BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
BAY SHIPBUILDING CORPORATION	
and	Case 90 No. 43697 A-4607
LOCAL 449, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO	

Appearances:
Mr. Clifford B. Buelow, Esq., Davis & Kuelthau, S.C., on behalf of the Company.
Mr. Kenneth Loebel, Esq., Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., on behalf of Local 449.

ARBITRATION AWARD

According to the terms of the agreement which was implemented by the Company on January 17, 1988, and based upon the parties' undated "Settlement Agreement" to arbitrate this case (Jt. Ex. 2 herein), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an impartial arbitrator to hear and resolve a dispute between them involving the discharge of K. B. on July 26, 1989. The undersigned was designated arbitrator and made full written disclosures to which there were no objections. Hearing was held on April 27, 1990 at Sturgeon Bay, Wisconsin. A stenographic transcript of the proceedings was made and received by May 8, 1990. The parties submitted all exhibits and post-hearing briefs by June 22, 1990 and the Arbitrator thereafter exchanged the briefs. The parties agreed to waive reply briefs and to waive the contractual requirement that the Undersigned issue her decision within 30 days following the receipt of briefs.

STIPULATED ISSUE:

The parties stipulated to the issues to be decided in this case in their "Settlement Agreement" (Jt. Ex. 2), as follows:

Whether K. B. was terminated for cause.

If not, what is the remedy?

RELEVANT IMPLEMENTED AGREEMENT LANGUAGE:

The most recent mutually agreed upon collective bargaining agreement between the parties expired on August 31, 1987. The Union and the Company were unable to agree upon a successor agreement, and on January 17, 1988 the Company put into effect its last offer to the Union which included an 18% cut in pay and benefits for employes and included, inter alia, the following language:

HOURS OF WORK AND OVERTIME
ARTICLE V

> **Section 1.** The regularly established work day shall start at 7:00 a.m. and this starting time shall be recognized as the beginning of the twenty-four (24) hour work day.
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> . . .
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> **Section 2.** The regular established work day shall consist of eight (8) hours per day.
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> **Section 3.** A thirty (30) minute unpaid lunch period shall be provided for the first and second shift near the midpoint of the shift. A twenty (20) minute paid lunch period shall be provided for the third shift near the midpoint of the shift. Employees assigned to work during their lunch period shall be allowed a reasonable period on Company time to consume their lunch after completion of such necessary or emergency work. Employees will receive overtime pay if they are not provided a thirty (30) minute unpaid lunch period within one (1) hour of the normally scheduled lunch period.
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> . . .
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> **SUPERVISION**

ARTICLE X

Section 1. A foreman shall be an employee of the Company who may have some or all of the following responsibilities:

A. Be in general charge of a department or shops.
B. Makes independent decisions as to operation.
C. Be charged with carrying out the Company policies.
D. Has the right to hire and discharge employees.

The foreman shall not be subject to the terms of this Agreement except that employees advanced to foreman positions shall be on leave of absence and shall retain their seniority in their classification for a trial period not to exceed one hundred eighty (180) days. During this period of time, the employee shall be considered foreman and shall be subject to Article I, Section 4. A list of foremen shall be furnished to the Unions and such list shall be posted and kept current.

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SENIORITY
ARTICLE VIII

Section 1. Seniority shall be established for all employees as set forth hereafter in this Article and shall be cumulative for all employees. Seniority shall mean continuous employment with the Company beginning with the date on which the employee began to work after being hired . . . .

Section 5. Seniority and active employment shall terminate when:

A. An employee quits;
B. Is discharged for cause;

. . .

The Company also has had a set of posted work rules which were cited in this case:

COMPANY WORK RULES
AND
DISCIPLINE

To accomplish the best results in our work and, at the same time, to preserve a spirit of fairness for everyone concerned, these rules of personal conduct, health and safety have been established. These rules shall be distributed to all employees, and a copy shall be displayed at all times on official Company bulletin boards.

Failure to observe these work rules may result in disciplinary action being taken as described herein. However, the rules are intended solely as guides for employees. They are not intended as limitations upon the Company's judgment to expand, alter or otherwise modify them as determined by the facts of each individual situation.

Any questions regarding these rules or interpretation should be directed to your department Foreman or Supervisor.

A. Disciplinary action for violation of rules within any group could be cumulative. Actions could also be cumulative between groups.
B. Disciplinary actions taken within Groups I, II and III will be removed from an employee's record after a twelve (12) month period. Records pertaining to Group IV will be retained in the Company file permanently.

Violation of Company Rules may receive disciplinary action as indicated.

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GROUP II
1st Offense - Written Warning
2nd Offense - 2 Day Suspension
3rd Offense - Discharge

1. Defacing or removing material from bulletin boards.
2. Operation of machines, tools or equipment which an employee has not been trained in operation, or is not normally used by the employee in his work.
3. Disorderly conduct while on Company premises.

4.Smoking in unauthorized areas.
5.Leaving Company premises during working hours without permission of the Foreman.
6.Reporting for duty while under the influence of alcoholic beverages or narcotics.
7.Negligence resulting in the damage or destruction of tools, machinery, or equipment, product or property belonging to the Company or to fellow workers.
8.Tampering with or abusing vending machines.
9.Defacing equipment, tools, machinery, products or property belonging to the Company, or to other employees, including removal of owner identification on same.

