BEFORE
JOSEPH V. SIMERI
ARBITRATOR

THE ARBITRATION	)	
	)	**FMCS Case No. 13-50298-3**
Between	)	
	)	
DAVIS & ASSOCIATES, INC.,	)	
	)	**A_____ , Grievant**
And	)	
	)	
LABORERS INTERNATIONAL	)	
UNION OF NORTH AMERICA	)	
STATE OF INDIANA DISTRICT	)	
COUNCIL,	)	

ARBITRATION AWARD

This dispute was arbitrated on December 6, 2012 in Indianapolis, Indiana. Davis & Associates, Inc. ("the Company") was represented by Gregory L. Thomas, Esq. The Grievant, A_____, and Laborers International Union of North America State of Indiana District Council ("the Union") were represented by Neil E. Gath, Esq. The Company and the Union presented witnesses and introduced evidence. By agreement, no post-hearing briefs were submitted. This Award is issued within 30 days from the date of the Arbitration Hearing.

RELEVANT CONTRACT PROVISIONS

THE COLLECTIVE BARGAINING AGREEMENT (Joint Exhibit 1)

ARTICLE VII
SELECTION OF LABOR-EMPLOYMENT REGULATIONS

Section 1. (b) The employer retains the right to reject any applicant whether furnished by the Union or not, and further the Employer shall have the right to determine the competency and qualifications of his Employees and the right to discharge for just cause.

ARTICLE XIII
WORKING HOURS AND OVERTIME

Section 1. Work Week/Work Day:

(a) The regular work week shall be a forty (40) hour week, Monday a.m. through Friday p.m. the project starting time shall be established in the pre-job conference (Article XII). Once established, the project starting time shall not be changed without mutual consent of both parties.

ARTICLE XX
MANAGEMENT RIGHTS

Section 1. The Employer retains and shall exercise full and exclusive authority and responsibility for the management of its operations, except as expressly limited by the terms of this Agreement.

ARTICLE XXIII
GRIEVANCE PROCEDURE

Section 1. (a) There shall be no stoppage of work on account of any difference of opinion, or dispute which may arise between the Parties of the First Part and Second Part. It is agreed by the Parties that all grievances, disputes, or claims, (except jurisdictional disputes, wage rates, fringe benefits and dues check-off) which may arise with respect to the enforcement or interpretation of any of the terms of this Agreement are to be resolved in the following manner:

All grievances, disputes, or claims which may arise between Employers signatory to this Agreement or Employees who have accepted this Agreement and thus became Parties hereto shall be resolved in the following manner:

(1) The dispute shall first be discussed by the Job Steward or other Union Representative and the Employer's Foreman and/or Superintendent.

(2) If the grievance is not resolved, then the dispute shall be referred to the Business Representative of the Union and Employer's Representative.

(3) In the event said dispute has not been resolved, the State of Indiana District Council through its Representative, shall meet with the Employer's Representative, in an attempt to resolve said dispute.

(4) The Arbitrator shall be selected in the following manner:

The Federal Mediation and Conciliation Service shall be requested to submit a panel of arbitrators, who shall be members of the National Academy of Arbitrators, of which names are alternately struck until the remaining arbitrator, whose name remains on the list, shall serve as the arbitrator to hear and decide the dispute and/or grievance. The arbitrator's decision shall be final and binding on both Parties.

The cost of the arbitrator shall be borne equally by both Parties to the grievance and/or dispute.

Section 2. No proceeding based on any dispute, complaint or grievance herein provided for shall be recognized unless called to the attention of the individual Employer and the Local Union involved in writing within ten (10) days after the alleged violation is committed.

Section 3. Copies of the decision made by the Arbitrator shall be mailed to the Employer and the Union.

FACTS

Friday, September 21, 2012, was the end of another work week for the Company's construction laborers on the job at the Wishard Hospital new construction site. Two of those laborers, Lana Jarvis and the Grievant, were paired together. Each with their separate brooms, they shared a large dumpster cart on rollers, jointly charged with the responsibility to keep the building and facilities under construction clean.

They had worked together before, but were an odd couple. You see, if this were a Disney movie, Ms. Jarvis would play the role of "Happy," and the Grievant would play the role of "Grumpy." Ms. Jarvis enjoyed a good conversation, even early in the morning, and even if she did most of the talking. The Grievant had no interest in any conversation, especially first thing in the morning. Undaunted, Ms. Jarvis, either unaware of, or in disregard of, the admonition that a discussion of religion and politics should be avoided in polite company, brought up the impending presidential election. Ms. Jarvis told the Grievant that Ms. Jarvis and her husband had been watching a television program and it was reported, likely on Fox News, that President Obama had spent more than any other president. The Grievant, a supporter of President Obama, did not want to hear any of it. What started as a one-way conversation escalated into a

heated argument. Ms. Jarvis and the Grievant have significantly different versions of who yelled what at one another, with the Grievant claiming that Ms. Jarvis called President Obama "... the worst black president we ever had ...", and that President Obama was a Muslim. Ms. Jarvis denied making those statements and said that she told the Grievant that she had actually voted for President Obama.

Ms. Jarvis, visibly upset, called her foreman, Earl Harris. The Grievant and Ms. Jarvis were on the third floor when Mr. Harris arrived. He wisely separated them and sent Ms. Jarvis to the second floor to work. Shortly after the separation, Ms. Jarvis came back to the third floor and the argument embers stoked up again. Mr. Harris returned to the scene of the verbal fire. He tried to disengage Ms. Jarvis and the Grievant, but to no avail. Ms. Jarvis did not leave the area as directed by Mr. Harris. The Grievant used profanity. Then he took one of the push brooms, flung it toward the dumpster and, in the process, the broom handle hit Ms. Jarvis.

