

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
LOCAL 63, AFSCME, AFL-CIO : Case 412
and : No. 49829
CITY OF RACINE (WATER UTILITY) : MA-8074
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Appearances:

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME,
AFL-CIO, appearing on behalf of the Union.
Mr. Guadalupe G. Villarreal, Assistant City Attorney, City of Racine,
appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to decide the grievance of Marc Jensen. A hearing was held in Racine, Wisconsin, on October 29, 1993, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by January 4, 1994.

BACKGROUND:

This case is about the discharge of Grievant Marc Jensen for an incident that took place on August 14, 1993. 1/ The facts surrounding that incident are in dispute.

Jensen worked for the City's Water Works Commission from August 20, 1985 to March 24, 1993, and again from May 11, 1993 through August 24, 1993. The short break in service will be explained later.

August 14th was a Saturday. A crew from the Water Works Commission was called out on an emergency to take care of a problem with a break (or blow hole) in a water main at 16th and Kearney Streets. The crew that responded consisted of Steven Dyer, Mario Malacara, Robert Kaplan, David King, and an assistant supervisor, Theodore Ramos. The crew arrived around 5:00 p.m. and worked until approximately 10:30 p.m.

The crew dug a hole that was about six feet wide and ten feet long, and at least six feet deep, as the depth of the water main was approximately six feet at that location. The crew needed to cut the water main where water was escaping from the pipe, remove it and put another segment in it. Dyer was assigned to

1/ All dates refer to the year 1993 unless otherwise stated.

stand on top of the hole, hand down tools, and keep an eye on the walls of the excavation site. Malacara was working in the hole, digging around the water main. Kaplan was also working in the hole, but was not in the hole when Jensen first arrived on the scene.

Some work had been performed at the same location the previous week and the crew had put a sleeve on the main without removing the pipe.

Jensen's home address is 1616 Kearney Avenue, obviously close to the location of the emergency work site on August 14th. Jensen testified that when he came home from work on the evening of August 14th, he saw the crew out digging. He went into his house to take a shower, and his wife told him to forget it, that the water was brown. He sat out on the porch and watched the crew for awhile, and he saw Ramos and a couple of workers leave. He told his wife that he was going over to give his buddy Dyer "the business," and his wife told him that it was not a smart idea. But Jensen went over there, acting like an irate citizen mad about the brown water.

Jensen testified that he said to Dyer, "Hey, what the hell, can't you guys fix this right the first time? Jesus Christ, I think I'll have to call the mayor." At that point, according to Jensen, Malacara said, "What the fuck are you doing here? Get the fuck out of here." Jensen was disgusted and kicked his foot toward the nose or front part of the trench. Malacara was working in the heel of the trench, and as he is under six feet tall, his head would have been below the top of the opening. Jensen was standing at the nose of the trench. He estimated that Malacara was at least ten feet away from him. He testified that he kicked his foot in a gesture of disgust, but without an intent to strike Malacara with debris.

It is undisputed that some dirt and gravel fell into the hole due to the motion of Jensen's foot.

Jensen further testified that Malacara then came out of the trench and said to him, "Are you serious" and started bumping into him. Dyer got between them and reminded him of his employment relationship. Jensen told Malacara that he "seriously disliked" him. Dyer and Jensen then walked across the street and Jensen gave Dyer a little peck or kiss on the cheek and went home. Dyer had asked him to leave.

Jensen returned later with a camera and took eight or nine pictures of the job site. Jensen testified that his daughter asked him to get some pictures because she was working with a University of Wisconsin project that deals with the environment. According to Jensen, after taking the third picture, Malacara said to him, "What the fuck are you doing here? God damn, get the hell out of here. Get that fucking camera out of here. How the hell can you do this in front of your God damn daughter?" Jensen testified that Malacara started to come after him, but the supervisor, Ramos, restrained him. Jensen took a couple of pictures of Ramos restraining Malacara and went home.