. . .

GROUP III
1st Offense - 2 Day Suspension
2nd Offense - Discharge

1.Negligence or horseplay resulting in an injury.
2.Falsifying Company records (other than application form).
3.Sleeping while on duty.
4.Disclosure of confidential Company information to unauthorized persons.
5.Willful punching or tampering with the timecard of another employee.
6.Creating a disturbance while on duty including foul or abusive language directed at Company personnel.
7.Concealing defective work knowingly.
8.Leaving yard and returning during the same shift without punching time card.
9.Misrepresenting facts to Foreman, Nurse or other Company representative regarding injury or illness.
10.Violation of good order, safety and discipline too serious to be considered as a Group II violation and not serious enough to be considered a Group IV violation.

BACKGROUND FACTS NOT IN DISPUTE:

The Grievant was employed by the Company from April 23, 1973 until his discharge by letter dated July 26, 1989. The Grievant was employed by the Company as an "outside" journeyman machinist on the first shift (working from 7:00 a.m. to 3:30 p.m.) during July of 1989. For about two weeks prior to July 21, 1/ the Grievant had been assigned a helper, a 17-year employe of the Company, Kenneth Kintopf, a mechanic specialist (a less-skilled position than the Grievant's), working on the vessel, the "Mormactide" which was dry docked at Berth 15. The Grievant appeared to be approximately five feet, seven inches tall and to weigh approximately 150 pounds.

As machinists, both the Grievant and Kintopf worked under General Foreman/Machinist Department Head Don Clarke and foreman "Red" Sunstrom during July. On July 21 and 24, the Grievant and Kintopf were fitting brake shoes or pads in the anchor windlass drums in the forward part of the "Mormactide." It is undisputed that the job did not go smoothly on either day since the brake shoes had to be hand sanded and fitted, whereupon they would crack after application to the drum and they would have to be replaced again with new shoes. Also, on July 24, it is undisputed that the weather was hot (in the 80's F.) and muggy.

Over the Grievant's tenure with the Company, the record here clearly showed that the Grievant had never been suspended by the Company and that during 1989, the Grievant had a perfect attendance record. 2/

Foreman Donald "Spike" Birmingham was hired by the Company in October 1972 as a journeyman mechanic/pipefitter. He was then a member of the Pipefitters Union. In October, 1977, Spike was promoted to foreman from a leadman pipefitter position. In 1982, Spike was promoted to General Foreman and Department Head of the Pipefitting Department. It is undisputed that Spike was not a foreman in charge of either the Grievant or Kintopf's work during July of 1989. Birmingham appeared to be approximately six feet tall and to weigh in excess of 180 pounds.

FACTS IN DISPUTE:

July 21 - Spike's Version:

1/ All dates hereafter are in 1989 unless otherwise stated.

2/ I reject and have not considered the evidence, proffered by the Company, that the Grievant had been previously suspended since the facts showed that that discipline had been expunged from the Grievant's record as a part of a settlement.

On Friday, July 21, at about 3:15 p.m., Spike Birmingham (hereafter Spike) left the Pipefitting Shop and went out and stood by the steps leading to the graving dock. There were at least three other foremen who also came out to stand at the same place. Spike stood near the steps (on Berth No. 15) at the stern of the "Mormactide." Spike noticed the Grievant and Kintopf walking down Berth 15 when they were approximately 50 to 100 feet away from him, walking toward Spike. Spike stated that he then said, "Hey, you fellows stay here till the whistle blows." The Grievant and Kintopf neither looked at Spike nor did they speak or stop. The Grievant and Kintopf just kept walking. Spike then asked the Grievant and Kintopf if they were working overtime or something (which would explain why they were leaving the boat early). 3/ Neither the Grievant nor Kintopf responded nor did they stop. Spike then said, "Hey, you fellows stay here till the whistle blows or I'm going to have to write you up for leaving the boat early." The Grievant and Kintopf continued walking toward the Machinist Shop. 4/ Spike assumed that the Grievant and Kintopf then went to their shop to clean up. Spike did not immediately prepare a warning for issuance to the Grievant and Kintopf on July 21.

July 24 - Spike's Version:

At about 11:45 a.m., Spike went to the graving dock and stood near the steps at the same place he had been standing on July 21 at 3:15 p.m. On July 24, Spike noticed five people walking toward him down Berth 15, which group Spike noticed when they were 40 or 50 feet away from him. Among the group were Shipfitter Lester Hembel and his helper, Shipfitter Gerald Kaye. The latter, Spike noticed, was carrying a hose over his shoulder. Spike stated that also in this group was a crane operator whose name Spike did not know at the time but who was later identified as Dale Ross, the Grievant and Kintopf. Hembel and Kaye walked ahead of the Grievant and Kintopf, according to Spike. Spike shouted to the group, "You fellows stay here till the whistle blows." At this point, Hembel said he was going to first aid (according to Spike) and Kaye said that he had a leaky hose he had to take to repair. Spike, satisfied with those responses then turned his attention to the Grievant and Kintopf. Calling them each by name and pointing to the ground, Spike told them, "You stay here till the whistle blows." At this point, the Grievant and Kintopf were parallel with Spike and about 20 feet across the Berth from Spike. Spike then asked, "Didn't you fellows receive the write-up I gave you last Friday?" According to Spike, Kintopf then turned and looked at Spike. Spike saw that the Grievant and Kintopf were not going to stop so he walked after them and, calling each of their names, again told the Grievant and Kintopf to stay where they were till the whistle blew. Neither the Grievant nor Kintopf stopped or slowed down. Spike continued to walk after them and caught up with them as they rounded the corner of the Berth, going toward the Machine Shop. Spike said the Grievant's and Kintopf's full names, adding, "you guys stay right here till the whistle blows."