Mr. Harris reported the incident to Mr. Harris' supervisor, Kevin Faust. Mr. Harris told Mr. Faust that some verbal issues had arisen between Ms. Jarvis and the Grievant. Mr. Faust told Mr. Harris to have the Grievant report to the job site trailer. The Grievant did so.

Mr. Faust then reported the incident to Tracy Short. Tracy Short is the Company's Project Manager on the Wishard Hospital project. His office is located in

the job site trailer. Based solely on his conversation with Mr. Faust, Mr. Short found that the Grievant's behavior was unacceptable and an embarrassment to the Company. Mr. Short decided that the Grievant should be sent home and permanently removed from the job site. Mr. Short made his decision to end the Grievant's employment without meeting with the Grievant, without securing a statement from the Grievant, and without even talking to the Grievant.

On September 27, 2012, lack of work required the Company to lay off nine or ten laborers. None have been called back to work.

ISSUE

The agreed issue is whether the Grievant, A_____, was discharged for just cause. If not, what is the appropriate remedy?

ANALYSIS

The Company is a construction employer. The construction industry is seasonal. The construction employer's need for construction workers varies. Work depends on many factors outside the construction employer's control. Interest rates, mortgage rates, the state of the economy, government stimulus, and consumer confidence all play a part in determining the amount of work available.

Once a construction project begins, the pace and completion of the project is affected by the supply of materials and the coordination of the work among the different building trades on the project. This means that the workforce of any construction employer on a construction project fluctuates. It means that the construction employer must have skilled workers readily available, but may not be able to keep those workers employed regularly. The union construction trades provide a solution. The union construction trades provide a trained workforce through their apprenticeship programs. The employer is able to draw from this skilled labor pool. Then, when the employer no longer needs these workers, they return to the union for dispatch to other employers.

For this reason, the normal seniority provisions, which are found in industrial collective bargaining agreements, are not present in the construction industry. Recognizing that the need for workers in the construction industry changes frequently, the employer is free, under a collective bargaining agreement, to let go, temporarily or permanently, any employee without regard to seniority. If an employer has 20 employees on a job site and work has slowed, and the employer determines that it will need only ten employees in the next week, the employer is free, in its sole discretion, to choose the ten who will stay, and the ten who will go.

There is but one limitation on the unfettered right of the construction employer to determine the number of employees on a job site at any given time. It is the shining principle of just cause. And that principle is written in the Collective Bargaining Agreement in this case.

The testimony presented to me is a potpourri of conflicting evidence. Who said what to whom? What was said? Who could have disengaged from the conflict, but chose not to? Was the broom, thrown in anger, aimed at the dumpster, or was it intended to strike Ms. Jarvis?

Fortunately, the resolution of this grievance is not determined by my answers to those questions. Instead, it comes from the meaning of the just cause protection in the Collective Bargaining Agreement. If the term "just cause" means anything, it means fundamental fairness. And so, you may ask what does the term "fundamental fairness" mean? I cannot define it, but like United States Supreme Court Justice Potter Stewart said, in another context, "I know it when I see it." Fundamental fairness in the workplace means that before an individual is disciplined, he is entitled to be heard. He is entitled to give his side of the story. The ultimate discipline an employer can impose on an employee is discharge. When the employer is contemplating whether to impose that punishment, the employee, in fairness, must be given an opportunity to state his case.

The process of discipline, how discipline is decided, is critical. In this case, the Company never heard from the Grievant. It is possible the Grievant's information may have affected the Company's ultimate decision. Having heard from the Grievant, the Company may have decided that a cooling off period would have been appropriate, or a day's suspension, or some punishment less than termination. Or, the Company may have decided termination was appropriate. We will never know. Not even asking to hear from the Grievant before imposing the most significant discipline the Company could impose, was fundamentally unfair. Stated another way, the end does not justify the means.

Having decided the Company's process in terminating the Grievant's employment was significantly flawed, I must determine the appropriate remedy.

> When an arbitrator is commissioned to interpret and apply the Collective Bargaining Agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There, the need is for flexibility in meeting a wide variety of situations. *Steel Workers v The Enterprise Wheel and Car Corp.,* 363 US 593 (1960), at p.597.

The undisputed evidence is that the project owner, Wishard Hospital, dictated the number of employees the Company could have on the job site at any given time. Further, it is undisputed that nine or ten Company laborers covered under the Collective Bargaining Agreement were laid off on September 27, 2012,

the Thursday following the Friday, September 21, 2012, incident. None of those workers have been called back. I find it much more likely than not that the Grievant would have been one of those nine or ten workers who would have been laid off on September 27, 2012.

AWARD

Therefore, I make the following Award:

1. The Company did not have just cause to discharge the Grievant, but the Grievant is not reinstated.

2. The Company must instead reimburse the Grievant for all lost pay and benefits, which the Grievant would have earned had he worked the full day on September 21, and on September 24, September 25, September 26, and September 27, 2012.

3. I retain jurisdiction to determine any dispute concerning the amount of pay and benefits to which the Grievant is entitled under this Award.

4. The Company and the Union must pay the Arbitrator his fee and expenses as provided in the Collective Bargaining Agreement between the parties.

Dated: December 31, 2012

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Joseph V. Simeri, Arbitrator