Jensen returned to the job site a third time to apologize to his friend Dyer. Jensen felt he had overreacted and wanted to let Dyer know that he was sorry for the way he had acted.

Malacara testified that he was working in the bottom of the hole when he heard a lot of commotion, a lot of screaming and yelling coming from the top of the hole and to the left of it. He saw Jensen screaming at Dyer about not fixing things right, that Jensen was going to go to the top to find out what's going on, that he was sick and tired of this and that. According to Malacara, Dyer looked surprised and said nothing. Malacara also testified that Kaplan was at the other end of the hole and looked up but could not see what was going

on.

Malacara testified that he then saw Jensen give Dyer a peck on the cheek and Malacara realized that Jensen had come over to "razz" him a little. Malacara said, "For a minute there, Marc, I thought you were serious." According to Malacara, Jensen looked down at him and kicked gravel into his face and said "I hate you too" or something like that. Malacara stated that gravel, mud and stone were kicked in his face by Jensen who kicked the debris just like someone would kick a football. Malacara testified that the debris hit his forehead and around his eyes.

Malacara testified that he got out of the hole and said, "Get him out of here," and that Dyer told Jensen to leave. Dyer was trying to calm down Jensen but Jensen kept on confronting Malacara, according to his testimony. Then Dyer took Jensen to the other side of the street and Jensen left.

Ramos and King were not at the site during this incident, because they were getting a piece of pipe from another location. When they returned, Malacara went to King, who is the Union steward. King told Malacara that they had a foreman there.

According to Malacara, when Jensen came back the second time, he was wearing a white construction hat and was dancing and acting drunk. Jensen took pictures of him, and he came out of the hole again and told Jensen to leave. Malacara testified that Dyer tried to get Jensen to leave the second time and Jensen finally left on his own.

Malacara stated that when Jensen returned the third time, he came back with his daughter. Malacara was at another street corner blowing out a hydrant. Malacara also stated that he did make a phone call to let "somebody" know what was going on, because he was afraid that Jensen might bring "something" back to the job site, since Jensen lived only about five houses away.

Dyer was the only person other than Malacara and Jensen to see the incident involving the debris being kicked into the hole. Dyer is the Union president. Dyer's recollection is that Jensen came to the work site and appeared as a very upset citizen. Dyer asked Jensen to leave a couple of times, possibly more than twice. According to Dyer, Jensen gave him a kiss to show that he was joking. Malacara then said, "I thought you were serious," and Jensen said something to the effect that "It's you I don't like." Then Dyer saw Jensen slide his foot which pushed some debris into the hole, and Malacara came out of the hole quite upset. Malacara was mad and moved toward Jensen. Dyer stepped between the two of them, and reminded Malacara that he was at work and a physical confrontation

could cost him his job. Dyer testified that Malacara initiated some of the confrontation between the two men, because Malacara questioned why debris got into the hole. Dyer did not believe that Jensen intended to kick dirt directly at Malacara.

Dyer and Jensen walked across the street and Jensen went home. According to Dyer, Malacara left the job site to make a phone call. When he returned, according to Dyer, he made a reference to calling his cousins and said something to the effect of a drive-by shooting or somebody would "come to kick his ass." Dyer took it as a threat to Jensen.

Dyer stated that he had no conversation with Jensen the second time Jensen came to the site, when he took some pictures. The third time Jensen came back, Dyer did not ask him to leave, and there was just a conversation between the two of them, the only ones on the scene.

Kaplan was on the job site when Jensen appeared on August 14th, but he did not see the dirt-kicking incident because he was getting out of the hole when Jensen first arrived. Kaplan went to the utility truck to refuel a generator. He saw Jensen, and first assumed that he was kidding around but then thought Jensen looked mad and intense. Jensen was talking about the dirty water, and why didn't they do the job right in the first place. Kaplan noted that it was around dusk when Jensen first appeared.

