BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION 695	Case 12 No. 46856 A-4874
and	
REYNOLDS TRANSFER & STORAGE COMPANY, INC.	

Appearances:

Ms. Marianne Goldstein Robbins, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appearing on behalf of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 695, referred to below as the Union.

Mr. Joseph A. Melli, with Mr. Douglas E. Witte on the brief, Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, Suite 600, Insurance Building, 119 Martin Luther King, Jr. Boulevard, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of Reynolds Transfer & Storage Company, Inc., referred to below as the Employer.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the Employer agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed by Mark J. Beaster, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on March 13, 1992, in Madison, Wisconsin. The hearing was transcribed, and the parties filed briefs by April 23, 1992.

ISSUES

The parties stipulated the following issues for decision:

> Did the Employer violate the parties' collective bargaining agreement when it suspended the Grievant?
>
> If so, what is the appropriate remedy?
>
> Did the Employer violate the parties' collective bargaining agreement when it demoted the Grievant?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE III - MANAGEMENT RIGHTS

Except as otherwise provided in this Agreement, nothing herein shall limit the Employer in the exercise of the rights and functions of ownership or management, including, but not limited to, the right to manage the operations of the Employer and direct the working forces . . .

ARTICLE IX - DISCHARGE, SUSPENSION

The Employer shall not discharge nor suspend any employee without just cause, but shall give at least one (1) warning notice of the complaint against such employee to the employee in writing, and a copy of the same to the Union affected. No warning notice need be given to an employee before he is discharged or suspended if the cause of such discharge or suspension is:

(1) Dishonesty.

. . .

(10) Failure of an employee to notify the Employer, prior to the start of the next shift, of a traffic violation while operating a Company vehicle.

(11) Failure to report to the Employer prior to the start of the next shift, any damage to the property of the Company or to the property of others.

. . .

ARTICLE XVI - EQUIPMENT, ACCIDENT REPORTS

Section 3. Accidents. Any employee involved in any accident shall immediately report said accident and any physical injury sustained. The employee before starting his next shift shall make out an accident report in writing on forms furnished by the Employer and shall turn in all available and pertinent information.

. . .

ARTICLE XXIII - WAGES, HOURS, WORKING CONDITIONS

> Section 2 . . . When new jobs are created or vacancies occur and transfer becomes necessary, such jobs shall be posted for at least two (2) working days. Employees desiring these jobs shall sign such posted notice. The Employer, in awarding the position where seniority, skill, ability, prior performance, attendance record and disciplinary record are relatively equal, will award the position to the senior employee.
>
> Where, in the Employer's judgement, there are no employees who have present skill and ability to perform an open Class III job in a safe and efficient manner, the Employer may hire from the outside the employee compliment.

BACKGROUND

The Grievant has been employed by the Employer for roughly fourteen years, and served as a Leadman for roughly six years prior to January 20, 1992. 4/ He has served as Union Steward since March 26, 1991.

The grievance was filed on January 6, 1992, and challenges the Grievant's "suspension of two weeks and reduction of . . . classification and pay rate." Mark Reynolds, the Employer's Treasurer/General Manager, informed the Grievant of both actions in a letter he delivered to the Grievant on January 3, which reads thus:

> This letter is to serve as a notice of suspension of your employment as an employee of Reynolds Transfer and Storage Company, Inc.
>
> On January 2, 1992 you were assigned two jobs that involved a pick up and a delivery in the Chicago, Illinois area. The pick up I am referring to was to haul office equipment for Nicolet from Schaumburg to their campus in Madison.
>
> Upon your arrival at the yard at 6:00 P.M., January 2, I asked you if everything had gone well throughout the day and you then left for the day.
>
> On January 3, 1992 you called the office at 7:40 A.M. and asked for the day off. I stated that I would prefer that you arrange for days off earlier than 20 minutes before your starting time, but I did tell you that you could have the day off.
>
> Approximately 8:30 A.M. Carl Thorsen was sent to Nicolet to unload the office equipment you loaded the previous day. At 10:45 A.M. he called me and stated

1/ References to dates are to 1992, unless otherwise noted.

there was a damaged file cabinet in the load. I called you at your home and asked if you knew anything about the damaged file cabinet. You stated that you had been responsible for the damage while loading the cabinet in Schaumburg.

This failure to report damage to property of the customer is a direct violation of Item 11 . . .

You clearly had two opportunities to inform me this damage had occurred. For some reason you chose not to.

For the above mentioned violation, we are placing you on a two week suspension without pay. The suspension will commence on January 6, 1992. You will be able to return to work on January 20, 1992.

I would like to take this opportunity to address three additional issues.

Reference is made to the letter I wrote dated October 14, 1991 regarding your refusal to wear the required uniform, your reluctance to take responsibility for a job and your failure to show up for work prepared to lead the crew in an organized fashion.

