

**THE PUBLIC REVIEW BOARD  
INTERNATIONAL UNION, UAW**

APPEAL OF:

BRIAN PENLEY, Member  
LOCAL UNION 23, UAW  
(Indianapolis, Indiana)  
REGION 3,

Appellant

-vs-

CASE NO. 1649

LOCAL UNION 23 SHOP COMMITTEE, UAW  
(THE UNITED AUTOMOBILE, AEROSPACE  
AND AGRICULTURAL IMPLEMENT  
WORKERS OF AMERICA),  
Appellee.

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**DECISION**

(Issued August 31, 2010)

PANEL SITTING: Prof. Janice R. Bellace, Chairperson,  
Prof. James J. Brudney, Prof. Fred  
Feinstein, Dean Harry C. Katz, and  
Prof. Maria L. Ontiveros.

Brian Penley argues that the local shop committee's decision to withdraw his discharge grievance lacked a rational basis.

**FACTS**

Brian Penley worked at General Motors' plant in Indianapolis, Indiana, in a bargaining unit represented by UAW Local Union 23. He had a corporate seniority date of August 27, 1990.<sup>1</sup>

In October 2006, Penley was placed on disability and sent for a psychological examination following an incident in the plant. Dr. Raymond Horn, the psychologist who conducted the examination, described the incident involving Penley in a report to the company nurse as follows:

“Prior to seeing Mr. Penley, I reviewed other documents that had originated in the Labor Relations Department, and that had been

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<sup>1</sup> Record, p. 86.

forwarded to me by you. These documents describe an incident that occurred on September 11, 2006, which purportedly involved Mr. Penley 'slamming his third rack loudly on top of the other two,' which he had previously unloaded, and then 'thrusting a stack of three into the rear of (another) fork truck.' Additionally, Mr. Penley reportedly side-swiped one individual's forklift with his, without any injury or damage. The notes also reported that Mr. Penley had 'slammed a scrap tub against the end of 54-27 line. ..."<sup>2</sup>

Dr. Horn found that Penley did not pose a physical threat to others in the workplace despite his tendency to act out periodic episodes of irritation and frustration in an aggressive fashion. Dr. Horn concluded his report as follows:

"...I think it is critical to make the behavioral and interpersonal expectations required for maintaining employment as clear and specific to Mr. Penley as are the expectations for his production requirements. He has the capacity to control and moderate the verbal and physical expression of his anger and irritation, but he will be aided in doing so by clearly defined behavioral rules and expectations that are spelled out in advance."<sup>3</sup>

In his appeal to the International Executive Board (IEB), Penley reported that after receiving this report, GM management recalled him to work and agreed to pay him for the money he lost as a result of his disability layoff.<sup>4</sup>

In January 2007, another incident occurred which led to Penley's discharge. Penley described the sequence of events leading to his discharge as follows:

"In January 2007, I was complaining to my foreman, committeeman, and EAP representative that I was being harassed/messed with by other personnel. My foreman saw first hand that this was going [on] and apologized to me, but nothing was still being done about it. On January 23, 2007, this 'being messed with' finally got to me and I did behave inappropriately and apologized for it. Management's reaction was to fire me for violation of Shop Rule 40 which reads, 'repeated violations of shop or safety rules.' At this time I had no violations and my personnel file had no discipline or infractions in it. I wound up checking myself into a stress center that very same day and was an inpatient for 10 days. When I was released, I continued my treatment. Management, namely, Steve Sprecher, then offered me a chance to apply for medical retirement. I am including a copy of that offer. His argument was that since my wife and

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<sup>2</sup> Record, p. 1.

<sup>3</sup> Record, p. 5.

