dent, does not consider which employee was the initiator and does not consider whether there was a real or perceived need for self-defense. No witnesses to the incident were interviewed before the grievant was terminated. The arbitrator was not persuaded by the "justification" that a line operator must be held to higher standard and no contractual basis was established to justify Mr. Wyatt's opinion. Thus, *the arbitrator finds that* the Company's actions in terminating M__ were discriminatory and *not* the result of a "fair investigation." (See also Koven & Smith, pages 229-236.)

The Company Rules preamble for Group I infractions indicates "that the first violation *would probably call for termination.*" Each party presented evidence to document its position about the mandatory nature of the penalty. *The arbitrator finds that* she has the authority to rescind the discharge of M__. However, *the arbitrator finds that* the grievant had the duty to back off and leave her work area in an effort to avoid the fight. The arbitrator makes this finding even in the failure of the Company to deal in a timely manner over the July incident. Therefore, *the arbitrator finds that* the penalty of discharge is modified to as suspension without pay for 10 work days. *The Company is directed to reinstate M__.* The Company is liable for back pay on the first work day after the suspension ends and the restoration of her seniority and all other benefits under the Agreement. Article VII, Section 4 should be applied to determine the amount of back pay. *The arbitrator denies* the Union's request for interest payments on the accrued back pay. The issue of interest was first raised specifically in the Union's Brief and the Company did not have any opportunity to argue and/or refute it.

The arbitrator finds that neither party's position has been sustained in this case. Thus, Article VII, Section 2, Step 4(b) is not of help to the arbitrator in determining how her bill shall be paid. The parties indicated at the hearing that they have some capability to determine responsibility for the payment when the arbitrator finds they have shared responsibility for the matter at issue. The arbitrator's billing letter will be prepared as though the parties' are equally responsible. However, the parties are free to design another formula under which they shall see that the arbitrator is paid.

THE AWARD

The grievant was not discharged for just cause. In the absence of a fair investigation and failure of management to complete promptly its efforts regarding the July 1, 1993 incident, the penalty of discharge is modified to a suspension without pay of 10 work days. The Company is directed to reinstate M__ effective the date the suspension ends. The Company shall have back pay liability which starts to accrue the first work day after the suspension ends. Article VII, Section 4 should be applied to determine the amount of back pay. The grievant shall have her seniority and all other benefits of the Agreement restored to her. As requested by the parties, the arbitrator retains jurisdiction for the sole purpose of determining the back pay, it they are unable to agree on the amount of the back pay.

CUSTOMIZED TRANSPORTATION —

Decision of Arbitrator

In re CUSTOMIZED TRANSPORTATION, INC. and LOCAL 825, UNITED PAPERWORKERS INTERNATIONAL UNION, FMCS Case No. 93/23843, March 22, 1994

Arbitrator: Lamont E. Stallworth, selected by parties through procedures of the Federal Mediation and Conciliation Service

DISCHARGE

— Racial harassment or horseplay ▸118.640 ▸118.645

Employee who approached black co-worker with cloth bag on his head and asked "How do you like my do-rag? What it be?" is properly subject to discipline for racial harassment, despite contention that he was merely engaging in light-hearted horseplay and that co-worker laughed and did not take it as racial harassment, where co-worker was only black employee in plant, specific language used reveals grievant's intent to make fun of speech or items of apparel that he associated with African-Americans, he knew that co-worker had complained to management about racial comments in workplace and had named him as frequent perpetrator, and minority group members may not always show that they are insulted by racial comments in order to fit into workplace, especially when they are greatly outnumbered.

— Racial harassment — Modification of penalty ▸118.640 ▸118.03 ▸118.815

Discharge is reduced to suspension—with reinstatement on last-chance basis—for

employee who approached black co-worker with cloth bag on his head and asked "How do you like my do-rag? What it be?" even though conduct constituted racial harassment and grievant should have known that it was offensive, where he had not received effective progressive discipline, it is not clear that he recognized severity of his offense at time of incident, and there is some evidence that other employees who committed similar acts of race-based teasing or taunting in workplace were treated differently.

— Progressive discipline — Weingarten rights ▸118.303 ▸93.27 ▸118.640

Absence of union representative at two meetings in which management officials warned grievant against engaging in racially derogatory behavior precludes finding that he received official progressive-discipline warning and is factor to be considered in determining appropriateness of discharge for further incident involving same conduct; presence of union representative not only protects rights of accused employee, but also underscores seriousness of conduct, which is especially important when warning consists of counseling session and employee may have regarded actions as harmless banter.