We have seen no effort on your part to correct any of the above mentioned items. We therefore find it necessary to reduce your classification and pay rate to Class III. This change will go into effect starting January 20, 1992.

We will expect to see you on January 20th with your required uniform on and the rest of your clothing clean. If you choose not to adhere to this requirement you will be suspended for one more week.

The October 14, 1991, letter referred to above reads thus:

> This letter is to serve as a confirmation of conversations that you and I have had at various times throughout the last several weeks.
>
> As I have outlined to you before, we are in a service business. I feel, quite frankly, that the level of service we are providing for our customers is declining. You are not showing up for work prepared to accomplish the given day's work, either through not having the proper tools (as was today's case) or not being mentally prepared and organized to lead the crew in an organized and efficient manner.
>
> You are reluctant to take full responsibility for a job, from start to finish. You have been consistantly (sic) the last member of your crew to arrive at work in the morning. It is my feeling that you should be the first, simply to be organized and prepared when the rest of the crew arrives. As a result, it is typically 8:15 when you leave the yard,

> due to last minute loading of equipment. As I have told you, we are glad to pay overtime wage if it benefits the job for the day.
>
> I have talked to you on many occasions about your lost tools. Again, it all gets back to service. You cannot provide a good service to our customers if you are not prepared to do every aspect of the job. I will expect you to have all your lost tools replaced by 10/17/91.
>
> In conclusion, I would like to see you communicate better with the office. For example, Friday 10/11/91, you called the office at approximately noon and indicated that there would be no problem in finishing the move by 4:30 or 5:00 pm. I did not hear from you again until 7:30 pm when you arrived at the yard. To me this demonstrates a lack of regard for the people that are responsible for scheduling work, as well as the men on the job. Circumstances would have allowed more men to be sent out to assist you, thus decreasing time spent on the job.
>
> I find the above mentioned points frustrating because I have seen you do such a good job at times. We continue to hear good things from some customers regarding your personality and your approach to many tasks.
>
> I have worked with you closely for many years now, and we are both getting older. I hope this letter serves to demonstrate how I would like to see you manage yourself and your crew. I have a great deal of respect for you and your abilities.

With limited exceptions, these letters state the basic themes which were developed at some length at hearing.

The Testimony of Mark Reynolds

Reynolds testified that he did not view the October 14, 1991, letter to constitute discipline and did not issue a copy of the letter to the Union. Reynolds issued the October 14, 1991, letter after what he viewed as a deterioration of the Grievant's work performance. Reynolds testified that this deterioration was the subject of an ongoing course of conversations between the Grievant and him. The deterioration continued, according to Reynolds, and prompted him, in March of 1991, to document some of his conversations with the Grievant. His personnel notes, which were not supplied to the Union until the arbitration hearing, state that he talked to the Grievant, on March 1, 1991, during a move for the University of Wisconsin, regarding the Grievant's coat being dirty, and regarding the Grievant's need of a haircut. The next notation from Reynolds' personnel notes concerns a discussion on June 4, 1991, "about taking leadership responsibilities". Reynolds could not recall what prompted the discussion. The entry preceding the letters stated above concerned a move for CUNA Mutual on August 7, 1991. That note states that Reynolds counseled the Grievant regarding "not taking care of work ie. organizing men, watching length of lunch, overall supervision".

Reynolds stated that a move, again involving CUNA Mutual, on October 14, 1991, brought his concerns regarding the Grievant's performance to a head and prompted him to move from discussion to the formal letter set forth above. Reynolds testified that the Grievant arrived that morning too late to get his crew out of the shop by 8:00 a.m., and could not find his tools. Reynolds stated he visited the job site sometime in mid-morning, and found that the move was poorly organized, with too few men in the trailer, and too many men stationed at the upper floors of the move site, causing a bottleneck at the rear of the trailer being loaded. He then returned to the office, drafted the letter set forth above, and later that day discussed it with the Grievant. The results of this, and his other discussions with the Grievant were similar. Reynolds stated that the Grievant would acknowledge the validity of Reynolds' concerns, and would improve his performance on a short-term basis, only to lapse again into a pattern of poor work habits as time wore on.

Reynolds testified that between October of 1991 and January 3, he and the Grievant continued to discuss the Grievant's work performance. The Nicolet move brought his concerns to a head, with Reynolds determining that "something had to be done" 5/, and taking the action set forth in the January 3 letter.

The Grievant's Testimony

The Grievant noted that the Nicolet move was scheduled as a two-day job for two employes. He was to load office supplies for Nicolet in Schaumburg, Illinois, on January 2, and then return to Madison. On January 3, the supplies were to be delivered to Nicolet. The Grievant noted that while loading the truck, the drawers of a four-drawer lateral file came open. The drawers were full, and the bottom drawer sustained damage. The Grievant became aware of the damage when he attempted to close the drawer. The drawer was not visibly damaged, but would not close, indicating an internal mechanism had been damaged. The Grievant set the damaged drawer on top of the file, and proceeded to complete the loading operation. He returned to Madison, driving through a heavy fog. The Grievant acknowledged that Reynolds asked him how the move had gone, and acknowledged that he said that it had gone all-right. The Grievant stated he could not recall Reynolds asking him if he had experienced any

2/ Transcript (Tr.) at 56.

problems with the move.