<sup>4</sup> Record, p. 49.

me are raising 3 of our grandchildren that this would help insurance coverage for them. I explained I couldn't accept the offer as presented as we have a small business on the side, and this agreement prevented me from having any outside income."<sup>5</sup>

The settlement agreement offered to Penley provided that he would be reinstated in order to apply for a Total and Permanent Disability retirement under the GM-UAW Pension Plan, but it did not guarantee that his application would be approved. In return, Penley agreed to release GM from any claims and acknowledge that he was relinquishing his corporate and local seniority rights.<sup>6</sup> In his appeal to the local union, Penley reported that he advised Local 23 Committeeperson Augie Freund that he could not accept the offer because there was too much uncertainty about it. He wrote:

"Augie and I met at the union hall and went over the offer. At that time I told him I couldn't accept it as there were too many loopholes still in the offer. As we left, Augie made the comment that the union could settle the grievance as they saw fit, even withdraw it if they wanted. I had no idea where that was coming from, but felt it was a threat. Augie told me, call Steve Sprecher to turn down the offer if that's what you want to do. At that time, Steve told me he realized there were many loopholes in the offer and he understood why I would turn it down. Since there was a 30-day window for me to accept the offer, the union would not do anything else till that time frame had expired."<sup>7</sup>

During this period, according to Penley, he continued to receive disability benefits until his benefits ran out in December 2007.<sup>8</sup>

In the meantime, Local 23 continued to argue for Penley's reinstatement. During local negotiations in October 2007, the company made the following offer to reinstate Penley:

"Reinstate upon ratification of local agreement  
No last chance agreement  
Clear record  
No pay for any time lost  
Agree to pay \$3000 lump sum payment."<sup>9</sup>

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<sup>5</sup> Record, p. 50.

<sup>6</sup> Record, p. 6.

<sup>7</sup> Record, p. 40.

<sup>8</sup> Record, p. 50.

<sup>9</sup> Record, p. 13.

This offer is dated October 3, 2007. The following comment is written on the October 3, 2007, settlement offer:

“Local agreement ratified 10/25. When this offer was made S. S. was aware of alleged phone call Penley made on 9/25/07. S. S. says Augie also was aware. S. S. says he made this offer because he thought he would be able to discharge Penley upon his R.T.W. on 10/31/07. W.P.M.”<sup>10</sup>

Based on this agreement, Penley was directed to report to work for reinstatement on October 31, 2007. When he reported to Labor Relations to be reinstated, however, Manager Steve Sprecher informed him that he was being discharged for violating the company’s workplace violence policy. Penley was issued a notice of discharge dated October 31, 2007.<sup>11</sup> Notes from a meeting attended by Penley, Committeeperson Freund, and Manager Sprecher report the following discussion:

Mgt: Brian, as you know, we are here for your reinstatement. Although we will live up to the terms of your settlement, something has come to my attention that needs to be addressed.

Union: What are we here for Steve? I thought it was a reinstatement.

Mgt: We are reinstating Brian.

Union: When is his reinstatement effective?

Mgt: Today.

Union: What needs addressing?

Mgt: Augie, this is a formal 76 interview concerning Brian.

Union: A formal interview?

Mgt: Yes. For workplace violence policy. You and Brian can ask any questions after I’m finished. Here is a copy of the complaint issued from GM Benefits and Services Center. On-line Threat Incident Report I received [one line is illegible]. You and Brian can have it as I read it.

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<sup>10</sup> Record, p. 13. “W. P. M.” is apparently the Local Bargaining Chairperson Bill Matthews.

<sup>11</sup> Record, p. 14.

Note Mgt. Read Memo, "On-line Threat Incident Report."<sup>12</sup>

The report was made by an employee of the GM Benefits and Services Center named Du Shune Raines to GM Security Officer Jennifer Howarth. Raines reported that on September 25, 2007, at 8:55 a.m., Brian Penley called the Center to obtain a supplemental extension form. He then asked why his disability benefit had been reduced. Raines reported she explained to Penley that after six months an employee on disability must apply for Social Security disability benefits and submit a receipt showing he or she had applied. At this point, Penley became angry because no one had informed him of the need to apply for Social Security disability benefits. Raines's report describes Penley's response as follows:

"...The employee said, 'Why didn't nobody fucking tell me I had to apply?' I advised the employee to refer to his GM contract or speak with the UAW. The employee then stated, 'I want to know why my fucking money was taken?' He then ordered me to answer that question or put someone on the line who could answer that question. I explained the money is being deducted due to no receipt being received showing that he applied for Social Security disability benefits and the carve remains until a receipt is received. The employee then said, 'How about if I just come up there and blow your fucking head off.'" Then the employee disconnected the line."<sup>13</sup>

Raines also reported the incident to the Southfield, Michigan, police department.<sup>14</sup>

Penley responded to the report during the Paragraph (76a) interview with Sprecher as follows:

"Emp: I never talked to them. My wife did & also my son might have, my youngest son, Chris. I have not dealt with them. I gave them permission to deal with my wife. They ask me identifying questions & what so and then I hand the phone to my wife. I'm sure they have plenty of records of that, my wife calling. It's been stressful on the whole family. That's why they kept me out of it, the loop.