When Jensen returned the second time, Kaplan was working in the hole and wanted to stay down there and get the job done. He heard his name called, and looked up and saw Jensen, who said "smile" or something like that and snapped a picture. Malacara was in the hole at the same time, and according to Kaplan, Ramos walked up and told Malacara to get out of the hole. Kaplan assumed that Ramos told Malacara to get out of the hole because Malacara did not have his helmet on as required. Kaplan testified that when Malacara got out of the hole, Malacara started a shouting match and went toward Jensen screaming at him to "get the fuck out of here." Malacara was loud enough for Kaplan to hear over pumps and motors running.

King testified that when he and Ramos returned to the job site, Malacara told him that Jensen had kicked stones or mud or gravel at him. King told Malacara to let the Union handle it. When Jensen returned with a camera, Malacara asked King to intercede again, and King told Malacara that it was the supervisor's job to handle the situation. Malacara told King that Ramos is not a boss. King's recollection of the second incident, when Jensen snapped photos, was that Dyer was trying to separate Malacara and Jensen, that a lot of obscenities were thrown about, and that King, Kaplan, and Malacara all told Jensen to leave. King recalled some discussion about calling the police, and that Dyer said that they would be forced to call the police if they could not control Jensen.

Ramos, the assistant supervisor of the construction department, noticed some tension on the job when he and King returned to the job site, but no one told him what had happened. Ramos testified that his first observation regarding Jensen on August 14th was while he was looking down in the hole watching Malacara and Kaplan cutting, and he heard some screaming. Ramos recalled Jensen saying to Dyer that he had his hard hat on, which he did, and Dyer whispered something to Jensen and walked him across the street. Ramos stated that he ignored Jensen, and then Jensen came back a few minutes later with a camera and started taking pictures. Ramos thought that Jensen was trying to annoy Malacara. Ramos could not recall if he asked Malacara to come out of the hole, but Malacara went after Jensen and Ramos restrained Malacara.

After Jensen left, Ramos told Dyer that if Jensen came back, he would have to call the police to keep him off the job site.

Ramos has had problems with Jensen in the past. He testified that Jensen would make comments that Ramos "should get the fucking truck cleaned," that Jensen was not going to do it and should not have to do it. When Ramos asked Jensen to work overtime, Jensen would ask who was the supervisor on duty. Ramos understood that to mean that if he was the supervisor, Jensen would not work overtime. Jensen did work overtime on one occasion, but according to Ramos, Jensen said that if he would have known that Ramos was the supervisor, he would not have worked. Ramos believes the conflict between them stems from the fact that Ramos became a supervisor and Jensen did not. Both Ramos and Malacara are Hispanic.

Working in a trench or hole such as the one dug by the crew on August 14th is hazardous work. Debris such as gravel and sand frequently falls into such excavation sites. The crews take certain precautions, such as wearing hard hats, having a man on top watch out for danger, using signs to alert the public of utility work going on, using flashing lights on the utility truck, etc. The crews do not use any kind of shoring or bracing of the walls. King noted that he learned at an OSHA school that every hole should be shored and braced to comply with OSHA regulations, and that such shoring or bracing should extend 18 inches above the hole so that no debris falls down in the hole.

The General Manager of the Water and Waste Water Utilities is Thomas White. White became aware of the August 14th incident on either the following Monday or Tuesday, when Ramos told him that Jensen disrupted the crew and kicked sand into Malacara's face when he was down in the excavation. White asked Tom Bunker, Chief of Operations, and Joe Wurster, the construction supervisor, to interview the crew regarding the incident. White later interviewed Jensen, and when he asked Jensen why he had gone out to the job site, Jensen replied that he did not know.

Jensen was not part of the crew but was working in meter repair and supervised by Ed Diaz. He had previously worked with the crew but had been removed from it due to a prior incident involving Ramos. Jensen served a 30-day suspension. According to an agreement worked out with the Union, Jensen was to be separated from the construction crew for a period of time. Therefore, White was surprised to learn that he had gone to the job site where the construction crew was working, because he was still under the agreement worked out in May of 1993.