At this point, Spike stated, the Grievant turned around and faced him and said, "All right, you f-----." The Grievant then threw down the brake shoe he had been carrying in his right hand close to his body which Spike had not noticed him carrying before the Grievant threw it to the ground. The shoe broke in three pieces. The Grievant said, "You're in big trouble, you S--O--B----. Look what you did. This costs $109 and you're in big trouble." Since Spike thought it looked like the Grievant was going to turn and leave, Spike said, "You stay right here till that whistle blows or I'll discipline you up to and including discharge." According to Spike, the Grievant then looked at him and said, "You S--O--B----." Spike responded, "Hey, that's insubordination. I'm going to discipline you for that." Spike then decided that the confrontation had gone far enough and he turned around and began to walk back to the stairs near the graving dock where the other foremen were standing. According to Spike, the Grievant followed closely behind him as he walked, saying, "You S--O--B----" three times, at the back of Spike's head although Spike did not turn around to determine how close the Grievant was to him, or to confirm to whom the Grievant was speaking. Spike thereafter observed the Grievant and Kintopf go down the steps onto the graving dock and they stood by the rudder of the "Mormactide" until the whistle blew.

Spike never asked Dale Ross, the crane operator, where he was going and Spike did not follow up on Ross' having left the boat early on July 24. Also, Spike did not check with the nurse to see if Hembel went to first aid on July 24 and he did not check up to see if Kaye had gone to hose repair that day. At the time of the confrontation between the Grievant and Spike, there were two or three other foremen standing near the steps next to the graving dock. Although each foreman was asked what, if anything, they had heard or seen during the Company's investigation of the July 24 incident, Spike stated that none of them had seen anything nor had any of them heard the language the

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3/ The parties stipulated that the Grievant and Kintopf were not scheduled to work overtime on July 21 and that their shift that day ended at 3:30 p.m.

4/ As a rule, and as occurred on July 21, the whistle blows five minutes before the end of the first shift, at 3:25 p.m., and employes are then free to stop working and go to their department shops to clean up and/or proceed to the front gate to punch out.

Grievant allegedly directed at Spike. Finally, although Spike insisted on direct examination that during the entire incident of July 24, he never lost his composure, he never got angry and he never lost control of himself, he later admitted pursuant to leading questions by Company counsel that he had been "perturbed" and "upset" after Spike had asked the Grievant and Kintopf three times to wait till the whistle blew without receiving a response.

July 21 - The Grievant's Version:

On Friday, July 21, the Grievant and Kintopf had been working alone on the forward end of the "Mormactide" fitting brake shoes to an anchor windlass drum, as stated above. After 3 p.m., the Grievant told Kintopf that they should clean up and put away the tools. After they had cleaned their work area it was 3:15 p.m. and they then started walking off the boat and onto Berth 15. As the Grievant and Kintopf walked down the Berth toward the Machine Shop, they saw four or five foremen standing near the steps leading down to the graving dock. The Grievant heard his last name called out three times, the first time when he and Kintopf were across from the steps leading to the graving dock. At first, the Grievant thought that someone was calling for one of three or four other people employed by the Company as employes (including one foreman) who all have the same last name as the Grievant. At this point (about 80 to 100 feet away from the steps), the Grievant heard the name "Kintopf" called out and he knew that whoever was calling his name, was calling for Kintopf and the Grievant. But, the Grievant stated, he and Kintopf were around the corner, close to their shop "so I decided not to stop and go in anyway," because (he admitted on cross-examination) it was "Friday, we wanted to get in early, we just kept walking in." The Grievant also admitted on cross-examination that he had identified the person calling to him and Kintopf on July 21 was Spike. The reason he did not stop at the point that he knew that Spike was calling to him and his partner, "There again, it's Friday, we were a long distance away, it's getting late, in we go."

July 24 - The Grievant's Version:

On July 24, the Grievant and Kintopf were performing the same task on the anchor windlass of the "Mormactide." According to the Grievant, the brake shoes they were fitting were cracking after being sanded by hand and applied on the drum by hand because they did not fit perfectly without being fitted individually. The first application of these shoes was cracking and the Grievant and Kintopf were forced to remove the cracked shoes and put on a second application of these shoes in the same area. The Grievant stated that this job was frustrating him and his partner and that it was hot and muggy that day. In addition, the Grievant, having a day or two earlier discussed the problems of cracking brake shoes on this job with his foreman, Red Sunstrom, (who had told the Grievant that these shoes cost more than $100 apiece), decided to go in just before the noon lunch break to show a cracked shoe to Sunstrom and/or Don Clarke (the Grievant's General Foreman and Machinist Department Head). The Grievant decided to leave the job at 11:50 a.m. and go into the Machine Shop before Sunstrom and Clarke left for lunch at noon, to show them the sample shoe.