Mgt: Have you, Brian, given the Benefit Center permission to talk to your son as well? According to the report, it was a male voice.

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<sup>12</sup> Record, pp. 19-20.

<sup>13</sup> Record, p. 10.

<sup>14</sup> Record, pp. 34-35.

Emp: That's the only person I think would do it is my youngest son."<sup>15</sup>

Following the interview, Committeeperson Freund submitted Grievance D5545 on Penley's behalf and the parties agreed to table the grievance pending further investigation. Committeeperson Freund apparently questioned Penley further about the telephone call after the Paragraph (76a) interview. The Grievance Investigation Form describes the following conversation:

"AF: Brian, I need to know what happened. Did you make this alleged threat?

BP: I don't recall calling them. As I said earlier, my family has been under a lot of stress. My money was cut by \$444.00 or something around that time. Although, I don't recall this.

AF: Brian, a lot of issues were mentioned during this conversation and you had to somewhat know about these sort of things to carry on a conversation like that. You stated in the 76 interview your son may have called. Brian, he would have had to know a lot to carry that out. I'm only saying, even if you didn't do it and he did, the conversation spoke in terms of I & me, and the statement says you wouldn't answer or did not wish to answer the supplemental interview questions, so regardless, it sounds like you made the call and accusations like this are not taken lightly any more. It is taken seriously.

BP: I honestly don't recall making that call."<sup>16</sup>

Committeeperson Freund's notes indicate that he continued to meet with Steve Sprecher in an effort to move forward on Penley's grievance.<sup>17</sup> Sprecher presented Freund with a settlement offer on February 12, 2008. The settlement offer is similar to the one offered to Penley in February 2007 in that it allows him to be reinstated in order to apply for Total and Permanent Disability benefits.<sup>18</sup> It also contains the following language regarding outside employment:

"...If benefits are awarded, Mr. Penley acknowledges that GM and its benefit plan administrators have certain fiduciary duties that obligate them

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<sup>15</sup> Record, p. 20.

<sup>16</sup> Record, pp. 16-17.

<sup>17</sup> Record, p. 31.

<sup>18</sup> Record, pp. 27-29.

to follow plan terms and to investigate information provided or known to them that suggests he is ineligible for benefits, e.g., reports that he has 'recovered,' is working, or is observed in conduct inconsistent with the benefit plan eligibility terms. Though GM may not agree to avoid an independent examination of his eligibility in any case, except as required by law or where information is provided to GM or its plan administrators that supports the scheduling of an independent examination, GM hereby agrees that he will not be scheduled for an independent medical examination on a random or scheduled basis."<sup>19</sup>

Penley acknowledged receipt of the offer on February 12, 2008. The offer indicates that on February 21, 2008, Penley called Sprecher and informed him that he had decided to decline the settlement offer because there was too much uncertainty.<sup>20</sup>

Steve Sprecher prepared a memorandum regarding a telephone interview he conducted with Du Shune Raines on May 6, 2008. Sprecher wrote that he interviewed Raines because she was unwilling to provide a written statement. Sprecher wrote:

"...The reason for the phone interview was due to Ms. Raines being reluctant to write a personal statement regarding the incident with Penley due to the threat he made over the phone and her fear of him. She indicated that she had in fact filed a crime report with the Southfield, Michigan Police Department (see attached)."<sup>21</sup>

Sprecher reported that Raines told him that she felt threatened and intimidated by Penley. Sprecher said that he asked Raines how she identified Penley. He wrote:

"...When asked how she knew it was Penley, she replied she followed standard protocol by asking him to identify himself by SSN and DOB among other questions (nature of the claim, etc.). When asked whether Penley had authorized the GMBSC to speak with his wife or son, she replied that an employee would have to give that permission each and every time by verbally authorizing it over the phone. In this particular incident, Penley did not pass the phone off to either his wife or son."<sup>22</sup>

Sprecher wrote that he also spoke with an investigative examiner named Sean Mahar who reported that Mrs. Penley had called the GMBSC and stated that her husband did not realize he was being recorded when he spoke with Du Shune, but that he denied making any threats. Sprecher commented:

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<sup>19</sup> Record, p. 28.