The Grievant testified that after he returned home that evening, he learned that a friend was leaving for China, and was going to have a going-away party the following day. The Grievant felt it was too late to seek to be excused from work that evening. Rather, he called in the next morning, and asked Reynolds if he could take the day off. He did not dispute the accuracy of Reynolds' January 3 letter regarding the events of January 3.

The Grievant acknowledged that Reynolds has been discussing work-related problems with him since February or March of 1991. The Grievant stated, however, that each problem had been addressed as he became aware of it. He stated he got a haircut within one week of Reynolds' request that he do so. He stated he washed the coat which offended Reynolds, and when that failed to remove the stains, bought a new one. He stated he always wears the pants of the Employer's uniform, but that he did not always wear the shirt to the uniform, especially in cold weather. He stated this practice paralleled that of many other workers, although the other Leadman regularly wears the full uniform. He stated he had no recall of the June 4 discussion noted in Reynolds' personnel notes, and that he believed he had followed the first load from the CUNA Mutual work site on August 7, 1991, when Reynolds observed the organization of the work force at CUNA Mutual. He stated his basic allocation of manpower to perform a move had not changed in any significant respect since he first assumed the duties of a Leadman.

The Grievant acknowledged that Reynolds has discussed his concern about when the Grievant reported for work and how the Grievant organized moves on several occasions. He could not recall any such discussions occurring between October 14, 1991, and January 3, but could not deny they might have. He acknowledged that Reynolds has discussed with him the length of his lunch break on at least one, and maybe more than one, occasion.

The Grievant's normal shift starts at 8:00 a.m. He acknowledged that, as a Leadman, he was expected to report early enough to get a move started by 8:00 a.m. On certain moves, he would report as early as 7:30 a.m. He stated that when he reported before 7:45 a.m., he would document his start time and would be paid overtime. When he reported after 7:45 a.m., he would neither request, nor be granted, overtime. He noted that the Employer relied on, and did not question, his documentation of his start time. The Grievant and Reynolds would sometimes prearrange an early start time, but more typically the start time was left to the Grievant's discretion.

Evidence On The Bargaining Relationship and Bargaining History

The Union has represented employes of the Employer for at least the past fourteen years. The Employer has never been the subject of an unfair labor practice charge. The Grievant, as Union Steward, has been involved in the processing of one grievance other than that posed here. That grievance involved Tom Williams, and is touched upon below.

Item (11) of Article IX first appeared in the parties' 1991-94 collective bargaining agreement. The Employer made the proposal which was eventually inserted as Item (11) of Article IX. Michael Spencer is the Union's Recording Secretary and has served as the bargaining representative servicing the Employer's Union-represented employes for roughly five years. He testified that when the Employer's bargaining representatives explained the proposal which would become Item (11) of Article IX, he understood the explanation to

mean that the reference to "the next shift" meant the next shift worked by the employe. Reynolds denied that the Employer representatives had so explained the proposal.

Evidence On The Discipline Of Other Employes

Reynolds testified that Vandy Prior, who was then a Class III employe, received a three day suspension for backing a trailer into a post and failing to report the incident. That incident involved roughly $150 - $200 worth of damage. Reynolds noted that Dale Steenberg was discharged for damaging the roof of a trailer on a bridge, and failing to report the incident. Reynolds could not specifically recall any incident in which an employe received a two week suspension. In a post-hearing submission, the parties submitted a personnel note initialled by Reynolds which notes that Norbert Giesselmann was "sent home for 1 wk. 3-13-86 thru (sic) 3-20-86 for appearance and horseplay." The post-hearing submission also noted that:

> . . . Mr. Furari who acted as union representative for the Union at the time, did not receive a copy of the enclosed document. Mr. Furari customarily placed correspondence concerning discipline in the union file for that bargaining unit. Mr. Spencer has reviewed that file and the enclosed notice of discipline is not there. No grievance was filed concerning the discipline. 6/

As noted above, the Grievant processed a grievance on behalf of Tom Williams, who received the following written warning, from David Reynolds, dated August 29, 1991:

> This letter is written to notify you that your performance as an employee of Reynolds Transfer and Storage has been unsatisfactory.
>
> On Thursday, August 22, 1991, you were instructed to move material from our warehouse at Darwin Road to our warehouse at East Johnson Street. You were told to take two trucks, with Mark Thompson driving the second truck, to Darwin Road to load two loads of equipment. You were told to call me by telephone when you had both trucks loaded. You were given these instructions at 2:55 p.m.
>
> You did call the office and left a message that you were leaving Darwin Road. I then met you at East Johnson Street to open the building for you to unload. When I arrived at Johnson Street at 4:05 p.m., you were pulling out of the driveway to the garage. I then discovered that you had only loaded one of the two trucks, thus one truck and driver had driven from our office to Darwin Road and then to Johnson Street and accomplished nothing. When I asked you why you failed to load the second load, you would only say that it was not your decision. When I asked who made the decision you responded by saying "It's not my decision." I

3/ The "enclosed document" is the personnel note set forth in the preceding sentence.