After they left the ship, the Grievant and Kintopf met up with Hembel, Kaye and Ross as they were walking down the Berth. The Grievant spoke to Hembel and showed him the brake shoe and the cracks in it and the Grievant told Hembel that Sunstrom had told him the shoes cost more than $100 apiece. When the group got parallel with the steps leading down to the graving dock, Spike walked over to the group and said something the Grievant did not hear, to Hembel and Kaye. (Hembel and Kaye were then closest to Spike.) Spike then said the Grievant's and Kintopf's last names and ordered them "if you go in, you are going to be written up for insubordination." The Grievant and Kintopf said nothing and kept walking toward the Machine Shop. Spike then followed behind the group. The Grievant then stated that for "some reason I was extra hot and for the spur of the moment I turned around . . . I threw the pad down" at Spike's feet. The Grievant admitted that the brake shoe broke in three pieces and that he said, "F--- you, Spike," twice and added that Spike had broken the pad which cost $109, or words to that effect. Spike turned around and walked back toward the steps. The Grievant and Kintopf quickly decided they had better go back to the graving dock and wait there until the whistle blew, so they walked behind Spike. The Grievant admitted that at this point he did say, "S--O--B----" but that it was not directed at Spike -- that this was directed at himself because he was upset at the trouble he had gotten himself into. The Grievant also stated that when he and Kintopf followed behind Spike they did not follow closely behind him, as Spike had a head start on them due to the Grievant's and Kintopf's discussion of what they should do after the incident. The Grievant went down the steps onto the graving dock to look at some boring work that he knew was being done and he came back up just before the whistle blew.

On cross-examination the Grievant recalled that Spike asked him and Kintopf if they had received his warning from Friday and that the Grievant responded, "No, we didn't." This was before the Grievant got angry, turned around and threw down the shoe at Spike's feet. The Grievant also admitted on cross that he might also have said to Spike, "Look what you made me do, you're in big trouble now," after he threw down the shoe, at the point at which he told Spike that it cost $109. Finally, the Grievant admitted on cross that Spike possibly told him that "if you go, you will be subject to discipline for

insubordination" and that he (the Grievant) had so testified previously at his Unemployment Compensation hearing.

In regard to his motivation on July 24, the Grievant explained during cross-examination that he felt Spike was "harassing" him "to an extent" on July 24 and that the reason he felt this way was because Spike ordered him and Kintopf rather than just asking them, and this upset the Grievant. The Grievant also explained that the day was hot and the job was stressful, having to fit brake shoes by hand when this should have been done by a machine. Finally, the Grievant admitted that he had been "playing games" with the Company and Spike on July 21 and 24. The Grievant explained that the fact that the Company had cut his wages by more than $2.40 per hour when it implemented the 1988 "Agreement" following impasse, had made the Grievant angry. And the Grievant implied that he had engaged in the acts of July 21 and 24 in an effort to get even with the Company.

ADDITIONAL UNDISPUTED FACTS:

The Processing of the July 21 Warnings and the July 24 Disciplinary Actions

On Saturday, July 22, Spike Birmingham was scheduled to work and on that day he filled out a disciplinary forms for the Grievant and Kintopf regarding the July 21 incident. Spike did not turn in the forms because he wanted to discuss the proper level of discipline with Mr. Barry Brusseau, Company Personnel Director. As Brusseau would not be back at work until Monday morning, Spike had to wait until between 7:30 a.m. and 8:00 a.m. to meet with Brusseau. On Monday, July 24, at the time stated, Spike met with Brusseau and the latter agreed with Spike that the circumstances warranted that the Grievant and Kintopf should receive a written warning for refusing to stop when Spike called out to them repeatedly on July 21. It should be noted that no independent investigation of the July 21 incident was conducted by the Company.

After the July 24 incident occurred, Spike did not go to see Brusseau immediately since he knew that Brusseau was in the habit of leaving for lunch before the whistle blew each day. Rather, Spike had his lunch as usual. Spike then made sure that his men were getting back to work after lunch. Thereafter, Spike then went to Brusseau's office and at some point the Vice President of Production, Bruce Shaw, joined Brusseau and Spike in Brusseau's office where Spike recounted to them the incident with the Grievant which had occurred that day. After the three discussed the situation in depth, Kintopf and the Grievant were called to the office. Kintopf was interviewed first by Shaw and Brusseau with Union Representative Lenny Gunderson and Spike present. The only item of significance which arose during this interview was the fact that Kintopf told Company officials he has a hearing loss and could not and did not hear the exchange of words between Spike and the Grievant on July 24 and at this interview Kintopf refused to state that the Grievant had thrown the brake shoe to the ground. Rather, he asserted that it had fallen but perhaps the Grievant had given it a little extra push. 5/ This interview was short and Kintopf was told to clear out his locker, that he would be paid for the rest of the day but to call in the next day to see if he should return to work. Ultimately, Brusseau decided to assess Kintopf a two-day suspension for his part in the July 24 incident. This penalty was later reduced to a one-day suspension (without pay) pursuant to a settlement of a grievance filed thereon.