White decided to terminate Jensen for kicking gravel into Malacara's face. Jensen is considered to be a good worker by his supervisor, and White knew that Jensen has never been accused of being a poor worker.

The settlement agreement of May of 1993 called for the Union and the Employer to cooperate in human relations training at the Employer's expense. None had taken place by the time of the arbitration hearing in October of 1993, although the Employer had contacted a firm to conduct interviews to see what type of diversity training would best suit the utility.

Several witnesses recalled their prior experiences with Malacara as being threatening and confrontational. Dyer testified that Malacara made remarks that he was part of a Spanish coalition that had influence and political clout and would support him, and that the employer would get rid of Dyer before it would get rid of Malacara. Dyer testified that Malacara would stick his chest out and give him a nudge to provoke him, but that Dyer always backed away to avoid trouble.

Kaplan recalled an experience with Malacara when Kaplan was joking around at the end of the day and threw a Kleenex box toward Malacara. It did not hit

him, and Kaplan was laughing, but Malacara grabbed him and threw him up against the wall. Kaplan testified that he and Jensen have worked together on crews and argued about how to do a job but nothing loud or physical. Kaplan finds working with Malacara difficult, and stated that Malacara gets obnoxious and irritating. When Kaplan gets into an argument with Malacara on the job, he calls the supervisor. Kaplan also testified that Malacara has considered the crew members to be racists. Kaplan stated that ethnic-based jokes have been told in the department by Jensen and others.

King recalled an experience with Malacara where King did not buy Malacara coffee one day, because Malacara had not been pitching in coffee money. Malacara said King was a "pussy, not a man," and came up to him and bumped him with his chest. King called the department supervisor, Joe Wurster, who took King aside and tried to calm him down. King also testified that Malacara has said that he has connections, and that King would lose his job before Malacara would ever lose his. King also stated that Malacara has pushed him and tried to intimidate him by pumping up his chest and coming up to him.

King testified that Jensen has told others that Jensen does not like Ramos because he does not feel that Ramos is qualified to be a supervisor. King stated that Jensen does not like Malacara, and vice versa. King also stated that he does not believe that Ramos has leadership capabilities.

White himself had a confrontation with Malacara, where Malacara came right up to White's face after White made a statement in a union-management meeting about the decision to promote Ramos to assistant supervisor. In answering a direct question, White admitted that Ramos was not the first choice of the utility but hoped that the utility would make him a good supervisor. Although White believed this to be common knowledge, Malacara took exception to the statement and confronted White about it. White believes that Malacara can work in the utility, although he has given White grief from time to time.

Another employee, Peter Georgeson, testified that Malacara is an instigator and threatening type of person. Malacara has said that the employer would get rid of Georgeson before himself. On April 22nd, Georgeson was involved in an incident with Malacara. Georgeson and employee John Carr were moving barricades off the road while Malacara was driving a truck. Georgeson was close to the truck, and testified that Malacara gunned the truck. Georgeson was not sure whether Malacara was trying to get him to move faster or what his intentions were. The front tire of the truck smashed into a barricade which fell on Georgeson's leg. He received an abrasion to his leg and his clothing was torn. Georgeson reported the incident to Ramos, the supervisor on the job. Ramos was close by and got out of his truck immediately when the accident happened. Georgeson told Ramos that he believed that Malacara ran into him. When back at the utility, Georgeson filled out an accident report which did not mention Malacara. A portion of the report was prepared by Ramos, who also did not mention Malacara's name. Georgeson testified that he did not pursue the matter because he feared retaliation from Malacara.