> repeated my question five or six times and each time you responded by saying "It's not my decision." As the senior person on this job you know that you are responsible for the task to be done, yet you refused to take responsibility for your actions. You also refused to tell me why you only loaded one truck. You denied that you were celebrating your wedding anniversary that day and wanted to be off work at 4:30 p.m.
>
> This refusal to tell me what you had done and why you had done it is clearly a act of dishonesty on your part.
>
> You then left the Johnson Street warehouse without telling me what you were doing. You returned to Darwin Road to load the second truck.
>
> You returned to our Dayton Street yard at 5:40 p.m. with the second load.
>
> You then reported that you worked 8 1/2 hours for the day. While this is less time than you actually worked, it does not reflect the time lost due to your failure to follow directions.
>
> We will not tolerate this failure to follow directions nor the dishonesty you demonstrated.
>
> Any repetition of these actions may result in your termination as an employee of Reynolds transfer and storage.

The Grievant testified that the parties discussed this matter at some length in a cordial fashion.

Further facts will be set forth in the DISCUSSION section below.

THE EMPLOYER'S POSITION

After an extensive review of the evidence, the Employer notes that "(t)here is no dispute surrounding the facts of (the Grievant's) suspension" and concludes that the relevant facts are that "(h)e damaged a customer's file cabinet and failed to report the damage to the company before 8:00 a.m. the next work day despite speaking with Mr. Reynolds on two separate occasions." The Employer contends the suspension was authorized by Article IX, Item (11), which, according to the Employer, requires notice of property damage prior to "the next shift the company operates".

The Employer contends its interpretation of Article IX, Item (11) is grounded by "(t)he contract itself and the evidence presented at hearing". More specifically, the Employer argues that Article XVI, Section 3, and Article IX, Item (10), establish that the parties specifically differentiate between references to "the employee's next shift" and "the next shift". Beyond this, the Employer notes that the parties, during the 1991 negotiations on Article IX, dropped a reference to "intentional" regarding a failure to report property damage. This change is, according to the Employer, a significant indication of "the company's view of the importance of that provision." Beyond this, the Employer argues that the Union was unable to offer any credible evidence that Article IX, Item (11) permits an employe until the employe's next shift to report property damage. It follows, the Employer concludes, that the Grievant

"was properly suspended."

The Employer's next major line of argument is that the length of the suspension was warranted, and "does not show disparate treatment." The Employer argues that every failure to report property damage under the current agreement has been met with discipline, and that the failure posed here is more significant than other instances "because it jeopardized customer relations." Acknowledging that three day suspensions "were more usual" under earlier agreements, the Employer asserts that the longer suspension posed here was warranted because the current agreement contains a "stricter reporting requirement"; the Grievant was, at the time of the incident, a Leadman; the Grievant was on the negotiating team which agreed to the stricter reporting requirement; and other instances of discipline involved Employer, not customer, property. The Williams warning letter cannot serve as a basis to modify the Grievant's discipline, according to the Employer, since the Williams matter posed an issue on employe intent and since any modification of the Grievant's discipline would in effect amend the contract, and induce the Employer to impose the highest level of discipline.

The Employer then contends that the Union has not substantiated its claim that the Grievant was disciplined because he is a Union Steward. Noting that the prior Steward was not disciplined; that the Employer has never been cited with an unfair labor practice; that the bargaining relationship is long-standing and functional; and that the Grievant has not processed any controversial grievances, the Employer concludes that the record will not support the Union's contention.

Noting that the "facts surrounding (the Grievant's) demotion are also not in dispute", the Employer asserts that his demotion was the culmination of a prolonged deterioration in his work performance. The Employer contends that the right to demote has been reserved under Article III, and that there "is no provision of the contract which limits the employer's right to demote." The Employer then asserts that the "great weight of arbitral authority supports the company's position" that the right to demote is a reserved right, and that the Union bears the burden of proving any limitation on that right.

Even if "the arbitrator places the burden of proof on the employer", the Employer asserts that it "has more than met that burden." More specifically, the Employer asserts if afforded the Grievant due process through verbal and written counseling, and did not demote him for arbitrary, capricious or discriminatory reasons. Contending that the basis for the demotion has ample record support; that the Employer did not use the demotion as a vehicle to promote a more qualified employe in circumvention of the posting provision; and that the demotion cannot be considered discipline, the Employer concludes that a denial of the demotion in effect grants the Grievant tenure as a Leadman.

Viewing the record as a whole, the Employer urges that "the grievance must be denied in its entirety."