The Grievant was then brought in and interviewed by the same people with Spike and Gunderson present. The only items of significance which arose during this interview were that the Grievant apologized immediately for swearing at Spike and explained that the weather and the frustrating brake shoe job had gotten to him; and that he admitted that he had been playing games with Spike and the Company on July 21 and 24. The Grievant was told to do the same as Kintopf had been told to do at the end of his interview.

Brusseau later interviewed Gerald Kaye but did not interview Lester Hembel or Dale Ross prior to his July 26 decision to discharge the Grievant (and to suspend Kintopf). 6/ On the morning of July 26, Brusseau had Spike give a written statement regarding his recollection of the events of July 21 and 24. Spike's July 26 recollection did not vary significantly from his testimony herein.

Evidence Submitted Regarding Prior Discipline Meted Out in Allegedly Similar Cases

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5/ At the instant hearing, Kintopf stated that the Grievant had thrown down the shoe on July 24 and confirmed that he (Kintopf) has approximately a 30% hearing loss.

6/ Kaye and Hembel testified here. Ross did not testify. However, Kaye and Hembel stated that they did not hear or see the altercation between Spike and the Grievant. Although Hembel stated he said nothing to Spike, Spike asserted Hembel told him he was going to the nurse. Both Spike and Kaye agreed that Kaye told Spike he was going to hose repair, at the point in time when Spike inquired where Hembel and Kaye were going before the noon whistle on July 24.

Both the Union and the Company presented documentary evidence of past cases which each party claimed were similar to the instant case and called for the imposition of their sought-for penalty here. Turning first to the Company's evidence, in the C.V.P. case, decided by WERC Arbitrator Pieroni, C.V.P. admittedly made several late-night phone calls to a supervisor's home, allegedly using abusive language during one conversation with the supervisor's wife and allegedly threatening the supervisor during later conversations with the supervisor. The Company discharged C.V.P., and Arbitrator Pieroni, crediting the testimony of the supervisor and his wife, upheld the discharge of C.V.P. In the Mindak case, the employe allegedly used unprovoked, violent, profane and abusive language toward a supervisor with many employe witnesses present. Despite two verbal warnings by the supervisor to stop, Mindak continued his allegedly abusive comments. The supervisor then advised Mindak he was suspended. The Company later discharged Mindak. Although a grievance was filed on Mindak's behalf, the grievance was withdrawn prior to arbitration because Mindak moved away from the community prior to the hearing. In the Suppanz case, the employe (hired September 29, 1975) was fired on September 30, 1976, allegedly for being drunk on the job, refusing to follow his supervisor's instructions regarding the safe performance of a job task, refusing to give the supervisor his correct name and clock number and refusing to leave the job site when ordered to do so by the supervisor.

The Union put into evidence "employee information notices" concerning two situations (Anschutz and Jadin) in which the Company had assessed a two-day suspension or less, for employe actions violating Group III of the Company's rules by creating a disturbance and using abusive language directed at Company employes and/or supervisors and (in the Charles Jadin case) refusing to follow a supervisor's instructions. These notices as a general rule did not recount the language used or the circumstances of the cases. In the Jadin case, the documents reflected some of the circumstances. Finally, the Union submitted WERC Arbitrator Pieroni's Award in the Konrad case. There, the Company discharged Konrad on October 4, 1979, because Konrad had allegedly lied to the Company, claiming an injury which actually occurred at a softball game at the Company on his work time. Arbitrator Pieroni found that the Grievant, in fact, had injured his hand at work and did not report this injury with any intention to defraud the Company and that, therefore, the Company lacked proper cause to discharge Konrad.

POSITIONS OF THE PARTIES:

Company's Position:

The Company argued that the facts of this case are essentially undisputed based upon the Grievant's admissions herein. For example, the Company pointed out that the Grievant admitted that Foreman Birmingham gave the Grievant direct orders to stop on July 21 and July 24 and the Grievant ignored those orders. In regard to July 21, the Grievant's only explanation why he did not stop when Spike told him and Kintopf to stop was because it was a Friday and he wanted to get a jump on the weekend. In addition, the Company pointed out that on direct examination, the Grievant admitted that Spike again ordered him and Kintopf to stop on July 24 subject to discipline. The Grievant explained, because he did not like to be ordered to stop but would have preferred to be asked where he was going, Spike's order made the Grievant angry, and, given the hot day and the fact that the new brake shoes he and Kintopf had been installing that day had been cracking, the Grievant turned and threw down the shoe he was carrying, saying, "F--- you, Spike. F--- you, Spike." The Company also noted that contrary to his position prior to the instant hearing, the Grievant for the first time admitted herein saying, "S--O--B----" to himself but denied saying this to Spike on July 24. In addition, the Company noted that on cross-examination, the Grievant admitted that he might have said, "Look what you made me do . . . you're in trouble now," after he threw the brake shoe down to the ground. The Grievant further admitted that Spike might have asked him if he'd gotten Spike's warning from the previous Friday.