<sup>20</sup> Record, p. 30.

<sup>21</sup> Record, p. 33.

<sup>22</sup> Record, p. 33.

"...In essence, Mrs. Penley was confirming that it was Brian Penley who made the call. As a side note, no recording device was used during the threatening phone call."<sup>23</sup>

Committeeperson Freund met with Sprecher concerning Grievance D5545 on May 9, 2008, for the last time. Freund's notes describe the following conversation:

"U: We have met on this case multiple times, (recorded and non-recorded) and have had lengthy discussions and or about offers. Are you willing to reinstate Penley to settle this grievance?

Mgt: No. I do agree we have had many discussions about this case and both parties in good faith have attempted to a mutually satisfactory resolution. However, this case is one that neither side can consider lightly because it deals with workplace violence policy and there is zero tolerance for that or those who violate it. Both the union and management are responsible for maintaining an environment that is safe and [free] from harassment. In addition to the threat Brian made to the GMBSC, "How about I come up there and blow your fucking head off," which is well documented, I have also considered his other acts of violence and aggression in the plant and it is disturbing. He was already discharged once for throwing a part at a fork truck driver, plus getting into it with another fork truck driver and banging racks and platforms. I don't see the situation improving. I see it getting worse. As we have discussed, when we sent him out to see an impartial doctor, that Dr. Horn found that he did not have a mental problem or illness, but could control his anger if he wanted to. He has failed to do so. With all that said, I tried to be as fair as I could with him and spent considerable amount of time drafting a proposal allowing him to retire on T & PD, that he rejected, as you know. I'm respectfully requesting the union to W/D on this case.

U: The S/C has carefully reviewed the facts along with Brian's history of violent behavior and after much deliberation we agree to withdrawal."<sup>24</sup>

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<sup>23</sup> Record, p. 33.

<sup>24</sup> Record, pp. 37-38.

Local 23 Shop Committee Chairperson Bill Matthews notified Penley of the decision to withdraw his grievance on June 10, 2008.<sup>25</sup>

Penley appealed the decision to withdraw his grievance to the local union on June 20, 2008. The appeal was considered by the Local 23 Executive Board on July 14, 2008. Chairperson Matthews reported to the executive board that he had reviewed several Umpire decisions upholding discharge for violence and threats of violence in the workplace. Based on his review of these decisions, Matthews recommended that the appeal should be denied. His recommendation was adopted by the executive board.<sup>26</sup> This recommendation was presented to the membership of Local Union 23 on August 20, 2008. The membership adopted a motion to deny the appeal.<sup>27</sup>

Penley appealed the membership's action to the IEB on September 10, 2008. In his appeal, Penley denied having made the threatening telephone call to the GM Benefits and Service Center. He described learning about the charge during his reinstatement interview as follows:

"...It seems a call was placed or at least the accusation of a call was made and the person said that a threat was made against them. This was the first either my committeeman or me had heard of this. Besides the point that the previous grievance was not settled in 'good faith' by Steve Sprecher because he fully had intentions to act on this after the other grievance was settled. The complaint was not signed and there is no recording of the call to verify if a call was made, who made it, or what was said. I found myself back in the stress center that very day. It was to the point I couldn't cope with the fact that every time I turned around I was being slammed by Steve Sprecher, that the financial stress that was being placed on me was tearing my family apart. I had not called the Benefit Center the entire time I had been off. My wife dealt with them on every occasion. I explained there was no need for me to call them then either, that if a call needed to be made, she would have done it then also. I remained in the stress center for 7 days this time. When I was released, I was still drawing my disability from the first incident."<sup>28</sup>

Penley also complained that the company did not consistently enforce a zero tolerance policy regarding workplace violence. He wrote:

"It seems that during the time I have been off there were two temporary workers who got into a physical fight within the plant. It seems that management wanted to keep at least one of the workers because they

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<sup>25</sup> Record, p. 39.