THE UNION'S POSITION

After an extensive review of the evidence, the Union contends that the Grievant's two week suspension constituted discipline which is addressed by, and was violative of, Article IX. That article, according to the Union, imposes the burden of proof on the Employer. The Employer has not, the Union argues, met that burden.

Noting that the Employer relies on Item (11) of Article IX, the Union asserts that the "language is ambiguous since it is unclear whether the exception refers to the 'next (scheduled) shift' or 'the (employee's) next

shift.'" That ambiguity is, according to the Union, fully clarified "by the parties' bargaining history." Even if this was not the case, the Union contends that "established rules of contract construction" require that "the proposed language should be interpreted against the proposer, in this case, the employer." Even if the Grievant was required to report the damage before the next scheduled shift, the Union asserts that "the discipline of a two week suspension still remains too severe under the circumstances." More specifically, the Union notes that discipline for similar conduct in the past "has only resulted in a three day suspension for the second offense"; that more severe discipline has been meted to employes in the past only for intentional offenses, and there is no evidence the Grievant intentionally withheld notice of the damage; that the Grievant had, prior to this case, no history of discipline; that his conduct did not "involve any of his leadman duties nor setting an example for others"; and that the discipline was related to his acquiring the status of Union Steward.

The Union's next major line of argument is that the Grievant's demotion "constituted discipline notwithstanding (the Employer's) disclaimers to the contrary." The demotion letter itself establishes this point, the Union asserts. Because the demotion was disciplinary in nature, the Union contends that the Employer bears the burden of proof.

The Union contends that Section 2 of Article XXIII establishes that the Employer lacks the "unfettered right to assign employees to classifications at its discretion." Because the Grievant successfully posted for the Leadman position, and received that position under the principle of seniority, the Employer urges that he could be demoted only "on the basis of the same factors articulated in the seniority clause." Beyond this, the Union urges that Article IX does not contemplate demotion as a form of discipline, and that it follows that the Employer lacks the authority to employ demotion as discipline. The Union also challenges any use of the contract's silence regarding demotion as a basis to support discipline. Such discipline would, the Union argues, be unlimited in duration, and thus could exceed the maximum disciplinary suspension permitted under Article IX for the same offense. Any such conclusion would effectively amend the contract, the Union concludes.

The Union asserts that the Employer has "failed to demonstrate conduct warranting conventional discipline, let alone demotion." The Union challenges the propriety of using the Employer's undisclosed personnel notations as any basis to prove the existence of disciplinable conduct by the Grievant. The absence of appropriate notice to the Grievant or to the Union defeats any possibility for prompt investigation or response to allegedly inappropriate conduct and "contradicts virtually every principle inherent in the concept of just cause", the Union concludes.

Viewing the record as a whole, the Union concludes by requesting "that the arbitrator sustain the grievance . . . and order that the Company rescind the suspension and demotion of (the Grievant) and make him whole for all losses resulting from (the Employer's) contract violation."

DISCUSSION

Article IX governs the first issue, and requires that the Employer have just cause to suspend the Grievant. The elements to a just cause analysis have been variously stated. In my opinion, where the agreement does not specify the standards and where the parties have not otherwise stipulated to them, the just cause analysis must address two elements. First, the Employer must establish the existence of conduct by the Grievant in which it has a disciplinary interest. Second, the Employer must establish that the discipline imposed for the conduct reasonably reflects that interest.

Article IX, Item (11), establishes the Employer's disciplinary interest in an employe's failure to report damage to customer property. The dispute posed here is whether that provision obligated the Grievant to report the damage before the shift he was scheduled to work on January 3, or before the shift he actually worked on January 6.

It is undisputed that the Grievant called Reynolds on January 3 before "the start of (his) next shift", and failed to report the damage. The Union reads Item (11) to operate less as an obligation than as a privilege which excused him from reporting the damage until he next reported for work. This interpretation is unpersuasive.

The Union plausibly contends that the reference to "the next shift" can be read as it asserts. Because the reference is amenable to more than one interpretation, it can be considered ambiguous.

Past practice and bargaining history are the most reliable guides to resolve ambiguity, since each focuses on the conduct of the bargaining parties, whose agreement is the source and the goal of contract interpretation. Neither guide is, however, available here. Item (11) was first inserted into the present agreement, and thus no practice has developed under it.

Bargaining history is, on this record, unhelpful. Spencer noted that he understood the Employer's explanation of Item (11) to read "the next shift" as "the next shift that the employee worked." 7/ He explained the basis of his understanding thus:

> (David Reynolds and I) sat there, and it was very little discussion on this. And the company proposed it, and I said, "Why do you want it?" And he said, "Because I want the people to report before they start their next shift if they had damage. 8/

This simply reflects the ambiguity posed here. Reading "the next shift" to mean "the employe's next shift" resolves this matter only if "the employe's next shift" is read "the employe's next shift actually worked" not as "the employe's next scheduled shift". Spencer's conclusion is clear. However, the statement he attributes to Reynolds can support either the conclusion Spencer drew or the conclusion advanced by the Employer here. The Grievant called on January 3 to be excused from "his" next shift after January 2. Because it is undisputed that this discussion was, at most, brief, it is impossible to conclude the parties mutually considered the impact on the employe of being excused from starting their next scheduled shift. Thus, evidence of bargaining history does no more than reflect the ambiguity posed here.