Another employee, Richard King (called Richard here to distinguish between this King and the Union steward David King), testified that Jensen is an excellent worker but that he has had trouble with Malacara. Richard stated that he had been in a number of shouting matches with Malacara, and that Malacara has threatened him a number of times. According to Richard, Malacara told Richard that Malacara would shoot Richard through his kitchen window while he laid in the corn field across the street. Richard also stated that he had several physical confrontations with Malacara, and that Malacara would run his chest into him and say, "Be a man, why don't you hit me? A real man would do something about it."

Richard recalled an incident where the crew was shutting off service for a project where houses were being torn down and he was waiting for Malacara to deliver stone to fill up a hole. When he saw Malacara come out of one of the houses, Richard urged him to get going and get the job done. According to Richard, Malacara replied that Richard was not going to tell him what to do. Richard started throwing the stone off the truck by himself, and stated that Malacara ran up to him, pumped up his chest, bumped into him, and called him a "pussy." Richard called the supervisor, Joe Wurster, to take care of the situation. According to Richard, Wurster said that there would be a meeting about it, but nothing happened.

Employee John Carr testified that he had no confrontations with Jensen but characterized Malacara as an instigator and troublemaker. Carr testified that Malacara has said he is putting a Spanish coalition together, and that the Spanish coalition was out to get Jensen fired. Malacara has physically confronted Carr in a manner similar to that described by others. Carr has complained to Wurster that Malacara creates problems and does not follow rules.

Employee Julius Gails, who is black, has worked with Jensen and has no indication that Jensen is prejudiced against him. Malacara irritated Gails one time a long time ago, and Gails could not remember what had happened.

Phil Cruz works with Jensen at Rohner Asphalt and Grading in Sturtevant. Cruz has known Jensen as a friend for 22 or 23 years, and has not known Jensen to make jokes or disparaging comments about minorities or Hispanics. Cruz is Hispanic. According to Cruz, Jensen blamed people he worked with who were Hispanic for his termination with the utility.

THE PARTIES' POSITIONS:

The City:

The City asserts that Jensen's actions on August 14th constituted a total disregard for the safety of the construction work and the Employer's best interest, and such behavior is just cause for his termination. It further asserts that the termination is consistent with past behavior that caused him to be disciplined and removed from the construction work crew and placed in an environment where Jensen would have no contact with Ramos. Jensen chose to come to a hazardous work site, even when his fellow workers advised him that he should not be there. Jensen specifically picked on Malacara and kicked mud and gravel in his face. Although Jensen initially denied kicking, he later said he only kicked gravel into the other end of the hole. Yet the testimony from Kaplan was that Malacara was at one end of the hole and Kaplan was at the other end of the hole.

The City contends that the Union did such a good job of making Malacara out to be the bad guy at the hearing that Jensen started to believe everything he heard about Malacara bumping into people and then testified that Malacara bumped into him on August 14th. Dyer maintained that Malacara did not initiate the confrontation between Jensen and Malacara, and those present were clear that no physical confrontation took place between Malacara and Jensen.

The work site was a hazardous and dangerous place to work, made even more dangerous at night. Jensen compounded this hazard by taking pictures with a flash that momentarily blinded those he photographed while in the hole. Jensen's actions of kicking mud and gravel into an excavation site not only aggravated and hurt Malacara but could have created a more serious mud and gravel slide. Although Dyer testified that he believed Malacara to be the aggressor by asking why Jensen kicked debris in his face, Dyer's story was totally different when interviewed by Bunker and Wurster. Dyer told them that

Malacara was doing his job and did not initiate anything.

The City argues that the Union's attempt to show disparate treatment of Jensen is without merit. The Union has alleged that Malacara intentionally hit Georgeson with a truck in April of 1993, but Georgeson made out a written report that never mentioned Malacara. Also, the Union attempted to portray Jensen as simply an irate citizen complaining about city services, but Kaplan saw the incident as more than an irate citizen.