Appearances: For the employer — Charles W. Petruska; Pat McHugh, facility contract manager; Pat Gibbons, operations supervisor. For the union — Fred A. Norris, representative; William Lange Jr., regional director; Henry Couchlin, warehouse worker; David Beason, steward; Beverly Rock-Evans, sequencer.

RACIAL HARASSMENT

Issue(s)

STALLWORTH, Arbitrator: — The Parties submitted the following issue(s) to the Arbitrator:

1. Was the Grievant discharged for just cause?

2. If not, what shall the remedy be?

Relevant Contract Language and Harassment Policy.

ARTICLE 22

DISCIPLINE AND DISCHARGE

The Union acknowledges that maintaining good discipline is central to efficient operation of the business. In furtherance of this need, management reserves the absolute right to establish, change or modify reasonable rules governing employees conduct and performance in the plant, provided the Union is notified of any such changes. All grievances concerning disciplinary actions or discharges must be filed in writing with the grievant's supervisor within two (2) working days of the disciplinary action and must otherwise be in accord with the provisions of Article 23. The Employer agrees to remove from an employee's personnel file any disciplinary notice or written warning on the following basis:

1. Any attendance-related warning or discipline (which shall include tardiness, absence or leaving early: twelve months

2. Any safety-related warning or discipline (which shall include, but not limited to, unsafe or hazardous operation of equipment or vehicles): 36 months

3. All other warnings or discipline: 24 months

Copies of all disciplinary and written reprimands will be given to the appropriate steward with one posted copy.

EMPLOYEE
HARASSMENT PREVENTION

Objective:

To ensure all employees work in an environment that fosters dignity and respect.

Policy and Responsibility:

CTI will not tolerate any form of harassment related to race, color, sex, religion, national origin, age, or physical or mental handicap whether directed towards an employee, customer or vendor. Violation of this policy will be treated as a disciplinary matter. For these purposes, the term "harassment" includes, but is not necessarily limited to:

Slurs, jokes, other verbal, graphic or physical conduct relating to an individual's race, color, sex, religion, national origin, age, or physical or mental handicap. Harassment also includes sexual advances, requests for sexual favors and other verbal, graphic, or physical conduct of a sexual nature.

Violation of this policy by an employee shall subject that employee to disciplinary action, up to and including discharge.

Procedure:

If an employee feels that they are being harassed by any other employee based upon race, color, sex, religion, national origin, age, or physical or mental handicap, they should immediately notify their Supervisor or Manager. That Supervisor or Manager will promptly notify the Human Resources Department, who will see that the matter is investigated, and where appropriate, disciplinary action taken. If the employee does not feel that the matter can be discussed with the Supervisor, they may call the Human Resources Department to discuss the complaint.

Harassment of the Company's employees in connection with their work by non-employees (vendors, truck drivers, etc.) may also be a violation of this policy. Any employee who becomes aware of any harassment of an employee by a non-employee should report such harassment to his or her Supervisor or to the Director of Human Resources, who is responsible for investigating all such incidents. Appropriate action will be taken against violation of this policy by any non-employee.

Background

This is a case involving the discharge of an employee for allegedly engaging in racial harassment. Mr.

Pat McHugh, the Facility Contract Manager, testified that he was approached in Fall, 1992 by Mr. Easley, the sole African-American employee at the plant at that time, contending that he was being racially harassed at the facility. In particular, Mr. Easley allegedly stated that employees were using a racially derogatory term at the lunch table.

Mr. McHugh also testified that Mr. Easley had filed a charge of discrimination against the Company with the federal Equal Employment Opportunity Commission. The Company presented a copy of that charge, which was dated November 25, 1992, in which Mr. Easley stated that he had been repeatedly verbally harassed and threatened by co-workers and management, and that he had repeatedly reported this to management.

Mr. McHugh further testified that at that time he verbally warned certain employees about the use of such language. Mr. McHugh testified that Mr. Easley named several employees as using such language, and that the Grievant's name came up most often. Mr. McHugh testified that he warned each of the named employees, about eight (8) employees total, including the Grievant, in the presence of a Union representative, about the use of such language. Mr. McHugh testified that he specifically mentioned that the employees could be disciplined for such conduct.