The Employer's interpretation of Item (11) is more persuasive than the Union's because it has greater support in the terms of the provision, and effects the evident purpose of the provision. The reference to "the next shift" is general and impersonal, and the Union's attempt to read the reference not just as "the employe's next shift" but as "the employe's next shift actually worked" interjects a more detailed factual analysis than the language points to. More significantly, it is apparent the purpose of the provision is to require prompt notice of property damage. To the extent the purpose of the

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4/ Tr. at 167.

5/ Tr. at 171.

notice is not self-evident regarding damage to customer property, it can be noted that prompt notice permits the Employer to minimize customer ill-will by responding quickly to customer problems, and to act promptly to protect itself from fraudulent damage claims. The Union's interpretation does all but defeat this purpose. In this case, the Union's interpretation would have required the Grievant to report the damage three days after the equipment had been delivered to the customer. Had the Grievant been granted a longer leave, the situation would only become more egregious.

The Union has forcefully asserted that the ambiguity of Article IX, Item (11), should be construed against the Employer as its proposer. This principle has been employed as a guide for interpreting labor agreements. Its use in this context is, however, limited. First, it is a general principle not rooted in the language at issue and not necessarily rooted in the conduct of the bargaining parties who created the language. Such logical fictions are best applied as a last resort. The general rule can be given more specific meaning if rooted to the parties' bargaining conduct, but the record here shows no indication the Employer sought to obscure the purpose of its proposal, or to deceive the Union. Beyond this, the roots of this general rule trace into contract law. The application of the rule there is most persuasive where the contract at issue is one of adhesion, drafted as a form by the party asserting its provisions:

> . . . (T)he general rule that ambiguous contract language must be construed against the drafter . . . has particular force where, as here, there is a substantial disparity of bargaining power between the parties, and a standard form is supplied by the party drafting the form. 9/

In this case, the language was found mutually acceptable to parties who have shared a long-standing bargaining relationship. The general rule thus affords limited guidance here.

In sum, the Employer has established the existence of conduct by the Grievant in which it has a disciplinary interest under Article IX, Item (11).

The next element of the just cause determination is whether the two week suspension reasonably reflects that interest. Article IX authorizes a suspension, without a prior warning notice, for violations of Item (11). Suspensions are authorized, not mandated, by Article IX, which specifies only that "(n)o warning notice need be given". This authorizes the exercise of discretion by the Employer. That this discretion can, but need not, result in immediate suspension is underscored by the Employer's action in issuing Williams a written warning for dishonesty, an offense listed at Item (1) as potentially warranting immediate suspension.

The Employer has grounded the severity of the discipline on the fact that the damage involved impacted customer relations, and reflected the Grievant's "failure in his lead man responsibilities." 10/

The Employer's assertion that the effect of the Grievant's conduct on customer relations is not limited to the monetary damage done to the filing

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6/ Goebel v. First Federal Savings and Loan Association, 83 Wis. 2d 668, 675, 266 N.W. 2d 352 (1977), citations omitted.

7/ Tr. at 52.

cabinet is persuasive. Similarly, the Employer persuasively notes that its insistence upon Item (11) during bargaining and its insistence that Item (11) not be restricted to intentionally caused damage underscores the significance of its disciplinary interest.

However, the Employer's disciplinary interest in the Grievant's conduct cannot be fully evaluated without resolving the demotion issue, because the Employer linked that interest to the Grievant's performance as a Leadman. In the January 3 letter, the Employer imposed the two week suspension through January 20, the same day the demotion took effect. Thus, the Grievant was denied the opportunity to upgrade his performance as a Leadman. If the demotion stands, the suspension reflects not discipline, but punishment. The distinction has been addressed as a matter of arbitral precedent. 11/ More significantly, Reynolds articulated the purpose of discipline in addressing the purpose for copying the Union on warning notices:

> Q Do you understand the purpose of those warning notices?
>
> . . .
>
> A All right, to communicate with members of the union that it happened . . . and as I see it or as I would hope, to give that party, Mr. Beaster or Mr. Steenberg, whoever, the opportunity to correct those problems. 12/

This aptly states the difference between discipline and punishment. The essence of a progressive discipline system is to sanction inappropriate behavior in a manner which provides the disciplined employe the incentive, which assumes the opportunity, to modify the inappropriate conduct. If the demotion stands, the Grievant was afforded no such opportunity.