The incident of August 14th is sufficient grounds to terminate Jensen. The City asserts that Jensen's actions must be viewed in light of his previous similar physical confrontation that resulted in his termination and eventual 30 day suspension, as well as viewed as the manifestation of continued dislike for the two Hispanics on the construction work crew. Jensen and fellow workers showed unsubstantiated bias when they described Malacara as an instigator, troublemaker, member of a Spanish coalition, untruthful, unqualified, bad work habits, and drive-by shooter.

The City concludes that there was just cause for Jensen's termination because of his abusive, unwarranted interference with the work crew in general and for the Employer's interest in maintaining a safe work site. Jensen's actions were in direct violation of the regard for safety of the crew, and his actions against Malacara amount to a physical assault on Malacara when he kicked mud and gravel into Malacara's face when he was in a precarious place.

The Union:

The Union asserts that Jensen was not terminated for just cause. It contends that Jensen did not deliberately kick debris at Malacara and display a willful intent to inflict harm toward Malacara. The Union notes that Dyer testified that Jensen slid his foot at the top of the hole and did not know if debris actually hit Malacara. Dyer further testified that in his opinion, Jensen did not intentionally kick debris at Malacara.

The Union also points out that Jensen testified that he kicked his foot, but not at Malacara, and that he had no intent of kicking debris at Malacara, and that he kicked his foot in disgust when Malacara asked "what the fuck are you doing here." Thus, the Union asserts that the Utility did not have just cause to terminate Jensen's employment where Jensen did not deliberately kick debris toward Malacara or intend to harm Malacara in any way.

The Union submits that the City has displayed disparate treatment toward Jensen, where the record shows that the termination of Jensen imposes a standard not required of other employees. For example, David King testified that Malacara called him a "pussy" and bumped into him with his chest, and when King reported this to his supervisor, Wurster, nothing was done about it. Georgeson testified that Malacara gunned the truck engine and hit a barricade which injured Georgeson, but no action was taken against Malacara even though the supervisor, Ramos, was aware of the incident. While the City blamed Georgeson for not naming Malacara on the accident report, Ramos should have reported the matter, and the General Manager of the Utility would agree with that. Richard King also reported to Wurster that Malacara had called him a "pussy" and bumped into him with his chest. Carr also reported problems he had with Malacara to Wurster. Kaplan and Dyer testified the Malacara has physically confronted them.

In all those cases, including those where supervisors were apprised, the Utility took no action. In this case, Jensen was terminated even though there was no intent on his part to cause harm. The Union argues that the Utility is clearly guilty of disparate treatment and unjustified in terminating Jensen.

The Union finds that the attempt to show that Jensen had a racial motivation for the August 14th incident is not the truth. The City tries to draw a nexus with a past occurrence involving Jensen and Ramos, and show that because Ramos and Malacara are Hispanic, Jensen has a bias towards that nationality. As part of the settlement agreement in the incident with Ramos and Jensen, the City agreed to participate in human relations training, but none has taken place. If the City really believed that there are racial problems within the Utility, such training would have occurred by now.

The Union states that Jensen has no racial bias toward minorities, while Malacara has repeatedly accused fellow workers of being racist. Gails, who is black, had no racial problems with Jensen, and Cruz, a Hispanic, has known Jensen for 23 years and never heard any disparaging remarks about Hispanics. The City's attempt to portray Jensen as a racist should be rejected.

The Union agrees that Jensen showed extremely poor judgment by showing up at the job site and acting in an irate manner. However, it asserts that Jensen did not go to the job site to argue with Malacara, and the debris that entered the excavation was not intended to hit or harm Malacara. There is nothing on the record indicating that Malacara was harmed by the debris.

The City's Reply:

The City states that the Union is implying that the Employer failed to prove that Jensen did anything to justify his termination simply because a fellow employee may have a different opinion of what happened. The City agrees that it did not prove that Jensen was intoxicated when he came to the work site, and that it was not trying to prove that, even though the evidence would indicate that it was likely that Jensen was inebriated, given his behavior. The City notes that Jensen's actions in kissing Dyer, dancing around taking pictures with a camera that had a flash light but probably no film was irrational behavior. While the City did not prove that there was no film in the camera, Jensen never produced any of the eight or nine pictures that he said he took.