The Grievant and the other employees deny that a Union representative was present. The Union steward testified that he was present only at his own counseling session.

Mr. McHugh testified further that on May 19, 1993, Mr. Easley came to his office and complained of an incident which occurred one day earlier involving the Grievant. According to Mr. McHugh, Mr. Easley, who did not testify at the arbitration hearing, stated that the Grievant approached him with a cloth bag on his head, and asked Mr. Easley, "How do you like my do-rag? What it be?" According to Mr. McHugh, Mr. Easley said he felt very angry and harassed over these incidents.

Mr. McHugh testified that he conducted an investigation of the incident. He stated that the Grievant denied making the statement, but never responded to Mr. McHugh's request that he provide a written statement describing the incident. Mr. McHugh testified that no other employee admitted overhearing the conversation in question, he waited a number of weeks for the statement, and then discharged the Grievant on June 14, 1993.

Mr. McHugh testified further that another employee had been terminated for making racial comments about a customer's employee. She was reinstated, Mr. McHugh testified, because he could not obtain a written statement from the customer to substantiate the charge.

Mr. McHugh also testified that Mr. Easley resigned on August 18, 1993 and gave racial discrimination as the reason for his resignation. According to Mr. McHugh, Mr. Easley felt uncomfortable coming to the arbitration hearing and therefore was not called as a witness.[1]

Mr. Pat Gibbons, Operations Supervisor, also testified that he was sitting in the shop office one day and the Grievant came in wearing "something wild and outlandish" on his head and said, "How do you like my do-rag?" Accordingly to Mr. Gibbons the Grievant told him that he was going out to show Mr. Easley his "do-rag," and Mr. Gibbons told him not to do it, because Mr. Easley construe this as racial harassment. The Grievant allegedly told Mr. Gibbons that he was "no fun." On cross examination, Mr. Gibbons acknowledged that the Union had never been informed of this incident.

The Grievant testified that he did put an orange mesh bag on his head on the day in question, walked over to Mr. Easley's areas and asked him "How do you like my do-rag?" He testified that Mr. Easley laughed and made a comment about the Grievant's belly (stomach) being large. This version of the events also was supported by Mr. Dave Beason, the Union Steward, who stated that he was standing nearby.

The Grievant testified further that he used the same computer as Mr. Easley, and often joked with him. The Grievant further testified that there was no Union Steward present when Mr. McHugh originally talked to him about Mr. Easley's complaints of racial harassment, and that Mr. McHugh did not mention that discipline or discharge could result from further similar conduct. The Grievant testified that he did not take this as a warning, except to leave Mr. Easley alone.

The Union also presented testimony that Mr. McHugh told the Union representative that the decision to terminate the Grievant was not made by him, but rather was made at the Company's headquarters in Florida. The

[1] Mr. Easley did not appear at the hearing. The Arbitrator advised the Parties of his willingness to hold the hearing at another location if Mr. Easley would prefer not to physically appear on the Company's property.

Union also presented testimony that Mr. Easley had grabbed the wrist of a female bargaining unit member and said something like, "We would make a nice baby." She testified further that she was satisfied with his response, that he would refrain from making such statements.

Another Union witness testified that when Mr. McHugh counseled the eight or ten employees regarding racial comments he did mention discipline and/or discharge. The evidence indicates that the employees were counseled separately in individual sessions.

The Union filed the instant grievance over the Grievant's discharge. The Parties were unable to resolve the grievance and the matter proceeded to arbitration. It is within this framework that the instant dispute arises.

The Company's Position

The Company contends that a hostile racial environmental was created by the Grievant against Mr. Easley. Accordingly to the Company, Mr. Easley felt that racial taunting was going on, and when he complained to the Company about it, the Company took action and confronted the employees allegedly responsible for it. In particular, Mr. Easley felt that the culminating incident of May 19, 1994 was a racial taunt.

The Company contends that the Grievant was warned on two occasions not to engage in such conduct and he continued to do so. The Company also notes that the Grievant was specifically warned against the "do-rag" incident and engaged in it, anyway. Accordingly, the Company contends that the instant grievance should be denied and the discharge upheld.

The Union's Position

The Union argues that there was no racial harassment by the Grievant against Mr. Easley in any way. Rather, according to the Union, Mr. Easley believed that the Company was discriminating against him.