The Company also argued that the Grievant had testified differently at his Unemployment Compensation hearing than he did at the instant hearing and, therefore, that the Company's witnesses should be credited over the Grievant. Based upon the Grievant's general alleged lack of credibility and his admissions against his own interests at hearing, the Company contended that the overall facts of this case demonstrate that the Company appropriately applied the penalty of discharge in the Grievant's case. The Company stated that the Company conducted a good faith, fair investigation of the acts of the Grievant and that the Union failed to prove that the Company's decision to discharge the Grievant was arbitrary, capricious or discriminatory. Thus, in these circumstances, the Company contended that the Arbitrator should not disturb the Company's discharge decision. Where, as here, an employe has been caught leaving work early, failing to respond to a supervisor's orders, damaging Company property and engaging in profane and abusive language and acting in a threatening manner toward a supervisor, the Company asserted that its decision to discharge the employe should stand.

The Company contended that the Union's suggested mitigating circumstances are an insufficient basis upon which to overturn the Company's penalty. First, the Company pointed out that the Grievant's seniority is not a plus for him because it illustrates that the Grievant should have known better and that the Grievant's example, should he be absolved of his acts, might be followed by

other less senior employes. In addition, if the Company cannot fire a senior employe based solely on his seniority, this Company could not fire anyone since the only employes still working at the yard are those with the same or greater seniority than the Grievant.

Second, the Company noted that the fact that the Grievant's prior work record contains only verbal or written warnings is not a sufficiently compelling reason to overturn the Company's penalty here, given the Grievant's admissions that he was playing games with Spike and the Company and given the seriousness of the Grievant's actions toward Spike on July 24.

Third, the Union's explanation that the Grievant's actions were spur of the moment, unintentional acts for which the Grievant apologized immediately, the Company argued, was simply unsupported by the evidence. The Company pointed out that the Grievant admitted that he intended to and did leave the boat early on both July 21 and 24; that he heard Spike call for him to stop on both days but that he chose to keep on going on both days; and he admitted at the instant hearing that he had testified at his Unemployment Compensation hearing to the effect that he threw the brake shoe down on the ground on July 24 to ". . . show a point." Thus, the Company asserted that the Grievant's actions were totally unprovoked and were a part of the Grievant's game-playing tactics.

Fourth, the Union's examples of "inconsistent" discipline, the Company claimed, were either too vague to be applicable here or were factually different from the instant case, while the Company's examples of consistent discipline are clear and should be applicable here. Finally, the Company contended, the fact that Spike Birmingham believed that the Grievant would only receive a 30-day suspension for his conduct, does not demonstrate that the penalty assessed by the Company was too harsh. In all of the circumstances, the Company urged that the grievance be denied and dismissed in its entirety.

UNION'S POSITION:

The Union sought to have the Arbitrator reduce the Grievant's discharge to a two-day suspension and reinstate him with back pay (less the two-day suspension). The Union pointed out that on July 21, although the Grievant failed to stop and wait for the whistle to blow as Spike Birmingham had ordered, others at the Company (like Mr. Brusseau) admitted leaving early regularly for lunch and at the end of the day. The Union pointed out the unfairness of the fact that Birmingham did not verbally warn the Grievant on July 21 that he and Kintopf would be disciplined for the July 21 incident, as well as the fact that the Grievant did not receive any written warning for the July 21 incident until just before the investigatory interview regarding the July 24 incident (after which the Grievant and Kintopf were suspended pending further investigation). Further, the Union asserted that the fact that Birmingham and Brusseau decided to issue the written warning for the July 21 incident without any investigation of the employe's versions of that incident, denied the Grievant and Kintopf due process.

The Union asserted that the facts surrounding the July 24 incident also showed that the Company failed to fairly investigate the July 24 incident by not seeking to interview Lester Hembel or Dale Ross. Furthermore, the Union contended that the treatment of Ross and perhaps of Hembel demonstrated that the Company's punishment of the Grievant was unduly harsh.

The Union argued that Birmingham's testimony at the instant hearing was unbelievable and that it conflicted with his July 26 statement given to Mr. Brusseau. The Union asserted, therefore, that the Grievant should be credited over Birmingham. The Union pointed out that the Grievant and Kintopf went to the dry dock and waited for the whistle to blow immediately after the July 24 incident, as Spike had ordered. Finally, the Union contended that Spike could not have considered the July 24 incident too serious, as after it occurred he merely went to lunch as usual and then saw his men had gotten back to work before he went to see Mr. Brusseau about his confrontation with the Grievant.

The Union contended that the Grievant's 16 years of virtually unblemished employment with the Company, as well as his general credibility in the instant hearing, should stand him in good stead in this case. The Union detailed the variations it found in the Company's witnesses' testimony to show a lack of credibility among the Company's witnesses in contrast to the credibility of the Grievant and the Union's other witnesses. In this regard, the Union pointed to: 1) the Company's erroneous assertions that the Grievant had received a prior suspension; Spike's assertions regarding the Grievant's having called him an S.O.B. were unsupported by any other witnesses' testimony; 3) Spike's credibility was challenged by the Company's own attorney after Spike refused to admit that the Grievant's actions of July 24 had made him (Spike) angry; and 4) employe Hembel's version of the incident varied from Spike's version of the July 24 incident.

