grievant owned knives and used them in his work; that he sharpened his coworkers' knives; and that he had previously demonstrated, to other employees, the sharpness of his knife by shaving the hair on his arm.

It is clear from the record as a whole that, had the Grievant made only the knife gestures – and not the Lincoln statement – he would not have been discharged. Discipline must be commensurate with the severity of the offense. The Grievant's inappropriate comment, to a coworker and friend of 15 years, did not warrant termination. The comment did not evoke fear in Mr. Taylor or cause him mental anguish; nor did Mr. Taylor think it warranted the termination of the Grievant's employment, but only that the Grievant receive counseling from the Employee Assistance Program. Mr. Taylor's state of mind in response to the comment is probative of the absence of harassment; he testified that he was offended by the comment, but did not consider himself to have been a victim of harassment, as the law views that charge or as contemplated in the *Harassment Policy*.

During the arbitration hearing, the Company cited, as a reason for discharging the Grievant, its need to enforce the *Harassment Policy* so as to avoid vicarious liability for the Grievant's future conduct. The Union asserts, however, that the Grievant's misconduct toward Mr. Taylor would not have resulted in liability to the Company under the prevailing Supreme Court standards set forth in *Faragher v. City of Boca Raton*[7], wherein the Court ruled, *inter alia*, that

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[7] In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Court enunciated the standards for determining vicarious employer liability, under Title VII of the Civil Rights Act of 1964, for a hostile

> "Mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not constitute a violation of Title VII by the employer;
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> that "discourtesy or rudeness should not be confused with racial harassment";
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> that "a lack of racial sensitivity does not, alone, amount to actionable harassment"; and
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> that incidents of harassment "must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive."[8]

The Grievant's racial comment was a single utterance, and was a departure from his conduct prior to that date. His single comment did not rise to the level of racial discrimination. There is no evidence that Taylor's work performance suffered or that he was psychologically harmed. The fact that he still considers the Grievant to be a friend belies the argument that his presence in the workplace would create a hostile work environment for Taylor, or for any other minority employee.

As for remedy, the Union seeks the Grievant's reinstatement with back pay for the duration of his discharge, and that any reference to the charges be expunged from his personnel record. In the alternative, if the Arbitrator determines that discipline was warranted, the Union seeks the imposition of a lesser penalty than discharge; e.g., a reprimand or short-term suspension, again with the restoration of back pay for the duration of his discharge.

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work environment, where the environment was caused by supervisor-inflicted harassment. The Court applied the standard for employer liability established in earlier cases, that

> "Mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee"

would not constitute a violation of Title VII by the employer. The Court observed that "discourtesy or rudeness should not be confused with racial harassment" and that "a lack of racial sensitivity does not, alone, amount to actionable harassment." The standard, applied by the Court, was to examine all of the workplace circumstances, including the

> "...frequency of the discriminatory conduct, its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

[8] The Court cited *Carrero* v. *New York City Housing Auth.*, 890 F.2d 569, 577 (CA2 1989) which, in turn, cited *Lopez* v. *S. B. Taylor, Inc.*, 831 F.2d 1184, 1189 (CA2 1987).

THE COMPANY'S POSITION

The Company's written policy prohibits harassment:

> "Anyone found responsible for creating a hostile work environment or harassing another individual will be subject to corrective action up to and including termination of employment."

The Company does not tolerate someone bringing in a knife and making threatening gestures with it. Physical threats have long been held to be good cause for termination of employment, as exemplified by the following arbitration decisions.