The Union suggest that Mr. Easley was unusually "sensitive" about these type of activities. Yet, according to the Union, Mr. Easley would deny that there was racial harassment when asked whether the bargaining unit employees were harassing him.

Accordingly to the Union, the Company never gave the Union a copy of the harassment policy. In addition, the Union asserts that the Company never posted the harassment policy.

The Union argues further that the Company was inconsistent in applying its harassment policy. The other employees who engaged in racial slurs were given either three days off, or reinstated, the Union asserts. The Union argues that the Grievant was made a "scapegoat" once Mr. Easley had filed his EEOC complaint.

For all of the above reasons the Union requests that the Grievant be reinstated with back pay and all seniority rights and benefits.

Opinion

In the instant case the Grievant has been discharged for allegedly engaging in racial harassment towards a fellow co-worker. The Parties submitted the following issue(s) to the arbitrator:

1. Was the Grievant discharged for just cause?
2. If not, what shall the remedy be?

The Arbitrator has considered the testimony, other evidence and arguments put forth by the Parties and concludes that the Grievant was not discharged for just cause. The Arbitrator's findings, conclusions and reasoning are set forth below.

The termination letter given to the Grievant, and dated June 14, 1993, stated,

> It has been determined that your actions on May 19th, 1993 were racially motivated. Corporate Policy and Contractual agreements with the A.I.W. preclude this type of behavior.
>
> Unfortunately, as a result of your actions, we are compelled to sever your employment relationship with CTI, effective this date.

The letter did not say what contractual provision precluded the Grievant from acting as he allegedly did, and this issue was not raised in the arbitration hearing.[3]

The May 19th incident has been described in some detail in the Background section of this opinion. The Grievant has attempted to portray it as light-hearted horseplay, not in any way intended to be racially insulting. The Company has portrayed the Grievant's actions as serious racial harassment.

The Union presented testimony that "do-rags" or head cloths or bandannas are worn by some employees at the plant, and suggests that Mr. Easley's reaction to the Grievant's comment about it was oversensitive. The Union also suggests that the Grievant did not intend the comment to be racially de-

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[3] Perhaps the letter refers to Article 15 of the Agreement, which prohibits the Employer and the Union from engaging in discrimination based upon race, creed, sex, color, national origin, age or religion. However, the Parties did not raise this issue.

rogatory and that Mr. Easley did not take it as racial harassment at the time because he laughed and made a comment about the Grievant's belly (stomach).

If the Grievant did not intend any racial overtones to his comment, then why did he select Mr. Easley as the person to whom he directed his comments about the "do-rag?" The Arbitrator also notes that Mr. Gibbons testified that the Grievant put a bag on his head on another earlier occasion and said that he was going to do just what he did in this case, i.e. approach Mr. Easley and call attention to the "do-rag." Mr. Gibbons testified that he told him not to do so on that occasion. The issue was never raised with the Grievant at the arbitration hearing. This incident occurred after employees had been counseled about Mr. Easley's complaint about the racial language used at the lunch table.

The termination letter suggests that the Grievant basically was terminated for his conduct on May 19, 1993. The Company at the arbitration hearing, (but not in the termination letter) also referenced the two earlier instances when the Grievant allegedly was warned against behavior which might be construed as racially derogatory. The Union has argued that the Grievant was not warned by either Mr. Gibbons on Mr. McHugh *in the presence of a Union steward,* and Mr. Gibbons acknowledged that the Union would have had no way to know about his discussion with the Grievant until after the discharge.

The Employer has the burden of proof over whether a Union steward was present at the initial one-on-one counseling sessions which were given to the Grievant, as well as other employees, in regard to the use of racially derogatory terms at lunch. Several other Union witnesses testified along with the Grievant and the Union Steward that there was no Union steward present at their sessions. The Arbitrator concludes that the Employer has not met its burden of proof on this point.

Therefore, the Arbitrator concludes that the situation here is not quite the same as one in which an employee has been discharged for engaging in certain behavior after he has been officially warned previously about the same behavior, in the presence of a Union steward. The presence of the Union steward in these types of cases not only protects the rights of the accused employee; it also underscores the seriousness of the employee's conduct. This is especially important when the warning is in the nature of a verbal counseling session and when the employee may have regarded his actions as harmless banter.