<sup>26</sup> Record, p. 44.

<sup>27</sup> Record, p. 48.

<sup>28</sup> Record, p. 50.

both only received 5 days off. Yet, they fired me based on a mysterious, unsubstantiated phone call I was accused of making. I know we are not supposed to point fingers when things happen but this clearly shows a complete bias towards me by management, which is not supposed to be tolerated either."<sup>29</sup>

Penley asked to have his grievance reinstated so that it could be settled at the International level. He stated that he could not get a fair settlement at the local level. He explained:

"I am hoping the International body and the president see fit to reinstate my grievance and move it through the proper stages or get it settled outside of the local arena as it is apparent Steve Sprecher will not settle it. This has been shown to be a personal vendetta for lack of a better word by Steve Sprecher in Labor Relations/Personnel to get rid of me by any way he can, even by offering me medical retirement, which he would not do if he had a case against me, and a breakdown in our local strength, which may be partially due to the possibility of our plant being sold or closed at the end of this contract. I know I may be asking for a lot, but I feel based on the company's behavior I should be reinstated with back pay for all time lost and credited for the lost time toward retirement."<sup>30</sup>

Chairperson William Matthews responded to Penley's appeal on November 5, 2008. He stated that Committeeperson Freund made a very assertive, good faith effort to reach a satisfactory settlement of Penley's grievance. Nevertheless, Matthews stated that based on various reports and Penley's own testimony, it appeared that Penley had made the threatening telephone call to the GM Benefits and Service Center. For this reason, Matthews concluded that the union's ability to successfully arbitrate Penley's grievance would be nearly impossible. Matthews referred to several Umpire decisions to support this conclusion.<sup>31</sup>

Acting on behalf of President Gettelfinger, Bob Kinkade and Phil Rose conducted an investigatory hearing on Penley's appeal on March 5, 2009. The hearing officers prepared a report to the IEB on Penley's appeal based on testimony given at the hearing and information provided by representatives of Local Union 23.

The hearing officers reported that Penley's son admitted making the telephone call to the GM Benefits and Service Center. Their report states:

"Appellant's son testified his father did not make the phone call, as he had. Son states he took it upon himself to assist his father. Son states he had

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<sup>29</sup> Record, p. 51.

<sup>30</sup> Record, p. 52.

<sup>31</sup> Record, p. 69.

password and Social Security number that were written down and eventually became frustrated with whom he was talking to and said, 'It's a wonder someone doesn't come up there and blow your brains out.' Son states he never told parents he made the call. When he found out his dad had lost his job, son testified he decided to tell him over the last couple months. Son states he was never asked by GMBSC if he, in fact, was the appellant."<sup>32</sup>

The Employee Assistance Representative Joe Norris testified that he was told by Committeeperson Freund that the union warned the son that the company might file charges against him for making this call and at that point, Brian Penley "took ownership" of the call.<sup>33</sup>

Penley's wife also testified that the people in the Benefits Center were very rude to anyone who tried to talk to them. According to the hearing officers' report, Penley's wife said she never let Penley call the Center and he never did in her presence.<sup>34</sup> She said she knew nothing about the statement in Sprecher's memorandum about being recorded, but she denied making any accusation against her husband.<sup>35</sup>

The hearing officers reported that Penley argued the union representatives did not conduct a complete investigation because they did not interview his wife and son. Penley also raised the issue of the two employees who received only minor discipline after getting into a fight in the plant. The hearing officers' report states:

"Appellant also claims disparate treatment and names two (2) employees who were disciplined and claims they were treated differently. Appellant also mentions an incident where two (2) employees got into a fight in the plant and both received short penalties. Of the two (2) named employees, appellant states that one (1) was disciplined for unsafe operation of a fork truck along with many other disciplines and is still working; the other named employee was fired for altering a doctor's statement and returned to work after 30 days off."<sup>36</sup>

Chairperson Matthews argued that the record supports a conclusion that the local representatives worked long and hard on Penley's grievance. Matthews maintained, however, that the grievance could not be successfully arbitrated.<sup>37</sup> Following the hearing, Matthews provided copies of the Umpire decisions he had relied

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<sup>32</sup> Record, p. 90.

<sup>33</sup> Record, pp. 94-95.