The parties' dispute is less whether the Employer has, under Article III, the authority to demote a Leadman for non-disciplinary reasons than on whether the Grievant's demotion constitutes discipline. Article III is sufficiently broad to authorize the action taken here, and applies "(e)xcept as otherwise provided in this Agreement". Article XXIII, Section 2, underscores the Union's assertion that permitting disciplinary demotions will erode other contractual provisions, but does not address the Employer's authority to demote for non-disciplinary reasons. More generally, the authority cited by the Union recognizes an employer's right to impose non-disciplinary demotions where the agreement does not limit such actions. 13/ Beyond this, it can also be noted that finding the contract to bar non-disciplinary demotions puts a promoted employe at risk of losing a job if a promotion has put the otherwise competent employe into a position not suited to their qualifications.

More significantly in this case, the parties' conduct supports the Employer's assertion that it can demote a Leadman for non-disciplinary reasons. Reynolds and the Grievant engaged in an extended series of discussions

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8/ See, for example, International Harvester Co., 14 LA 883 (McCoy, 1950).

9/ Tr. at 80-81.

10/ See, for example, Thompson Brothers Boat Manufacturing Company, Inc., 55 LA 69 (Moberly, 1970).

regarding the Grievant's performance as a Leadman. Reynolds testified that these discussions included his questioning whether the Grievant wanted the responsibilites of being a Leadman. The Grievant, an articulate and intelligent witness who also serves as Union Steward, neither objected to the discussions, nor challenged the issuance of the October 14, 1991, letter. This indicates that the Grievant and Reynolds shared the belief that the Employer could issue a warning regarding the Grievant's Leadman status without that action being disciplinary in nature. In sum, the issue posed here is whether the demotion was disciplinary.

As noted above, progressive discipline sanctions inappropriate conduct and provides the employe an opportunity to modify the inappropriate conduct. Demotion "must be related to an employee's ability to perform the work on a continuing basis in terms of his competence and qualifications". 14/ The Union forcefully argues that the Grievant's past satisfactory conduct as a Leadman establishes that the demotion was disciplinary in nature. While making a strong case, the Union's assertion is, on this record, unpersuasive.

The Union's assertion cannot obscure the length of time for which the Employer discussed the Grievant's job performance with him, and the nature of the position the Grievant occupied. Reynolds was a credible witness, and his testimony establishes that he was continuously concerned with the Grievant's performance for roughly a year before the demotion. The Grievant was also a credible witness. While the two witnesses struggled to recall the specific moves which prompted performance based discussions, it is undisputed that the Grievant's performance was the subject of an ongoing series of discussions. The evidence supports Reynolds' assertion that the Grievant's performance would improve only on a short-term basis.

Ultimately, the Union's arguments fail due to the nature of the Grievant's position. The position of leadman is quasi-supervisory in nature and is, then, unique. 15/ The Employer's more subjective concerns about the Grievant's performance as an example to his crew and regarding his leadership capabilities carry greater weight regarding this position than regarding totally non-supervisory positions. That the Grievant's performance required Reynolds' continuing attention is itself a reasonable source of concern for the Employer. A Leadman is expected to provide, not require, supervisory-type service. The Union's arguments on the specific items of conduct are not fully responsive to this concern. That the Grievant abuses the uniform standard no more than other employes does not address the Employer's concern that the Leadman set the standard. That the other Leadman more regularly wears the full uniform bears directly on this point. That the Grievant would report early if Reynolds requested him to do so does not address Reynolds' concern that the Leadman himself determine how to get jobs started promptly at 8:00 a.m. That the Employer relied, without question, on the Grievant's time records and overtime requests indicates the responsibility the Employer attaches to this point.

The Grievant's failure to report the damaged file represents the culmination of the Employer's longstanding concern. The Union has, with considerable force, contrasted the severity of the response meted to the Grievant than to other employes. This point again fails to address the fact that the Grievant, as Leadman, was to set the standard for other employes.

11/ Duquesne Light Co., 48 LA 1108, 1112 (McDermott, 1967).

12/ See, for example, General Battery & Ceramic Corporation, 68-1 ARB Par. 8191 (Lanna II, 1968).

The record supports, then, the Employer's assertion that it demoted the Grievant based on its conclusion that he was, on a continuing basis, not performing at a level expected of a Leadman.

The Union, due to its position that the demotion was disciplinary, has not addressed the standard appropriate for reviewing a non-disciplinary demotion. The Employer urges the standard stated in Southwestern Bell Telecom, 94 LA 199 (O'Grady, 1990). Arbitrator O'Grady, in that case, examined a demotion to determine whether the employer's determination was "arbitrary, discriminatory or capricious . . . supported by a reasonable basis." 16/ Whether this states one or two standards is irrelevant here. The Employer's conclusion that the Grievant was not performing satisfactorily as a Leadman, and was not, after due notice, modifying his conduct on a continuous basis, cannot, on this record, be dismissed as unreasonable. The issue is not whether I, or any other arbitrator, agree with the decision. The issue is whether the agreement grants the Employer that authority and whether the Employer's decision was reasonable. The Employer has proven its case on both points.