The Union argued that the penalty assessed against the Grievant was too severe in all of the circumstances. There was no evidence in the record to show that the Grievant would be likely in the future to engage in any conduct like that he engaged in on July 24. As discipline should be corrective and not punitive, the Union contended that the Company should have weighed certain

circumstances here heavier than it did and that it should therefore have assessed a less harsh penalty in the Grievant's case. Those circumstances are: 1) the Grievant's seniority; 2) the heat of the day; 3) the fact that the brake shoes had been cracking; 4) Spike's tone of voice and imperious commands to stop; 5) the fact that the Grievant apologized to Spike after the incident; and 6) the fact that the Grievant did as Spike commanded on July 24 by waiting in the dry dock until the whistle blew.

The Union asserted that the Company and Birmingham had been selective over the years in enforcing discipline. In this regard, the Union pointed to Spike's recounting of his own treatment of the Grievant in 1985 -- not formally warning the Grievant for failing to wear safety glasses -- and the fact that Spike let Dale Ross slip by him on July 24 without inquiring where Dale was going, showed that Birmingham was "out to get" the Grievant and that he used the whistle rule as a "pretext" to discipline the Grievant. Further, the Union asserted that Birmingham should have reported the July 24 incident to the Grievant's foreman and general foreman so that they could have issued appropriate discipline to the Grievant.

The Union argued that although it was bad judgment for the Grievant and Kintopf not to tell Spike where they were going on July 24, Spike also displayed bad judgment in his handling of the situation. Brusseau's interpretation of the Grievant's actions as an attack on Spike and that the Grievant had incited Kintopf to break the whistle rule was unfair since Spike had not interpreted the incident as an attack and since the evidence showed that it was not unusual for employes to leave before the whistle blows. In addition, the Union asserted that it was totally arbitrary for the Company to hold the Grievant more accountable than it did Kintopf for the July 24 incident.

Finally, the Union pointed to the fact that in similar cases it had cited which had occurred in the past, lesser discipline had been assessed. Also, in the Mindak, C.V.P. and Suppanz cases, cited by the Company, the Union asserted that these cases are factually distinguishable. In sum, the Union urged that the Arbitrator sustain the grievance, overturn the penalty of discharge assessed by the Company, and return the Grievant to work with full benefits and back pay (less deductions for a two-day suspension).

DISCUSSION:

As the above description of the facts indicates, there is dispute between the parties regarding what was said and done on July 24. It is unnecessary for the undersigned to resolve this credibility conflict because assuming, arguendo, that the Grievant's version of the facts is credited in its entirety, 7/ I find that the actions the Grievant admittedly took, as well as the words he admittedly uttered on July 24, make it impossible for me to return him to his former job with the Employer. In this regard, I note particularly that on July 24, the Grievant admitted that he knew that Spike had ordered him to stop and stay where he was until the whistle blew. But the Grievant admittedly chose not to respond either by stopping or by speaking to Spike. The Grievant's first words to Spike (as the Grievant recalled) were, "F--- you, Spike. F--- you, Spike," uttered as the Grievant threw down the brake shoe at Spike's feet. On this point, whether or not Spike had noticed that the Grievant was carrying the brake shoe in his hand before or at the moment the Grievant threw the shoe down, the act of throwing the brake shoe down, in all of these circumstances and noting the Grievant's obscene language, was clearly a violent and threatening act. 8/

In addition, the fact that the Grievant later admitted during the July 24 investigatory interview that he was "playing games" with the Company and with Spike when he engaged in the conduct of July 21 and 24 must be weighed heavily against the Grievant in this case and the Union's assertions here that the Grievant's acts were unintentional or spur of the moment must be discounted. The fact that the Grievant may have been upset or angered by the fact that under the Company's implemented agreement his wages had been cut by some $2.40 per hour does not give the Grievant (or any other employe) the right to "play games" with the Company. In addition, the Grievant's repeated assertions that Spike's orders for him to stop somehow amounted to harassment and that Spike should have requested the Grievant to stop rather than ordering him to do so, are insufficient justification for the Grievant's actions. 9/ As stated above, the circumstances here demonstrate that the Grievant intentionally ignored

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7/ I disagree with the Company's assertion that the Grievant was impeached at the instant hearing when he was confronted with a transcription of his Unemployment Compensation testimony. In my view, the Grievant adequately explained and/or confirmed that certain portions of his prior testimony at his Unemployment Compensation hearing were correct. Thus, those portions should stand as an addition to his testimony herein.

8/ The fact that the Grievant is smaller in stature and lighter in weight than Spike Birmingham does not require a contrary conclusion.

9/ As a general rule, an employe should perform tasks whenever a supervisor orders him to do so and grieve the order later.

Spike's orders to stop even after the Grievant knew that Spike was addressing him and Kintopf. In this regard, I note that the fact that the Grievant admitted (on cross-examination) that he accused Spike of breaking the shoe, stating the cost of it and saying that Spike was in big trouble, also further supports the concept that the Grievant intentionally broke the cracked brake shoe. Furthermore, the facts here also demonstrate that the Grievant was fully aware of the nature of the conversation Spike had had with Hembel and Kaye. I note also that the Grievant admitted on cross-examination that he had also stated at his Unemployment Compensation hearing that he had thrown down the brake shoe "to make a point." This testimony tends to support a conclusion that the Grievant's actions of July 24 were informed and intentional.