<sup>34</sup> Record, p. 91

<sup>35</sup> Record, p. 92.

<sup>36</sup> Record, p. 92.

<sup>37</sup> Record, p. 95.

on in reaching this conclusion.<sup>38</sup> He also provided details regarding the discipline imposed on the other employees referred to by Penley. In a letter dated March 20, 2009, Matthews commented with respect to these records:

“...After researching the disciplinary records of these employees, it is obvious that none of the people were charged with the same violation as Mr. Penley. Therefore, the issue of disparate treatment has no merit.”<sup>39</sup>

On March 31, 2009, Hearing Officer Bob Kinkade advised Penley that his claim of disparate treatment had been investigated, but that the records did not support it.<sup>40</sup>

In their report to the IEB, the hearing officers stated that the record supported the local union’s conclusion that Penley’s grievance could not be successfully arbitrated. They found that the decision to settle the grievance was proper, therefore, and not devoid of a rational basis. They also found no evidence of fraud, discrimination, or collusion with management.<sup>41</sup> The hearing officers denied Penley’s appeal and their report was adopted by the IEB as its decision in a letter dated December 21, 2009.<sup>42</sup> Penley has now appealed the IEB’s decision to the Public Review Board (PRB).

## ARGUMENT

### **A. Brian Penley:**

Since the accusation was first made, I have unequivocally denied calling anyone at the GM Benefits Service Center. As I have repeatedly explained, my wife, Diane Penley, always communicated with the Center on my behalf. In early 2009, my son, Chris Penley, confessed to me that he had made the threatening telephone call to the Service Center. Chris attended the hearing on March 5, 2009, and testified to this effect. Chris stated that he had identified himself as me and gave the service representative my password and Social Security number, which Diane had posted in the kitchen for quick reference.

The testimony of Representative Joe Norris that Augie Freund told him I said Chris did not make the call is false. Furthermore, Norris’s testimony is hearsay and should not be credited. If Mr. Freund had something important to contribute to this appeal, then he should have attended the hearing on March 5. The record shows Mr. Freund consistently took notes regarding his work on this grievance. If he had really discussed this with Chris and me, and I had really told him I wanted to take ownership

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<sup>38</sup> Record, pp. 99, 106-113.

<sup>39</sup> Record, p. 99.

<sup>40</sup> Record, p. 115.

<sup>41</sup> Record, p. 97.

<sup>42</sup> Record, p. 116.

of the threatening call, he would have put that in his notes. There is nothing about this alleged conversation in the notes prepared by Committeeperson Freund.

The union has not conducted an adequate investigation into the charge against me. No one ever discussed the case with Diane Penley, even though I explained that she handled all of my interactions with the GM Benefits Service Center. Furthermore, no one from the union ever interviewed Du Shune Raines. Everyone relied on Steve Sprecher's claim that she felt the threat was real. Let's be realistic. A threat made over the telephone is the least intimidating kind of threat. Ninety-nine point nine percent of the time, such threats are empty talk and not taken seriously. It is comical to think that anyone really believed that there was a legitimate possibility that someone would drive from Indianapolis to Detroit to physically harm some operator in the GM Benefits Service Center. Comparing this telephone conversation to an in-plant threat or act of violence is clearly erroneous. To date, the union has failed to demonstrate that comparable behavior has led to a discharge.

I do believe that I have received disparate treatment. An employee who was fired for altering a doctor's statement was reinstated after a thirty-day layoff. Committing fraud is easily on the same level as the charge against me.

I disagree with the opinion of Chairperson Matthews that my grievance could not be successfully arbitrated. Perhaps this was true before it was revealed that Chris made the telephone call to the GM Benefits Service Center, but once this was known, why wouldn't I win at arbitration? Furthermore, it could be argued that my grievance was already settled on October 3, 2007. The settlement agreement management entered into on that date specifically resolved all open grievances up to the date of the settlement. Given that the telephone call took place on September 25, 2007, management waived its right to impose discipline for this incident. Representative Matthews stated that management was aware of the phone call on October 5, 2007, when they settled my previous grievance. He wrote this on the grievance settlement contained in the record. This legal point needs to be presented to an arbitrator for resolution.