- The grievant in *Johnston Coca-Cola Bottling Group, Inc and Teamster Local 215*, 106 LA 88 (Brunner 1995), was discharged after making threats about his former spouse, co-workers, and managers.[9]

- The grievant in *Michigan Milk Producers Assn. and United Dairy Workers, Local 86*, 114 LA 1024 (Patrick A. McDonald 2000), upheld a discharge for making

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[9] Here are the facts of the case in *Johnston Coca-Cola*:

> The employee had a "lengthy" arrest record and convictions, in 1992, for hunting migratory birds with a shotgun in excess of the limit, and for dealing in a controlled substance, for which he was sentenced to three years probation. In 1993, battery charges were filed against the employee; no conviction resulted.
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> In February, 1994, the grievant told an acquaintance that he was going to go to the restaurant where his wife worked, and "waste" everyone. The Coca-Cola branch manager admonished the grievant about the seriousness of such talk, and told not to do it again. On May 4, 1994, the grievant, having had a disagreement with an account manager, stated that he was going to, "have to get some shotgun shells and take care of the matter." The grievant claimed that he was joking. He was issued a three-day suspension and told that he would be discharged if he ever issued threat remarks again. On May 20, 1995, the grievant was displeased with the quantity of product ordered by an account manager, and stated "I will 'take care' of [the account manager] and his wife." As a result, the grievant was discharged.
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> Coca-Cola's rules of conduct prescribed progressive for "threatening, intimidating, coercing fellow employees": verbal reprimand for the first incident, verbal reprimand for the second, three-day layoff for the third, and discharge for the fourth. Arbitrator Brunner ruled, in relevant part, that
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> > "When agreed contract language itself provides the basis ... for disciplinary or discharge action and the facts match the basis, no further inquiry is necessary..."
> >
> > "What is clear is that this Grievant has, over time, exhibited a behavior that, sadly, appears in tune with the times and that the Company recognized and proscribed.
> >
> > "To accept the Union's argument that he should be reinstated on some technical just cause omission ... leaves the Company nakedly exposed to liability... if the Grievant were returned to work and he later committed a violent act, or even kept on unnerving co-workers with continued threats."

threatening remarks, even though the Union dismissed the remarks as "smart ass comments." [10]

- Inappropriate actions involving deadly weapons are also grounds for termination. The grievant in *Sandusky Cabinet, Inc and United Paperworkers International, Local 7643,* 112 LA 373 (Charles A. Morgan Jr. 1999), was discharged for firing a starter pistol at work. Even though the arbitrator was convinced that the grievant's actions were without evil intent and that he had no intention of intimidating or frightening his co-workers, the discharge was upheld.[11]

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[10] In *Michigan Milk Producers*, the grievant had been employed by the Milk Producers for over 20 years and, at the time of his discharge, was working as a maintenance mechanic.

In January 1999, he engaged in a locker room altercation with another employee, and was issued a reprimand for violating a work rule against making vicious or malicious statements.

The grievant frequented, over several years, a barber shop located near his place of work. His barber, a woman, testified that the grievant was often angry with his managers and co-workers; used vulgarities when alluding to them; and asserted that they were engaged in a conspiracy against him. In November, he entered the barber shop "angry, loud and boisterous." A television in the barbershop was tuned to the news, and reported a shooting incident in another city. According to a witness whom Arbitrator McDonald found to be credible, the grievant exclaimed, "Yeh, a guy should go down to the creamery and start at the east end and work his way down to the west end...." The Grievant angrily used an arm gesture to signify moving from one end of the facility to the other. Minutes later the grievant stated "I would be happy if that happened." Then, quieting his voice, he said, several times, "I'm that close to doing that myself," gesturing with his thumb and forefinger a fraction of an inch apart. The grievant then said: "It would make me feel better." The grievant changed the subject, telling the barber that he had attempted to contact her, but had been unable to do so because he didn't have her home number. The barber replied that if he wanted to contact her, just call the shop and leave word. The grievant then responded by saying: "I want your phone number before I leave, or this shop might be firebombed" and "I can get your number from my brother." The barber reported this to the Milk Producers' plant manager and to the police.

Arbitrator McDonald gave credence to an expert witness on workplace violence who, cited the grievant's

> "...pattern of anger, expressions of resentment, bearing a longstanding specific grudge, an absence of normal inhibitions, an interest in weapons and shooting, and an escalation of such behavior..."

as indicators of a "potentially violent employee." Arbitrator McDonald concluded that

> "The Grievant's actions demonstrate an escalating pattern of hostility and misconduct. The Grievant at no time provided an explanation for his remarks or conduct. The Grievant showed no remorse for his conduct. The total record does not provide a justification to set aside the discharge and order the reinstatement of the Grievant."