The Grievant's various explanations for his conduct do not require a different conclusion. Neither the effect of the heat and humidity on him on July 24 nor the frustrations of the brake shoe job that day are sufficient, in the circumstances, to justify or explain the grievant's actions of July 24. Additionally, the fact that managers and unrepresented employes of the Company leave early for lunch or leave work before the whistle blows at quitting time 10/ is irrelevant here. What non-Union and salaried workers do or do not do has no bearing here, where no evidence was presented to show what hours of work and terms and conditions of employment these employes are subject to and what, if any, discipline they are subject to. The fact that the Grievant decided to return to the boat and to wait there until the noon whistle blew after his July 24 confrontation with Spike, is in my view a demonstration that by this point, the Grievant had identified that if he did not comply with Spike's orders, he would likely be in bigger trouble. Thus, the Grievant's actions in this regard did not mitigate his prior actions. Similarly, the Grievant's apology to Spike at the start of the July 24 investigatory interview and his later offer to pay for the brake shoe were also insufficient to mitigate against his actions of July 24, in my view.

Finally, I must address the Union's assertions that the Grievant's prior clean record and 16 years of employment with the Company is a justification for the Grievant's actions and for a finding that the Grievant should be returned to work since he will not likely again engage in similar activities. The fact that the Grievant admitted at his July 24 investigatory interview (without apparent prodding) that he had been playing games with the Company by engaging in the actions he took on July 21 and 24, tends to indicate that the Grievant could potentially become involved in similar actions in the future. Also, the very provoking, threatening and violent nature of the Grievant's actions of July 24 prompt one to question whether the Grievant might go even farther the next time he feels hot, harassed and upset at being ordered to do something by a supervisor. In all of the circumstances of this case, I find that the Grievant should not be returned to work.

Due Process Considerations

The question arises whether the Company's investigation of the July 24 incident and its treatment of the Grievant were arbitrary, capricious or discriminatory, denying him due process and justifying my returning him to work at the Company. The fact that the Company did not seek the Grievant's version of what occurred on July 21 does not *per se* require a finding in favor of the Grievant here. I note in particular that the Grievant's version of what occurred on July 21 would not have helped his case even if known to Brusseau and Birmingham prior to the issuance of the written warning for the July 21 incident. Second, the fact that a written warning was issued for the Grievant's failure to stop as ordered on July 21 is neither arbitrary nor excessive in the circumstances here. The fact that Spike might not have verbally warned the Grievant on July 21 appears to have been based upon the Grievant's intentional refusal to stop and listen to Spike and not upon any negligence on Spike's part.

Similarly, I am unpersuaded that some sinister motive or meaning should be read into Spike's treatment of Dale Ross and Lester Hembel 11/ -- that Spike must have been out to get the Grievant since he let these two employes pass his checkpoint without penalty. No independent evidence was presented to show that Spike held any animus against the Grievant for any reason or that he and the Grievant had had any previous relationship or contacts which might support a conclusion that Spike was "out to get" the Grievant, as the Union asserted. The Company's decision to hold the Grievant primarily responsible for the incident of July 24 was supported entirely by the evidence it had at the time it meted out the punishments for Kintopf and the Grievant and it was demonstrated at the instant hearing to have been a decision free of any arbitrary, capricious or discriminatory motivation. In regard to the ultimate penalty which Spike allegedly thought should be imposed upon the Grievant because of the Grievant's actions of July 24, such opinions are not relevant

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10/ As a general rule, the facts showed that the quit whistle blows at 3:25 p.m. to allow employes five minutes' paid time to wash up prior to the contractual 3:30 p.m. quitting time.

11/ I shall assume, for the sake of argument, that Lester Hembel's testimony is true regarding what was said between Spike, Kaye and him on July 24, noting that Hembel had no axe to grind in this case.

here and should hardly form the basis for the Arbitrator's setting aside the penalty assessed by Brusseau, whose decision it was to set the penalty. Finally, the fact that the Company chose to hold the Grievant primarily responsible for the July 24 incident was entirely reasonable based upon the facts of this case.

In sum, I cannot find any violations of the Grievant's right to have his conduct fairly analyzed and considered and to have his grievance fairly considered and processed, which would warrant the Company's penalty being set aside. 12/

Based upon all of the relevant evidence and arguments herein and the foregoing analysis thereof, I conclude that the Grievant was terminated for cause and the grievance herein is denied.

AWARD

K. B. was terminated for cause.

The instant grievance must be and hereby is denied and dismissed.

Dated at Madison, Wisconsin this ____ day of _____, 1990.

By _____
Sharon Gallagher Dobish, Arbitrator

12/ The prior arbitration decisions cited by the parties I find to be generally distinguishable from the instant case, although the C.V.P. case bore some factual similarities to the instant case. I note further that the other cases cited by the parties, Anschutz, Jadin, Mindak and Suppanz, lacked full details as to the facts thereof, including what "abusive" language was allegedly used. Therefore, I do not believe that any of these prior cases necessarily require that I set aside the Company's discharge penalty, as the Union has argued.