This conclusion squarely poses the remaining issue regarding the nature of the Employer's disciplinary interest. Because of the Grievant's demotion, he no longer serves as Leadman and cannot be held accountable to set the example of a Leadman. Thus, the two week suspension based on his failure to perform satisfactorily as a Leadman stands not as discipline, but as punishment. The sole basis justifying the two week suspension is, then, the impact on customer relations of his failure to report the damage.

Thus isolated, the Employer's disciplinary interest was neither intended to, nor can, reasonably support the two week suspension. The Employer has never before issued a suspension of this length. The amount of damage actually caused was minimal, estimated by the Employer at roughly $20. Employes, such as Prior, having caused considerably more damage have received considerably less discipline. The Employer accurately notes that Prior did not damage customer property, but this ignores that Article IX, Item (11) does not discriminate between customer and Employer property. Beyond this, the record shows that the Grievant made no attempt to hide the damage, and in fact left the cabinet in a position which assured that the Employer's, not the customer's, employes would have discovered it. The Grievant at no time misrepresented his role in causing the damage. While intent is irrelevant to establishing the existence of the Employer's disciplinary interest under Article IX, Item (11), it does not follow that every type of conduct falling under that item is disciplinable by the same sanction. In this case, the conduct at issue is far less than egregious. Finally, it must be noted that the Grievant has a solid work record, and no prior history of discipline. The Employer placed him on the Nicolet move precisely because of his demonstrated competence. In sum, the disciplinary interest demonstrated by the Employer in this case falls far short of reasonably supporting a two week suspension.

The demotion left the Grievant in a position in which he has demonstrated his competence. The demotion exhausted the Employer's demonstrated concern that the Grievant could not provide the example it expected of him as a Leadman. With this as background, and given the fact that the Grievant has no prior disciplinary history, there is no reason to believe the Grievant requires a higher level of discipline than a warning to modify his conduct regarding the reporting of property damage. The Employer has cautioned that a suspension is required under Article IX, Item (11), but the warning issued Williams belies

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13/ 94 LA at 203.

this point. This is not to equate the conduct of Williams and the Grievant. Rather, this underscores that in this case, the Employer based the suspension on the same concern which grounded the demotion. Because the demotion exhausts that concern, there is little left to the articulated basis of the suspension. Because of the Grievant's work record, there is no reason to believe a written warning cannot fully communicate the Employer's disciplinary interest. That the Employer had the Grievant serve the suspension while technically classified as a Leadman is irrelevant here. To conclude otherwise would permit the Employer to punish, not discipline, the Grievant. This is inconsistent with the principle of just cause discipline. Reynolds' acknowledgement that the purpose of a warning is to instruct, not merely punish, underscores this point.

The issue of remedy requires little discussion. The award entered below requires the Employer to make the Grievant whole for the two week suspension it imposed, and to expunge his personnel record of any reference to the suspension. The award formally denies the grievance regarding the January 3 demotion.

Before closing, it is necessary to touch on one point stressed at length by both parties. The discipline or demotion could not stand if it was based on the Grievant's status as Union Steward. The record will not support a conclusion that either action was so based. The parties have a long-standing bargaining relationship, not marred by findings of unfair labor practices. The predecessor Union Steward received no discipline from the Employer, and there is no evident basis to ground a conclusion that the Grievant acted, as a Steward, on any matter which would have prompted the Employer's animosity. The Union has questioned why Reynolds would make personnel notes on the Grievant which started roughly the same time he became a Steward. Those notes consist of less than ten sentences covering a period of roughly nine months. If the Employer was making a record on the Grievant, it was a notably cursory one. It is more likely that the notes are brief reminders of points Reynolds did not wish to forget or overlook. Beyond this, Reynolds' testimony that he made similar notes on other employes stands unrebutted. Beyond this, none of the conduct Reynolds held the Grievant accountable for appears manufactured. For example, the record demonstrates other employes have been disciplined for their appearance. In sum, the record will not support any conclusion that the demotion or the suspension sought to sanction the Grievant's Union activities.

AWARD

The Employer violated the parties' collective bargaining agreement when it suspended the Grievant.

As the remedy appropriate to the Employer's violation of Article IX of the parties' collective bargaining agreement, the Employer shall make the Grievant whole by compensating him for the wages and benefits he would have earned but for the two week suspension noted in the January 3 letter. The Employer shall expunge any reference to the suspension from the Grievant's personnel file. The Employer may amend the Grievant's personnel file to note the issuance to him of a written warning for his failure to report damage to customer property under Article IX, Item (11).

The Employer did not violate the parties' collective bargaining agreement when it demoted the Grievant.

The grievance is, therefore, denied as to that allegation.

Dated at Madison, Wisconsin, this 18th day of May, 1992.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

rbm/gjc
REYNOLDS.A