While the Union argues that Jensen is not a racist, the Employer was not presenting a discrimination case but merely presenting some facts that have an important bearing on this case. In a recent previous physical confrontation, Jensen picked on Ramos and was disciplined with a 30-day suspension. The Employer and the Union agreed that something beyond the suspension was called for to prevent a similar situation, and agreed to remove Jensen from the construction crew. The removal of Jensen from the crew did not solve the problem, given whatever it is that causes Jensen to behave the way he does toward Hispanics.

The Employer argues that termination is the only solution where the Employer has tried lesser disciplinary measures with Jensen, and those measures did not work. From a progressive discipline standpoint, termination is the next step and must be upheld by the Arbitrator.

The Union's Reply:

While the Employer asserted that Jensen initially denied kicking gravel into the hole occupied by Malacara, the Union asserts that the record casts a different light on this matter. Jensen testified that he was never questioned by the Employer before the hearing as to whether or not there was any kicking of gravel intended to harm Malacara.

The Union has not attempted to paint Malacara as the "bad guy" on the evening of August 14th, and has argued that the Employer has shown disparate treatment toward Jensen.

While the Employer states that Dyer modified his recollection of the events and that his testimony differed from statements made to Bunker and Wurster, the Employer did not offer Bunker or Wurster as witnesses. There is no concrete evidence that there is any difference in the interview conducted by the Employer and the testimony given. City Exhibit #7 was prepared by the City, and is not sworn or accurate testimony, only management's notes.

DISCUSSION:

Under the parties' collective bargaining agreement, specifically Article 10, Section B, the Racine Water Works Commission has the right to discharge or discipline employees for just cause. The issue is whether there was just cause to terminate Jensen. If Jensen deliberately kicked gravel at Malacara while he was down in the excavated hole, the Employer would have just cause to terminate Jensen.

One of the problems with this case is that no one tells the same story. The arbitration hearing was held only two and a half months after the incident. Memories should not have been so faulty.

There are several discrepancies in the testimony about what actually happened the evening of August 14th. For example, Jensen testified that he gave Dyer a little peck on the cheek after the gravel-kicking incident, while Dyer and Malacara recall the peck on the cheek before the incident. Jensen testified that Malacara started bumping into him when he got out of the hole, while Dyer did not confirm that a direct physical confrontation took place between the two of them. Malacara testified that Kaplan was down in the hole with him when the gravel-kicking incident happened, and although Kaplan's testimony was slightly confusing on this point, it is clear that Kaplan was not down in the hole when the gravel fell in. Kaplan never saw it as he was at the utility truck by that time. Malacara also testified that Dyer tried to get Jensen to leave when Jensen appeared the second time with a camera, while Dyer testified that he did not speak with Jensen during the picture-taking incident.

Malacara and Dyer's versions of Malacara's phone call following Jensen's visit differ substantially. Malacara testified that Jensen came back with his daughter on the third visit, while no one else mentioned Jensen's daughter being on the scene with him. Jensen testified that Malacara asked him why he was taking pictures of the crew in front of his daughter, which also makes no sense, unless his daughter was at the scene on one of the occasions, or unless the reference was made because of the proximity of Jensen's home.

Memories really should have been better.

However, the critical part of all of this is the gravel-kicking incident. There is no indication that Jensen would have been discharged for taking pictures of the crew, or even being there, albeit loud, boisterous and disruptive. White clearly discharged Jensen for kicking gravel at Malacara while he was working in the excavation. It is the City's burden to prove that this indeed happened.