I respectfully ask that my grievance be reinstated and pursued in arbitration.

**B. International Union, UAW:**

Although Penley continues to assert that he did not make the telephone call to the GM Benefits Service Center on September 25, 2007, it would be difficult for the union to prove that. It is undisputed that the caller used Penley's personal information, including his Social Security number and had first hand knowledge of Penley's benefits and claim. The caller did not identify himself as someone other than Penley. Furthermore, the caller's behavior was consistent with Penley's previously aggressive behavior in the plant. Moreover, Diane Penley's subsequent telephone call to the Center about the incident suggested that Penley was, in fact, the caller.

EAP Representative Norris testified that Penley admitted having made the call during a conversation with Committeeperson Freund when he was confronted with the possibility that the telephone call had been recorded and that charges might be filed against his son. Although Penley now denies that he made the statement and claims that Norris's testimony is not credible, it is not normally the function of the PRB to determine credibility issues. As an appellate body, the PRB must rely upon the findings of those who have heard the actual testimony.<sup>43</sup> The hearing officers for the IEB found Norris's testimony to be credible.

The evidence shows that the local union investigated Penley's grievance and worked to reach a reasonable settlement. The fact that the local union was unwilling to pursue the grievance further was rational given the lack of evidence to support Penley's initial denial that he was the caller, and his subsequent admission to Freund that he made the telephone call on September 25, 2007. The local union's presentation of several unsuccessful Umpire cases involving similar threats, abusive language, and acts of violence also demonstrates that it evaluated the potential success of Penley's grievance, and that its decision to withdraw was based on legitimate considerations.

Finally, Penley's claim of disparate treatment is totally unsupported. None of the other cases cited by Penley are comparable to his. In one case, the employee was progressively disciplined for violating several minor shop rules, none of which involved violence or threats. The union was able to get that employee back to work, apparently on a last chance basis. In the case involving the charge of having altered a doctor's note, the local union demonstrated that the employee had not actually falsified the note and the company returned the employee to work. Finally, in one of the cases cited by Penley, the employee was terminated and never returned to work. Not one of these cases supports Penley's claim of disparate treatment.

**C. Rebuttal by attorney Ronald E. Weldy on behalf of Brian Penley:**

The local union's response to Penley's appeal improperly discusses past matters that had been cleared from Penley's record by the settlement agreement dated October 3, 2007.

The IEB ignores the fact that the October 3, 2007, settlement agreement resolved the issues surrounding the alleged September 25, 2007, telephone call. The agreement specifically states that it is "in resolution of all issues." On October 31, 2007, Chairperson Bill Matthews wrote a statement on the agreement that GM Representative Steve Sprecher was aware of the alleged September 25 incident when he signed the settlement agreement. Therefore, Penley has a compelling legal argument that GM waived its right to pursue any discipline associated with the alleged telephone call.

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<sup>43</sup> *Sarkissian v. Local Union 6000*, 5 PRB 624 (1989) at 629.

We would like to highlight some of the facts and testimony in the record. Committeeperson Augie Freund took copious notes of his handling of Penley's grievance. There is no mention in Freund's notes of any conversation with Representative Norris about the telephone conversation. Norris's testimony on this point is not credible. It is also notable that the Benefits Representative testified that all telephone calls to the Benefits Center are recorded. The fact that the September 25, 2007, call was allegedly not recorded is highly irregular. This circumstance suggests that the call was erased because it would have established that Penley's son Chris made the call rather than Penley himself.

### DISCUSSION

The record demonstrates that Committeeperson Freund energetically pursued grievances on Penley's behalf in an effort to protect his job. It also demonstrates that Penley did not correct the behavior that repeatedly put his job in jeopardy. Freund's notes from the grievance meeting on May 9, 2008, indicate that Penley's discharge on January 23, 2007, resulted from his having thrown a part at another employee. Although the union was able to negotiate Penley's reinstatement following this incident, the threat made during a telephone call to the GM Benefits Center led to Penley's immediate discharge on the day he was to be reinstated. By this point the union's options were limited. Supervisor Steve Sprecher made it plain to Committeeperson Freund that he was determined to prevent Penley from returning to work at the plant. The company was not going to reinstate Penley unless ordered to do so by the GM Umpire.