[11] In the *Sandusky Cabinet* case, Sandusky had published Work Rules differentiating two Groups of prohibitions: violation of a Group 1 work rule was cause for immediate discharge; violation of a Group 2 work rule was cause for discharge or a lesser penalty. Included in the Group 1 prohibitions were "Willful... violation of any safety or health rule," "Possessing weapons, firearms, or explosives on Company property," and "Violation of any local, state, or federal law on Company property." The Work Rules contained the following admonition:

- Any inappropriate action with a deadly weapon that could be perceived as a threat or attack is grounds for termination, regardless of mitigating factors such as seniority. In *Piedmont Publishing Company, Inc and Winston-Salem Mailers Union, Local 133,* 97 LA 739 (Dennis R. Nolan 1991), the grievant took a swipe at a truck driver, with a knife he had been using in his work, cutting the driver's shoulder. Arbitrator Nolan found that there was just cause for the discharge, notwithstanding that the employee had been with Piedmont for 17 years and had previously been issued only a single, minor discipline: a letter of warning for having failed to report for an overtime assignment.[12]

"Some infractions are so serious that application of progressive discipline is not appropriate. In such situations, the first infraction will warrant immediate discharge."

The grievant, while on the workroom floor, extracted a pistol from his jacket, pointed it at the ceiling, and fired twice; he announced that it was a "starter pistol," and replaced it his jacket. He was discharged, notwithstanding that he had been employed by Sandusky for an aggregate of 25 years. Arbitrator Morgan upheld the discharge, finding that the Work Rules were reasonable; that the grievant had knowledge of them; that the Grievant violated the aforesaid three Group 1 prohibitions; that the firing of the gun had been an aggravating factor; and that two other employees had been discharged for the brandishing of potentially dangerous instruments.

[12] In *Piedmont*, the grievant, a journeyman mailer, got into an argument with an independent hauler over whether the driver would move his truck. The driver threw a balled-up piece of paper at the grievant, and the grievant responded by swiping at the driver with a knife he had been using in his work. (Arbitrator Nolan found evidence of an intentional swipe to be more credible than the claims (1) that the grievant had swiped at the ball of paper in flight or (2) that he had only attempted to push the driver away.) The knife cut through the driver's jacket and into his shoulder. The driver drove off and the Grievant told his foreman that he had "popped" the driver with his knife. Arbitrator Nolan observed that the Company presented little evidence of how Piedmont had treated other employees involved in fights. He also found, however, that Piedmont "had a long-standing and well-known rule against fighting at work" and that "[Piedmont's] decision to fire the grievant complies with the Agreement." Here is the portion of Arbitrator Nolan's decision relevant to the principle of mitigation of penalty based upon seniority:

"The Union's most compelling argument concerns the appropriateness of the penalty. Although Rule (d) states that fighting "Is grounds for dismissal" the Company cannot simply ignore mitigating factors. One of those factors is long seniority. Had the Grievant merely pushed Davis, for example, discharge would be unreasonably severe for a first offense by a senior employee. Particularly given Davis' provocation What distinguishes this case, however, is that instead of pushing Davis, the Grievant swung at him with a knife. By any possible standard of workplace conduct, an attack with a deadly weapon is intolerable; indeed, it rates at the top of any list of industrial offenses. The greater the offense, the less protection seniority offers the offending employee. [This Arbitrator's underlining]

A more tolerant employer would have suspended rather than fired an employee in the Grievant's position, but it is not the arbitrator's job to second-guess the chosen penalty or to substitute his judgment for that of the employer. An arbitrator can only determine whether the discipline met the test of reasonableness (or such other term as the agreement may provide). In this case I cannot find

In the instant case, there was just cause for discharge. The Grievant intentionally insulted a staff employee and displayed threatening gestures toward him with his knife. The Grievant has shown no remorse for his actions, characterizing it as a mere "joke." In his testimony, he rearranged the order of his actions – claiming that he brandished his knife before "joking" that Lincoln had "fucked up that day when he freed you all." This was his attempt to be able to claim that the last thing he said to Taylor was that he was "joking." Similarly, during the investigatory interview, the Grievant blamed stress and frustration for letting "his mouth overload his ass." However, at the arbitration hearing, he dropped that excuse in favor of an "I-was-only-joking" defense.

At the hearing the Union noted that Mr. Taylor had used derogatory racial language himself. However, Mr. Taylor made the comment about himself; not about someone else. And, as noted in the *Harassment Policy*, harassing another employee because they "asked for it" is not acceptable.

The Union's argument that the Grievant had not interfered with Taylor's work and that Taylor had not really felt "threatened" misses the point that the Company has an obligation to its employees: to furnish them with a workplace that is free of harassment. The Company cannot look the other way when an employee engages in inappropriate conduct, and it cannot tolerate insulting and demeaning actions that are rationalized by the offending employee as only "messing" with his co-worker, or engaging in "banter" or "horseplay." There would be no protection against a hostile work environment if the offending employee, to avoid punishment, could simply declare that he was "joking." The declaration by the offending employee, made after he realizes he is in trouble, of innocent intentions is not a basis for determining the appropriate level of discipline. .

An intentionally insulting racial remark to a staff employee is a serious offense. Following the remark with gestures with a lethal weapon – indicating that the blade is so sharp you could cut a throat – is intolerable. The Grievant's misconduct was severe and warranted a correspondingly severe punishment.

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it unreasonable for an employer to fire an employee who attacked someone with a knife, even if the employee had long seniority. I must therefore deny the grievance."

DECISION

Mr. Taylor's testimony regarding the events of July 15, 2005, insofar as it differed from that of the Grievant, was the more credible. Neither man was forthcoming, initially, with all of the salient events of that date, and both had the same purpose: to mitigate the consequences of the Grievant's misconduct. But Mr. Taylor's motive was altruistic, while that of the Grievant was self-serving, a distinction that reflects well on the credibility of the former and poorly on the credibility of the latter. And, while Mr. Taylor initially misled by omission, the Grievant made statements to Management that he knew, at the time, to have been factually untrue. Mr. Taylor's recollection of, and his testimony about the sequence of events on July 15th were both precise and consistent. The Grievant's recollection – specifically his uncertain recall of (1) whether he had mimed the slicing of his tongue and (2) had admitted having done so to H.R. Representative Donaldson – is tenuous and impairs his credibility. Based upon the foregoing assessment of credibility, the Arbitrator finds that the Grievant made his "Lincoln" comment before he made his knife display.

The Arbitrator finds that the statement, "Abraham Lincoln really fucked up when he freed you all" was an expression of resentment by the Grievant against Mr. Taylor, engendered by Mr. Taylor's ordering that the compressor be taken off line. There was no bantering prior to the utterance of this statement. Nor was the context before or after one of light-heartedness, "horseplay" or frivolity. This was a naked racial slur, obviously intended as such; it was not a "joke."

Mr. Sparks testified that he had previously seen the Grievant shave the hair on his arm to demonstrate the edge on his knife's blade, and the Arbitrator finds it likely that the Grievant had done so previously. The Arbitrator does not deem this demonstration to have been a hostile act. However, there is no credible evidence that the Grievant had ever before mimed slicing his throat or tongue within view of other employees, prior to his doing so before Mr. Taylor. These gestures were manifestly hostile and, given their proximity in time to the racial slur, constituted part of a single, intentional expression of hostility.

In the arbitration hearing, Mr. Taylor testified that he had felt threatened by the Grievant's knife gestures. However, the degree to which he – Taylor – perceived those gestures to be a genuine threat of imminent personal harm – an assault – as opposed to a parody, is best gauged by Mr. Taylor's response. He did not remove himself, immediately, from the Grievant's vicinity, nor did he seek the Grievant's immediate removal. And, when he did report the incident, he omitted mention of the Grievant's knife gestures. This is not the conduct of a man who believes himself to be under threat of imminent jeopardy; who believes that the Grievant's gestures were the prelude to an attack. Something in the Grievant's conduct communicated to Mr. Taylor that the Grievant was unserious. Based upon the available evidence, the Arbitrator deduces that the Grievant's statement and gestures were intended to communicate his resentment toward Mr. Taylor for authorizing the shut-down of the compressor, and not that he intended to actually do Mr. Taylor harm.

The Arbitrator finds that the events in this case are distinguishable from those in the arbitration decisions cited by the Company, as set forth in the above footnotes:

- In the *Johnston Coca-Cola* case, the employee had a lengthy arrest record, including for battery. Coca-Cola's rules of conduct prescribed progressive for "threatening, intimidating, coercing fellow employees," and the grievant had received discipline, at each level, to the level immediately preceding discharge. He was told that he would be discharged if he again issued a threat. He made explicit and repeated threats against the lives of his managers and co-workers. *Coca-Cola* is distinguishable from the instant case. In the instant case, there is no provision, in the Agreement or in the *Harassment Policy* for progressive discipline for threats or intimidation, and no prescribed penalty. The Grievant was not shown to have had a history of law breaking or of making threats; and was not explicitly forewarned (as was the grievant in Coca-Cola) that any threat would result in his discharge. The severity of discipline in the instant case is based entirely upon the intrinsic severity of the Grievant's misconduct; not on progressive discipline, extrinsic evidence of criminality, or explicit forewarning.

- In *Michigan Milk Producers*, the grievant made repeated threats to kill the people for whom and with whom he worked, and an expert witness on workplace violence opined that he was a "potentially violent employee" who might well act on those threats. Similar evidence (including expert testimony) of violent proclivity or disposition has not been presented in the instant case.

- In the *Sandusky Cabinet* case, the grievant possessed and fired a gun and committed two other violations of the company's published Group 1 work rules, for which discharge was the prescribed penalty. Sandusky had previously discharged two other employees for the brandishing of potentially dangerous instruments. In the instant case, the Grievant's knife was a dual-purpose instrument: a work-related tool and a weapon. It possession by the Grievant in the workplace had been tolerated by Management over many years. Unlike the work rules cited in *Sandusky*, the Company's *Harassment Policy* did not prescribe a penalty for possession of weapon, and no evidence has been presented of the discipline issued to other employees for like offenses, if any.

- In *Piedmont*, the employee attacked and cut someone in the workplace with a knife. There was no physical contact in the instant case and, as the Arbitrator has concluded, no serious threat of imminent attack.

As noted, the Grievant's knife was a dual-purpose instrument. When he ceased using it for valid operational purposes, it became a weapon. However, the Arbitrator finds that the single incident of hostility and harassment engaged in by the Grievant in this case was not intended to, was not perceived as, and did not pose a serious threat of injury by the Grievant to Mr. Taylor. The episode was the Grievant's "acting out" of his resentment that the compressor had been shut down, and appears to have been situation-specific. The racial element of the Grievant's statement was the result of his grasping, at that moment, for the only insult that, he thought, might be hurtful to Mr. Taylor: the riposte of a provincial mind when all other comparators failed – Taylor's race. The Grievant's statement to Mr. Taylor, coupled with his knife wielding, violated the prohibition in the *Harassment Policy* against engaging in harassment based upon an individual's race or color but it did not create a "hostile work environment," because that

term is generally understood to mean a climate of hostility that persists over time, and not a single event.

The Arbitrator finds that there was not just cause to discharge the Grievant; that the penalty was unreasonably disproportionate to the infraction committed. In reaching this conclusion, the Arbitrator has given no weight to the length of the Grievant's employment with the Company; the Union objected to the Company's introduction of evidence of his work record, so no presumption can be drawn that it would have been a mitigating factor.

AWARD

The grievance is sustained. The discharge is to be reduced to a 14-day suspension without pay, and the Grievant made whole of all other wages and benefits of employment, less those wages and benefits received by reason of his employment elsewhere during the interval he was discharged. The 14-day suspension shall remain an active element of the Grievant's personnel file for 2 years from the date of this decision.

Mark I. Lurie 11/21/2006
Arbitrator