Only Jensen, Dyer, and Malacara were witnesses to this incident. Dyer's testimony, while falling short of any ringing endorsement of Jensen, tends to corroborate Jensen's testimony regarding the kicking of the gravel, at least more than it tends to corroborate Malacara's testimony. Only Malacara relates that Jensen kicked gravel at him -- in a direct and deliberate manner. Jensen and Dyer testified that Jensen kicked his foot in a gesture of disgust, and some gravel fell into the hole. Jensen said he kicked toward the nose of the trench, and Malacara was working in the heel of the trench. Actually, Jensen struck a note of sincerity when he testified that he would never willfully kick dirt or gravel in the face of a worker, knowing the danger of working down there himself and having been in the construction business since 1968.

If I were to uphold this discharge, it would be on the word of Malacara alone. And that's just not good enough.

It is not that one credible witness cannot overcome two other witnesses -- but Malacara is not that witness. His testimony has certain flaws. He testified that Kaplan was in the hole with him when the dirt-kicking incident occurred, but it is clear that Kaplan was not, according to Kaplan himself, as well as Dyer and Jensen. He was evasive about the phone call he made after the incident, alluding to feeling threatened by Jensen's home being close to the job site, while Dyer testified that it was Malacara who alluded to retaliating against Jensen. Malacara testified that Jensen brought his daughter to the site the third time he came back, which was not mentioned by anyone else. Malacara also testified that Dyer tried to get Jensen to leave during the picture-taking incident, while Dyer never spoke to Jensen during this time. And Malacara never mentioned his own behavior, while it is clear that Dyer restrained him during Jensen's first visit to the scene and Ramos restrained him during Jensen's second visit. Finally, Malacara is well under six feet tall, and one wonders -- how could he see the motion he so plainly demonstrated at the hearing, that of Jensen kicking gravel like one kicks a football -- from his vantage point -- in a hole at least six feet deep, well below the opening of the hole, while Jensen was on top?

Just as Malacara has made himself into a larger than life character by his actions which threaten his co-workers, he has made mountains out of mole hills in the past, such as taking offense when Kaplan threw a Kleenex box at him in jest, or confronting King when he did not buy Malacara coffee. Amazingly, he has even confronted White. It is well within the realm of reason that any gravel or debris going in the hole where Malacara was working could have caused him to take offense out of proportion to the incident.

The Employer would not have discharged Jensen because some gravel fell into the hole while Jensen was on top and kicked his foot in a motion of disgust, because gravel and debris can fall into a hole which is not shored up by several means. Dyer's presence on top could cause debris to fall into the hole. Nor would the Employer have discharged Jensen for being on the scene and disrupting the crew, although this behavior is not necessarily to be condoned and everyone agrees that Jensen used poor judgment in going to the scene at all. It was the Employer's belief that Jensen deliberately kicked gravel at Malacara that led to the discharge. And on this essential fact, the proof falls short. Therefore, the Employer did not have just cause to discharge Jensen, and the normal and usual remedy will be ordered.

However, because Jensen was to be separated from the construction crew according to the May 1993 settlement agreement and because Jensen needs to be aware that even off-duty conduct may not necessarily be acceptable when it affects the City's interests, the Employer may issue a written warning to Jensen for his conduct in disrupting the crew in a loud and boisterous manner on August 14th on two occasions and not leaving upon being asked to do so.

AWARD

The grievance is sustained.

The Employer did not have just cause to terminate Marc Jensen, and is ordered to immediately reinstate Marc Jensen to his former position or substantially equivalent position and to make him whole by paying him a sum of money, including all benefits, that he otherwise would have earned from the time of his termination to the present, less any amount of money he has earned elsewhere.

The Employer may issue a written warning consistent with the discussion above but no broader.

The Arbitrator will retain jurisdiction over this matter until May 31, 1994, solely for the purpose of resolving any disputes over the scope and the application of the remedy ordered.

Dated at Elkhorn, Wisconsin, this 10th day of March, 1994.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator