IN THE MATTER OF THE ARBITRATION BETWEEN
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INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 117, UNION,	)	ARBITRATOR'S OPINION AND AWARD
and	)	*****
***** OF SEATTLE, INC., EMPLOYER.	)	TERMINATION GRIEVANCE FMCS NO. *****

BEFORE: JOSEPH W. DUFFY
ARBITRATOR
PO BOX 12217
SEATTLE, WA 98102-0217

REPRESENTING THE UNION: TRACEY A. THOMPSON
SENIOR STAFF ATTORNEY
TEAMSTERS LOCAL UNION 117
14675 INTERURBAN AVE. S., SUITE 307
TUKWILA, WA 98168

REPRESENTING THE EMPLOYER: RICK J. SUTHERLAND
***** OF SEATTLE
PO BOX 770
PARK CITY, UT 84060

HEARING HELD: FEBRUARY 8 & 28, 2008
TUKWILA, WA

OPINION

Introduction

Teamsters Local Union 117 ("union") serves as exclusive bargaining representative for a bargaining unit of employees who are employed by ***** of Seattle, Inc. ("employer"). The union and the employer ("parties") submitted this dispute to arbitration under the terms of their June 1, 2006 – September 1, 2012 collective bargaining agreement ("Agreement"), a copy of which they introduced at the hearing as a joint exhibit (J1). The parties selected me to arbitrate this dispute from a panel of arbitrators supplied by the Federal Mediation and Conciliation Service ("FMCS").

This arbitration arose from a grievance filed by the union on June 13, 2007, protesting the employment termination of the grievant, Mr. B*****. (J2)

The hearing took place at the union's offices in Tukwila, WA. At the hearing, the parties agreed that the grievance is properly before me for a final and binding decision on the merits. The parties also agreed that I should retain jurisdiction to aid in the implementation of the remedy if a remedy is awarded.

The hearing proceeded in an orderly manner. The attorneys did an excellent job of presenting the respective cases. Both parties had a full opportunity to call witnesses, to submit documents into evidence and to make arguments. Witnesses were sworn under oath and subject to cross-examination by the opposing party. A total of eleven witnesses testified at the hearing, including the grievant. The parties submitted three joint exhibits (J1-J3), eight company exhibits (C1-C8) and nine union exhibits (U1-U9). At the close of the hearing the parties elected to submit post-hearing briefs electronically and by simultaneous mailing to me and to each other postmarked by March 14, 2008. The parties later extended the deadline by mutual agreement. I received the briefs, postmarked by the agreed deadline, and closed the record on, March 25, 2008.

Issue for Decision

At the hearing, the parties agreed on the following statement of the issue for decision:

> Did the employer have just cause to terminate the employment of the grievant, B*****? If not, what is the appropriate remedy?

Background

The grievant worked for the employer as an order selector on the night shift in the employer's *****, WA warehouse for approximately seven years prior to his termination. The night shift at the warehouse runs from 5:30 p.m. to 2:30 a.m. The employees working that shift ordinarily take a lunch break at 11:30 p.m.

On Thursday, May 17, 2007, the night shift workers took a lunch break as usual. The grievant and others watched sports highlights on ESPN on a television in the lunch room. At some point, while watching soccer highlights, a discussion ensued about the height of a soccer goal. The grievant contended that the height was ten feet and a co-worker, Mr. T*****, contended that the height was eight feet.

At some point, another co-worker used his cell phone to look up the height of a soccer goal on the internet and he shared the information with the others that the goal height is eight feet.

A lot of people engaged in the discussion about the goal height, but the grievant and Mr. T***** were the ones primarily interested. Mr. T***** and the grievant argued in a friendly manner at first. Mr. T***** testified that the exchange with the grievant at first involved laughing and joking and poking fun at the situation. The discussion became progressively more heated, however, and eventually, in the words of Mr. T*****, became personal. Testimony showed that at some point the grievant called Mr. T***** "dumb" or a "dumb motherfucker" or words to similar effect. In his statement that he signed about two months after the incident, Mr. T***** stated that the grievant "also said I needed to clean the wax out of my ears and he waved his finger in my face, taunting and disrespecting me." (U9)

A dispute exists whether the grievant also referred to Mr. T***** as a "nigger" or "dumb nigger" or words to similar effect during their interchange in the lunchroom and later on the warehouse floor. Both Mr. T***** and the grievant are black men. The grievant denies making the racial slurs and Mr. T***** testified he did not hear the grievant make a racial slur. A co-worker, Mr. C*****, testified that he was sitting between the grievant and Mr. T***** in the lunch room. He did not hear the grievant use a racial slur, but he also testified that when he went back to work the grievant and Mr. T***** were still in the lunch room. Another co-worker, Mr. A*****, testified that he heard the grievant make racial slurs. Other witnesses testified that the

racial comments became a subject of discussion among employees later that night, but no one other than Mr. A***** reported hearing the grievant make the alleged racial slurs.

The facts are in dispute about how events unfolded after the lunch break. The grievant contends that any argument or confrontation with Mr. T***** ended in the lunch room once the goal height was established by consulting the internet. Other witnesses recall events differently and they testified that the confrontation continued in the warehouse and became more heated. Some witnesses expected to see a fight start between the grievant and Mr. T*****.

After work, a fight between the grievant and Mr. T***** did take place, but the fight was off the premises.

Mr. K***** testified that a few days after May 17, he heard from someone that an altercation had occurred on May 17. He learned that Mr. T***** and the grievant had been involved in the altercation so he suspended both of them pending investigation and arranged a meeting to interview them with union representation present.

Mr. K***** testified that at the beginning of each interview, he read the following statement to the interviewees, including the grievant:

> **DISHONESTY POLICY STATEMENT** This is a Company Investigation. I will be asking you questions, which you need to answer fully and honestly. If you are dishonest in this investigation, that alone is grounds for termination, independent of the reason you are being questioned today. Do you understand this policy? (C1)

Mr. K***** testified that he initiated the practice of reading the "dishonesty policy statement" before each investigative interview about twelve or fifteen years ago. In addition, Mr. K***** testified that at the end of each interview he asked the interviewees, including the grievant, if they had been truthful. He testified that the grievant answered "yes" when asked if he had been truthful.

Mr. K***** testified he began the interview with the open-ended question: "I heard there was an altercation. What happened?" He interviewed a number of people and found that the statements conflicted. In particular, he found that the grievant's version of events differed significantly from that of other witnesses.

Mr. K***** arranged a follow-up interview with Mr. T***** and the grievant. Mr. T***** repeated the version of events he had provided previously and his story was consistent with that of other witnesses. The grievant also provided the same version of events that he had

previously provided, but his version varied considerably from what Mr. T***** and the other witnesses reported.

The grievant consistently maintained that the argument in the lunch room ended when the co-worker obtained the information from the internet. The grievant stated that he dropped the subject after that point and then went back to work. The grievant admitted that he and Mr. T***** had a fight across the street after work, but he maintained that the fight had nothing to do with the earlier argument in the lunch room.

Mr. K***** re-interviewed other witnesses and then met with the grievant a third time. He read the dishonesty policy again. The grievant had union representation, as in the previous investigative meetings. Mr. *****, the employer's Vice-President of Administration, Human Resources and In-House Counsel, also attended this meeting. Mr.K***** again noted the discrepancies in the grievant's version of events versus other employees' versions. The grievant adamantly maintained that he had been truthful and he stuck to his version of the events. Mr. *****, the union Business Agent who attended the investigative interviews with the grievant, testified that the grievant became concerned because the employer asked him the same questions over and over and the grievant asserted he had answered to the best of his recollection.

Following the last interview with the grievant, management made the decision to terminate the grievant's employment. The employer mailed the grievant a letter, dated June 14, 2007, notifying him of his termination. The text of the letter reads as follows:

> This letter confirms that your employment with ***** has been terminated for: your overall work record; making inflammatory racial slurs; engaging in threatening and intimidating behavior; inciting violence in the workplace; violating company policies (including without limitation policies regarding harassment, proper conduct, and termination); dishonesty; recklessness; and failing to cooperate in a company investigation. Each of these matters is independent grounds for termination. (C4)

The employer brought Mr. T***** back to work based on the conclusion that Mr. T***** had been truthful during the investigation. Mr. T***** received extended probation of two years and a two or three week unpaid suspension for his part in the events of May 17.

The union filed a grievance over the grievant's termination and when the parties could not resolve the dispute in the grievance procedure, this arbitration followed. (J2)

The Agreement

The Agreement contains the following provisions:

ARTICLE 4 – EQUAL EMPLOYMENT

4.01 The Employer shall not and the Union shall not unlawfully discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of race, religion, color, age, sex, national origin, active military status (USERRA) or disability. The Employer and Union agree to comply with the Family Medical Leave Act as amended. (J1, p. 2)

ARTICLE 5 – DISCHARGE AND SUSPENSION

5.01 Warnings, suspensions or discharges not in accordance with the provisions of this Article are null and void.

5.02 No employee(s) shall be warned or suffer suspension or discharge except for just cause and in strict accord with the provisions of this Article and such must be in writing and dated. The reason for the action taken must be included in the letter.

5.03 As a condition precedent to any suspensions or discharges, the Employer must have given the employee a written warning notice wherein facts forming the grounds of Employer dissatisfaction are clearly set forth. The facts therein set forth must be of the same type as those upon which the suspension or discharge is founded. Warnings, suspensions or discharges must be given by registered or certified mail or personally with a written acknowledged receipt….

5.04 Copies of all warning notices, suspensions or discharges shall immediately be forwarded to the Union.

5.05 Warning notices not given and suspensions and discharges, except as hereinafter provided, not executed within ten (10) business days (Monday through Friday) of any given incident are null and void. Warning notices given within ten (10) business days of any given incident shall be null and void and incompetent evidence under the provisions of this Agreement after nine (9) months.

5.06 EXCEPTION: Warning notices are not necessary for grounds such as dishonesty, recklessness, fighting on company premises, carrying unauthorized passengers while operating Employer's vehicles, possession, sale or use of dangerous drugs, narcotics or drinking related to employment. Such discharges or suspensions must be executed within ten (10) business days of the occurrence of the incident forming the grounds. However, if the Employer's knowledge of the

incident is not immediate, a discharge or suspension founded thereon must be executed within ten (10) business days of the time the Employer acquires knowledge of same, but in no event more than sixty (60) days following the incident, except for dishonesty or trafficking narcotics. When the Employer issues a warning letter in lieu of suspension or discharge, such warning letter shall not be subject to the nine (9) months limitation in 5.05. (J1, p. 3)

ARTICLE 23 – SETTLEMENT OF DISPUTES

23.05 A Board or Arbitrator shall have no power to add to or subtract from or to disregard, modify or otherwise alter any terms of this or any other agreement(s) between the Union and the Employer or to negotiate new agreements. Board and/or Arbitrator powers are limited to interpretations of and a decision concerning appropriate application of the terms of this Agreement or other existing pertinent agreement(s), if any. (J1, p. 20)

23.16 Arbitrators agree, by accepting the position of Arbitrator, to abide and be bound by the provisions of this Article. (J1, p. 22)

ARTICLE 26 – MANAGEMENT RIGHTS

The management of the Company and the direction of the working force are rights vested exclusively with the Employer, except as modified by the terms of this Agreement, any addendum or past practice. (J1, p. 23)

Discussion

The Just Cause Standard

The Agreement provides that the employer may discharge an employee for just cause. The parties did not define just cause, which is not uncommon in collective bargaining agreements. The terms just cause, justifiable cause and sufficient cause, as well as other similar terms, often are used interchangeably in the collective bargaining context. The terms have developed a specific meaning in labor arbitration based on numerous arbitration decisions issued over many years under many different collective bargaining agreements in a wide range of industries and employment settings.

Arbitration decisions often refer to the "seven tests" of just cause developed by Arbitrator Carroll R. Daugherty. (see *Enterprise Wire Co.*, 46LA359; Daugherty:1966; *Moore's Seafood Products, Inc.*, 50LA83; Daugherty:1968) The seven tests have been widely used and also

criticized. (see *1989 Proceedings of the National Academy of Arbitrators*, Chapter 3, p.23) Leading arbitrators have taken issue with mechanical or automatic application of the seven tests except where the parties have specifically agreed on that approach.

In a 1947 arbitration decision, Arbitrator Harry Platt made the following observation about cause as applied by labor arbitrators in termination cases:

> It is ordinarily the function of an Arbitrator in interpreting a contract provision which requires "sufficient cause" as a condition precedent to discharge not only to determine whether the employee involved is guilty of wrongdoing and, if so, to confirm the employer's right to discipline where its exercise is essential to the objective of efficiency, but also to safeguard the interests of the discharged employee by making reasonably sure that the causes for discharge were just and equitable and such as would appeal to reasonable and fair-minded persons as warranting discharge. To be sure, no standards exist to aid an Arbitrator in finding a conclusive answer to such a questions and, therefore, perhaps the best he can do is to decide what reasonable man, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just. (*Riley Stoker Corp.*, 7L.A.764; Platt:1947)

Generally, a common understanding has developed in the field of labor/management relations that just cause requires: 1.) Notice to the grievant of the rules to be followed and the consequences of non-compliance; 2.) Proof that the grievant engaged in the alleged misconduct; 3.) Procedural regularity in the investigation of the misconduct, and; 4.) Reasonable and even-handed application of discipline, including progressive discipline when appropriate. (see Hill & Sinicropi, *Remedies in Arbitration, 2nd Ed.* (BNA Books; 1991) p.137-145) I have, therefore, considered the facts of this case against the just cause standard as that term is commonly understood in the field of labor/management relations.

Summary Discharge and the Just Cause Standard

The Agreement contains a strong commitment to progressive discipline. The concept of progressive discipline is based on the premise that an employee's conduct can be improved and corrected over time through the application of escalating penalties. Progressive discipline gives the employee an opportunity to understand the seriousness of the performance problem and to reflect on the need for and the method for correcting the problem. Employers and employees

both benefit from the rehabilitation and retention of employees through the use of corrective action.

At the same time, certain acts of misconduct represent such a severe problem that immediate discharge without corrective action is justified. The parties have recognized this fact by including in the Discharge and Suspension Article of the Agreement a section on exceptions to the progressive discipline requirement (Section 5.06, J1, p. 3). The Agreement allows summary discharge for certain types of misconduct, such as dishonesty or sale or use of dangerous drugs or other similarly serious offenses. A central issue in this case is whether the grievant's alleged misconduct gave the employer sufficient reason to impose summary discharge without engaging in progressive discipline under the exceptions noted in Section 5.06 of the Agreement.

Credibility

On the record before me, opposing witnesses testified to substantially different versions of certain events. Therefore, I have to determine which testimony to believe and which testimony cannot be credited. Such credibility judgments are among the most difficult decisions an arbitrator has to make. When different people give opposing and directly conflicting testimony about the same events no method exists to determine with absolute certainty which testimony should be believed. (see Mittenthal, Richard, *Proceedings of the National Academy of Arbitrators, 1979*, p. 61-74; and see Hill and Sinicropi, *Evidence in Arbitration,2nd Ed.*, Ch.8, p. 108 (BNA Books; 1987))

As Arbitrator Mittenthal wrote:

> Experience has taught me that, in this kind of situation [in which two people give directly opposing versions of the same event] neither man may be consciously lying. When two people are involved in a highly emotional confrontation, their recollection of the facts is far from reliable. Each tends to repress whatever wrong he's done. Each quickly recasts the events in a light most favorable to himself. As time passes, this distorted view of the events slowly hardens. By the time the arbitration hearing is held, each man is absolutely certain that his account of what happened is true. Perhaps neither man is then telling a deliberate untruth. Their own self-interest and self-image operate to limit their capacity for reporting the truth. (Mittenthal, Richard, *Proceedings of the National Academy of Arbitrators, 1979*, p. 62)

Arbitrator Fleming wrote the following comment on the difficulty of making credibility judgments:

> Arbitrators are not equipped with any special divining rod which enables them to know who is telling the truth and who is not where a conflict in testimony develops. They can only do what the courts have done in similar circumstances for centuries. A judgment must finally be made, and there is a possibility that the judgment when made is wrong. (*General Cable Co.*, 28LA97, 99 (Fleming; 1957))

Some of the factors that are helpful in assessing credibility or the lack of it include: 1) The ability of the witness to perceive, to remember and to communicate the facts about which the witness testified; 2) Consistency of the testimony and consistency with statements previously made; 3) The plausibility of the testimony; 4) Corroboration or contradiction by other witnesses, particular ones with no bias or motive; 5) Corroboration or contradiction by other known facts; 6) Bias, motive or interest in the outcome or the lack thereof; 7) Available evidence not used to substantiate controverted testimony; 8) The witness's reputation for honesty or the opposite; 9) Demeanor of the witness at the hearing and demeanor observed during the investigation, and particularly whether the witness testified in a forthright or an evasive manner.

The Alleged Misconduct

In examining the facts of this case, the first question to ask is what misconduct did the grievant engage in on May 17, 2007? The employer listed numerous items in the termination letter, but the list boils down to three principal allegations. The employer contends that the grievant: 1.) Violated the employer's Dishonesty Policy; 2.) Violated the employer's Standards of Conduct Policy, and; 3.) Violated the employer's Anti-Harassment Policy.

The union contends that the employer failed to meet its burden to prove that the alleged misconduct took place.

1.) The Alleged Dishonesty Policy Violation

The events of May 17, 2007 have to be seen within the context of the working atmosphere in the warehouse. Testimony at the hearing established that the warehouse is a place where employees yell at each other and argue from time to time. Order selectors work to timed production standards and can become frustrated with each other if, for example, a worker blocks an aisle and impedes another worker's progress. Testimony also showed that the atmosphere in the warehouse can be intimidating to some, particularly new employees. One witness compared the situation that new employees face to "seniors picking on freshmen" in high school. He also testified that "the mentality is that you have to stand your ground". (***** Testimony) The employer has done exit interviews with employees who have resigned and learned that some of

those individuals identified intimidation as a problem in the warehouse. Mr. K***** testified that the night before this incident the employer held meetings with a number of groups of employees to talk about the policy against intimidation.

Against that background, testimony at the hearing showed that the argument between the grievant and Mr. T***** on May 17 stood out in the minds of the witnesses as more heated and more disruptive than usual. Mr. A***** thought the argument looked serious enough that he expected the two men to start fighting each other in the warehouse. He warned them twice that they were risking their jobs by continuing the confrontation. Another witness testified that employees talked about the argument for the rest of the night. (***** Testimony) Mr. T***** testified that he was sufficiently upset by the incident that he made mistakes in order selecting that night.

In response to the employer's inquiries in the investigative interviews, the grievant, however, consistently maintained that nothing noteworthy happened after he and the others left the lunch room. He testified that once he learned the height of the soccer goal from the co-worker with the cell phone internet connection the discussion ended and he went back to work. The grievant also contended that the fight he had with Mr. T***** across the street after work had nothing to do with the events in the lunch room. Corroboration from other witnesses is lacking for both of these points.

Mr. *****, the Shop Steward, testified that if he saw co-workers engaged in a serious argument or confronting one another face-to-face he would get involved. He testified that he did not consider what he saw going on between the grievant and Mr. T***** serious enough to warrant intervention. He also testified that when he returned to the warehouse he may not have seen everything that occurred between the grievant and Mr. T*****.

Other witnesses testified that the grievant took the argument in the lunch room in a personal direction. Mr. A***** testified that it appeared to him that when the grievant realized he was losing the argument about the soccer goal the grievant started name calling.

Witnesses testified credibly that the grievant tried to continue the conflict as he and the other employees left the lunch room and returned to the warehouse. Mr. T***** described how the grievant referred to him as "dumb" or said "dumb motherfucker" as Mr. T***** was leaving the lunch room and going down the stairs and Mr. T***** said words to the effect "leave it alone." Mr. H***** left the lunch room and went downstairs behind the grievant and Mr.

T***** and he heard them continuing to argue all the way down the stairs. Mr. H***** went to the rest room and when he returned he saw the grievant and Mr. T***** arguing further. He testified that he thought they were going to fight. (see also U8) Mr. D***** testified he saw the incident in the lunch room and later he saw the grievant and Mr. T***** arguing chest-to-chest in the warehouse.

Mr. T***** testified that he wanted to end the interchange with the grievant because he thought it had become too serious. After he left the lunch room, however, he could hear the grievant making comments. As he went downstairs, he assumed when he heard the grievant using the word "dumb" that the grievant was continuing to refer to him. He tried to ignore the grievant but the conflict continued at the drinking fountain in the warehouse. After they clocked in, Mr. T***** walked away to his machine but when the grievant continued to make comments and said things like "he needs to open a book" Mr. T***** felt provoked and he came back to confront the grievant. He told the grievant "leave it alone; you're crossing a line." Mr. T***** testified that he did not like the fact that the argument had turned from the subject of the soccer goal to a personal attack on him. Mr. T***** testified he did not want to get into a fight at work because he knew he could lose his job, but he also did not want to be subjected to intimidation by the grievant. (U9)

Mr. A***** testified credibly that when he saw the grievant and Mr. T***** arguing at the water fountain near the time clock in the warehouse he walked up to them and told them to settle this somewhere else outside of work. He testified that the conflict between Mr. T***** and the grievant seemed to have gotten worse since they came downstairs and he became concerned that they would come to blows. He testified that they both walked away, but then the grievant said something else and Mr. T***** came running back. At that point Mr. A***** got between the grievant and Mr. T***** and warned them they were risking their jobs. He testified he has seen arguments in the warehouse "all the time" but he had never seen this much arguing and name calling. (J3)

After considering the entire record, I find that the grievant's contention that the argument did not continue outside the lunch room lacks credibility. I also find that the grievant's contention that he did not have a clear recollection of the events of May 17 because of the time that elapsed before he was interviewed lacks credibility. The detailed and consistent testimony

from other witnesses clearly establishes that a significant argument with Mr. T*****continued outside the lunch room and the grievant actively worked to keep the conflict going.

The grievant testified that because he and Mr. T***** were on friendly terms after May 17 he did not give any further thought to the events of May 17 and therefore did not remember the events clearly when he was interviewed. This explanation lacks plausibility. The grievant recalled in his testimony that he and Mr. T***** had a fist fight after work on May 17. (The grievant testified "He got me a couple of times and then I said that's it.") The grievant testified he had been called out across the street only once before. Surely, if fights are a rare occurrence, the grievant would, as he indicated he did, remember this fight and that would aid his memory of the cause of the fight and the events of May 17 generally.

I also find that the grievant's contention that the fight across the street had nothing to do with the earlier events lacks credibility. Mr. A***** wrote in his statement that as he was trying to calm the situation in the warehouse: "T***** eventually asked B***** to take the fight outside after work. B***** agreed to do that." Mr. T***** testified that when he confronted the grievant across the street after work he asked him about ten times whether the grievant had called him a "dumb nigger." Mr. T***** testified the grievant did not respond. Mr. ***** testified that Mr. T***** said to the grievant "Do you have anything to say now?" and "You wanted to run your mouth at work so you can run it now." Clearly, the fight related to the earlier events. Otherwise, why would they be fighting at all? In his testimony the grievant gave no clear reason for the fight. In my judgment, the grievant tried to minimize the scope and significance of the earlier altercation by his contention that the fight did not relate to the earlier events.

Therefore, I find that the grievant violated the employer's dishonesty policy when he denied in the investigative interviews that the confrontation with Mr. T***** continued outside the lunch room and when he asserted that the fight across the street after work had nothing to do with the earlier altercation. The evidence concerning the racial comments the grievant is alleged to have made is not as compelling, but based on the entire record I also find that the grievant violated the dishonesty policy when he denied or asserted he couldn't remember the racial comments.

2.) The Alleged Standards of Conduct Policy Violation

For obvious reasons of safety and productivity the employer has standards of conduct that require employees to act respectfully toward one another and to avoid behavior that is intimidating, threatening or harmful. The grievant received and signed off on a copy of those standards. (C2)

Mr. T***** had a role in continuing the confrontation with the grievant. The two had walked away from each other, but then, after further comments from the grievant, Mr. T***** came back to confront the grievant and they faced off in the warehouse. Mr. T***** reacted aggressively, but from the record little doubt exists that the grievant acted as the instigator. Mr. T***** would have walked away from the confrontation in the lunch room and gone back to work, but the grievant continued to make provocative comments as the employees returned to the warehouse. Even when the grievant and Mr. T***** walked away from each other after further arguing near the water fountain, the grievant continued to make provocative remarks that caused Mr. T***** to react. The grievant unnecessarily continued what started as a pointless argument and turned it into a personal confrontation. The grievant's behavior can only be seen as an attempt to provoke or to intimidate Mr. T*****. (see U9) His conduct clearly violated the employer's Standards of Conduct Policy.

For his part, Mr. T***** received extended probation and a significant suspension. The employer reasonably concluded that corrective action rather than termination was appropriate for Mr. T***** because Mr. T***** had been forthright in the investigation.

3.) The Alleged Violation of the Employer's Anti-Harassment Policy

Mr. A***** testified that the grievant made two racial slurs. First, Mr. A***** testified that while seated at the next table in the lunch room he heard the grievant say about Mr. T*****: "This stupid nigger doesn't know what he's talking about." In his statement that he signed on July 24, 2007, Mr. A***** stated: "I remember thinking, 'I can't believe he just said that'". (J3) Mr. A***** testified Mr. T***** may not have heard the statement from the grievant as the grievant and Mr. T***** were both talking loudly and both talking over each other. In his testimony at the hearing, Mr. A***** said that he did not think too much about the comment at the time, which differs somewhat from his assessment of the comment in his written statement.

Mr. A***** testified that in the confrontation near the water fountain the grievant again said "stupid nigger." He testified that since Mr. T***** and the grievant were facing each other

he didn't see how Mr. T***** would not have heard the comment, but he also testified that the confrontation had become even more loud and heated at this point.

Although other employees were present in the lunch room and were nearby when the confrontation occurred near the water fountain, no one but Mr. A***** reported hearing the grievant use a racial slur. Mr. T***** testified he did not hear the grievant use a racial slur, but he overheard other employees talking about it later in the warehouse. No one told Mr. T***** directly that the grievant had used a racial slur. Mr. T***** testified he became upset when he heard he had been called the "n" word and that's one reason he wanted to confront the grievant across the street after work. (U9) Mr. E***** testified that he and Mr. T***** are friends. He testified that about half an hour after the lunch break he ran into Mr. T***** in the warehouse and Mr. T***** was upset and offended because he had heard that the grievant had called him the "n" word.

The direct evidence of the racial comments comes only from Mr. A*****'s testimony. The record also shows, however, that employees were talking about the racial slur later in the warehouse and Mr. T***** testified he overheard others talking about it. The testimony about rumors circulating in the warehouse about the racial slur provides some corroboration of Mr. A*****'s testimony, but not very strong corroboration.

A determination of whether or not the racial slurs took place depends on a credibility judgment. I found Mr. A***** to be a credible witness. He had nothing to gain from testifying as he did. (For example, Mr. E***** testified that no one who works in the warehouse wants to be labeled by co-workers as a "snitch".) Although Mr. A***** testified to having a past conflict with the grievant, he also indicated that the grievant had apologized to him after they argued. I have resolved this credibility issue in the employer's favor.

Termination Without Progressive Discipline

Since I find that the alleged misconduct has been proven, the next question is whether the grievant's misconduct falls within the exceptions to progressive discipline contained in Section 5.06 of the Agreement. Deciding where the line should be drawn between misconduct that justifies immediate discharge and misconduct that is subject to progressive discipline can at times be difficult, and reasonable people may disagree about where that line should fall in particular cases.

The employer has a long-established policy on dishonesty and the employer has applied the policy consistently. The fact that the employer goes to the extent of reading the dishonesty statement at the beginning of each investigative interview and then asks at the end if the individual has been honest places unmistakable emphasis on the need to comply with the policy and the consequences of non-compliance. Mr. ***** testified that the employer gave the grievant every opportunity to come clean in three interviews during which the grievant had union representation. Mr. ***** testified that the grievant became angry when told that other witnesses disagreed with his account of his conduct and he forcefully denied that the confrontation continued outside the lunch room. He denied that the after-work fight had anything to do with the earlier altercation. He also denied making any racial comments. (At one point during the interviews the grievant responded, when asked if he made racial comments, "Maybe" and later "I don't remember.") Mr. ***** testified that corrective action in the form of progressive discipline cannot be effective if the employee will not admit to the misconduct.

The employer wrote a termination letter that contained a long list of offenses. In my experience, a "kitchen sink" set of allegations can be an indication that the employer does not have convincing proof of misconduct. In this case, however, the employer listed all the possibilities in the letter, but provided convincing evidence on each of the three essential charges. Dishonesty is specifically mentioned in the Agreement as an exception to the progressive discipline requirement. The evidence of the grievant's dishonesty during the investigative interviews is compelling and would, on its own, be just cause for immediate termination under the Agreement Section 5.06 and the employer's dishonesty policy. Therefore, no basis exists for setting aside the employer's decision to terminate the grievant's employment.

Conclusion

Based on the entire record submitted by the parties, I find that the employer had just cause to terminate the grievant's employment. No remedy is appropriate.

IN THE MATTER OF THE ARBITRATION BETWEEN

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 117, UNION,	)	ARBITRATOR'S AWARD
and	)	*****
	)	TERMINATION GRIEVANCE
***** OF SEATTLE, INC., EMPLOYER.	)	FMCS NO. *****

For the reasons set forth in the Opinion that accompanies this Award, the grievance must be and it is denied.

Dated this 25th Day of April 2008

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Joseph W. Duffy
Arbitrator