However, on the other hand, the Grievant is not in the same situation as an employee who engaged in the behavior of May 19th without any prior history of conduct with racial overtones. He had some kind of notice that racial comments and horseplay were not appropriate at the plant, and might subject him to discipline, even if the Company's harassment policy were not posted or in effect at that time.

The Arbitrator concludes that the Grievant was motivated to make a racial joke or insult to Mr. Easley on May 19, 1993. His choice of Mr. Easley, the only African-American at the plant, his use of the term "do-rag,"[1] his prior discussion with Mr. Gibbons about the same behavior, and with Mr. McHugh about using racially derogatory language, all convince the Arbitrator that he knew or should have known that he was engaging in a teasing or taunting by racial stereotyping. The Arbitrator concludes that the Grievant intended to tease or taunt Mr. Easley by making fun of terms of speech or items of apparel which he associated with African-Americans.

In doing so, the Grievant's actions were severe. He testified that he was friendly with Mr. Easley, that he did not intend his comments to be racially insulting, and that Mr. Easley laughed at them. Minority group members may not show that they are insulted in every case when a racial comment is made, in order to fit in with other employees in a workplace, especially where they are greatly outnumbered. This does not mean that the racial comments or conduct are not offensive to them personally (subjectively) or objectively, as something a reasonable person would find offensive if he or she were the recipient of such comments or conduct in the workplace.

This might be a different case if the two were close friends and a lot of banter, some of it of a racial nature, passed between them all the time. However, Mr. Easley had made known that he did not appreciate racial comments, and the Grievant knew, when

[1] Mr. McHugh also testified that Mr. Easley had reported that the Grievant said something like, "What it be" to him. Mr. Easley did not testify, and there was no statement from him describing the incident, so this testimony is pure hearsay and cannot be given the same kind of weight as the other evidence here. However, the comment would appear to be in the same vein of teasing or taunting by racial stereotyping which the Arbitrator has concluded the Grievant did engage in here.

he approached Mr. Easley on May 19th, that Mr. Easley had specifically named the Grievant as an employee who had engaged in such conduct in the past.

In light of these factors the Arbitrator concludes that the Grievant should have known that his conduct was offensive. Even if the prior discussions with management did not serve as progressive discipline, in the official sense, the Grievant should have known that his conduct was offensive when he engaged in it on May 19th.

Nevertheless, the Arbitrator concludes that the penalty of discharge was excessive. As discussed above, the absence of a Union Steward at the earlier two meetings means that no effective progressive discipline was applied in this case. Furthermore, even though the Arbitrator concludes that the Grievant's actions were severe, and that he should at least have known they were offensive, the Arbitrator is not convinced that the Grievant recognized the severity of his offense when he engaged in it. Although this might not be a reason for overturning a discharge standing alone, it has some bearing on this case.

Even though the Grievant's actions were severe, he was not the only employee engaging in race-based teasing or taunting in the workplace. Therefore, whether or not there was racial harassment of Mr. Easley, in the legal sense, might involve facts which go beyond just the Grievant's conduct.

In addition, there is some evidence that the Grievant was treated somewhat differently than other employees who engaged in similar acts. The other employee who was terminated for making a racial comment about a customer's employee was later reinstated. The Employer contends that she was reinstated because the customer would not give a written description or complaint regarding her conduct. However, there is no record of such a written statement from Mr. Easley in this case either.

The Arbitrator does not consider it within his authority to order the Grievant to undergo some kind of diversity training. However, it might be appropriate for the Employer to consider some type of diversity and sensitivity training for the entire workforce here.

In addition, the discharge and arbitration award should serve as a wake-up call to the Grievant and other employees in the workplace that racial comments and racially-motivated conduct intended to ridicule the race, gender, religion, etc. of other employees is not acceptable in the workplace. Racial jokes or stereotyping conduct which may seem funny to the perpetrators may actually be very offensive to those against whom it is directed.

On the facts of this case, the Arbitrator concludes that the discharge should be overturned and the Grievant reinstated on a Last Chance basis. Because of the seriousness of the Grievant's conduct he will not be awarded any backpay.

AWARD

The instant grievance is sustained, in part. The discharge is overturned and the Grievant is to be reinstated, without backpay. The Grievant is reinstated on a Last Chance basis. If the Grievant engages in any similar activity, i.e. conduct which constitutes a non-trivial violation of the Employer's anti-harassment policy, during the period of one year, he may be subject to discharge.