Penley argues that his grievance could have been successfully arbitrated once it was known that his son was responsible for the telephone call, but that fact has not been established. We cannot say for certain who made the call to the GM Benefits and Services Center on September 25, 2007, on the basis of this record. Representative Norris's testimony about a conversation he had with Committeeperson Freund only clouds the issue further. Regardless of the witness's credibility, testimony about conversations between absent third parties has little probative value because statements are susceptible to misinterpretation and misunderstandings cannot be cleared up. The hearing officers reported that Penley's son claimed to have made the call. As Committeeman Freund pointed out to Penley, however, the evidence supports a conclusion that Penley himself made the call. The speaker identified himself as Penley and spoke in terms of I and me. Furthermore, the speaker's behavior was consistent with Penley's pattern of angry outbursts. Penley cannot completely disassociate himself from the call. Either he made the call himself, or his son made it acting on his behalf. The question before us, however, is not whether Penley was guilty of having made this threatening telephone call, but rather whether the local representatives had a rational basis for their conclusion that his grievance could not be successfully arbitrated.

The Umpire decisions relied on by Chairperson Matthews fully support his conclusion that the union could not obtain Penley's reinstatement through arbitration.

The Umpire has sustained discharge as a penalty based on a single instance of violent behavior in the plant even where the employee had an excellent record and long service. In Umpire Decision No. C-308, dated January 27, 1945, the union argued that discharge was too harsh a penalty in view of the fact that the employee had never previously lost his temper or assaulted another employee. Umpire Ralph Seward responded:

“The Umpire cannot agree. Some violations of Shop Rules are in themselves so serious that the best of prior records should not mitigate their punishment. Throwing a twenty-seven pound steel shell at a man with such force as to send him to the hospital cannot be excused or condoned. K. might never again repeat such an act, but management cannot be required to take that risk.”<sup>44</sup>

As Umpire Seward suggests, the risk to other employees posed by violent behavior can override factors that might otherwise mitigate penalties applicable to different categories of shop rule violations. Umpire Nathan P. Feinsinger stressed this point in Umpire Decision No. H-84, dated June 1, 1959. His decision states:

“...In each case, the Umpire must weigh the risk of exposing fellow employees to physical harm in the future. If the risk is clear, the discharge should stand. ...”<sup>45</sup>

In Penley’s case, rather than one instance of violence in the context of an excellent record, there is a pattern of angry outbursts. Given this documented pattern, it was rational for the union to conclude that the GM Umpire would likely have been persuaded by Supervisor Sprecher’s argument that Penley posed too great a threat to his fellow employees. Management has a responsibility to its employees to respond where it appears that an individual in the workplace is disturbed to the point that he poses a risk to other employees. Tragic incidents can and do occur when an employee cannot deal with day-to-day frustrations without resorting to angry outbursts.

Our jurisdiction to consider appeals related to the handling of grievances is limited to claims that the handling of the matter was influenced by impermissible factors such as fraud, discrimination, or collusion with management, or that the decision was devoid of any rational basis.<sup>46</sup> This record demonstrates that Committeeperson Freund met with management on several occasions in an attempt to secure Penley’s reinstatement. He convinced the company to bring its prior settlement offer back to the table which would have allowed Penley to obtain disability benefits, and to the extent possible, permit him to earn additional income from his involvement in a small business.

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<sup>44</sup> Record, p. 106.

<sup>45</sup> Record, p. 111.

<sup>46</sup> International Constitution, Article 33, §4(i).

When Penley refused this offer of settlement, there was little the union could argue on his behalf.

Penley maintains that the October 3, 2007, settlement should have cleared the penalty imposed for the incident on September 25, 2007. However, this argument would be unlikely to convince an Umpire to ignore the pattern of violent behavior revealed by Penley's disciplinary record. Supervisor Sprecher may have known about the threatening telephone call when he made the first settlement agreement, but the discipline for this incident had not yet been assessed. Management could argue, therefore, that the settlement agreement did not apply to the discipline assessed in connection with the telephone call. Management was clearly out of patience with Penley's inability to control his temper and was not willing to reinstate him. The union tried to negotiate some relief for him without success. Its decision that no further relief could be obtained through arbitration was not without rational basis.

The decision of the IEB is affirmed.