

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

TEAMSTERS GENERAL LOCAL UNION NO. 200

and

FOND DU LAC STONE COMPANY, INC.

Case 19  
No. 53433  
A-5431

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Mr. John J. Brennan, appearing on behalf of the Union.

Mr. Daniel Homuth, President, Fond du Lac Stone Company, Inc., appearing on behalf of the Company.

ARBITRATION AWARD

The Company and Union above are parties to a 1993-96 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the grievance of Mark Gawaresky, protesting his discharge.

The undersigned was appointed and held a hearing on February 16, 1996 in Fond du Lac, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, the Union filed a brief, and the record was closed on March 28, 1996 except for delayed receipt of one exhibit.

Stipulated Issues

The parties stipulated to the following:

1. Did the Company violate the collective bargaining agreement when it discharged the grievant for fighting?
2. If so, what remedy is appropriate?

Relevant Contractual Provisions:

ARTICLE 11

DISCHARGE OR SUSPENSION

Section 1. The Employer shall not discharge or suspend any employee without just cause and, in respect to discharge or suspension, shall give at least one (1) warning notice of the complaint against such employee, to the employee, in writing, and shall send a copy of the notice to the applicable Union and the applicable job steward, except that no warning notice need be given to an employee before discharge, if the cause of such discharge is dishonesty, drunkenness, the use or possession of intoxicants or under the influence of intoxicants in excess of .04 or illegal drugs during working hours, recklessness while on duty, refusal to perform a job duty where the job is assigned by a properly authorized supervisor and the carrying of unauthorized passengers while on the job, refusing to submit to a drug or alcohol test upon request by the Employer. All Company requested tests for drugs or alcohol shall be done on Company time, paid for by the Company at the employee's regular rate of pay.

Section 2. The warning notice, as herein provided, shall not remain in effect for a period of more than six (6) months from date of said warning notice. NOTE: In cases where an employee has a warning letter in effect at the time of layoff, it is agreed that no more than three (3) months of the six (6) month warning letter period referred to herein may be forgiven during a layoff period. Discharge must be by proper-written notice to the employee and the Union affected. An employee who has been discharged or suspended may request an investigation as to his discharge or suspension. Where the investigation as to his discharge or suspension proves that an injustice has been done, the employee shall be reinstated and compensated at his usual rate of pay for the time he was out of work. Appeal from discharge or suspension must be taken within five (5) days, by written notice, and a decision reached within ten (10) days from the date of discharge or suspension. The period of suspension shall not exceed three (3) days.

## WORK RULES

ANY CONFLICTS BETWEEN THE PROVISIONS OF ARTICLE 11 AND THE FOLLOWING DISCIPLINE, THE PROVISIONS OF ARTICLE 11 SUPERSEDE.

INFRACTION	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
7. Fighting: a. Aggressor b. Defender	3 Day Suspension Warning	Discharge 3 Day Suspension	Discharge

### Discussion:

Grievant Mark Gawaresky had been employed by Fond du Lac Stone Company as a truck driver for three months when, on or about September 13, 1995, he was discharged as a result of an incident in the plant. The incident involved a fight between the grievant and another employe, Tom Marcin, also a truck driver. It is undisputed that an altercation between the two took place on that date, and that both were injured as a result. The fundamental cause of the dispute between the parties is a difference as to whether Marcin began the fight or whether the grievant engaged in an unprovoked assault on Marcin. The various witnesses' differing statements are best understood if recounted separately:

### Marcin's Version:

Tom Marcin testified that when the grievant first started work, he and the grievant had a good relationship, but several months later the grievant quit talking to him. Marcin recounted an incident in which the grievant was changing the oil in truck number 19 one day, and stated that he attempted to make friendly conversation with the grievant but the grievant refused to talk to him. Marcin added that even prior to this day, other employes had told him that the grievant was "ripping on him" and cutting him down to other employes. Marcin stated that when the grievant refused to talk to him he said "things go a lot better around here if you talk" and added "maybe the problem is you can't handle some young punk driving a better truck than you got." Marcin stated that the grievant just turned around and smiled, and that Marcin then left.

About two weeks later, after other incidents in which other employes had told him that the grievant was making unfriendly remarks about him behind his back, he asked foreman Norm Helmer to get the grievant to knock it off. Marcin testified that Helmer said there wasn't much he could do. Marcin also testified that another employe had told him that the grievant had threatened to get Marcin fired so that the grievant could be driving Marcin's truck. Marcin stated that he took this issue to Dan Homuth and that Homuth told him "he can't get you fired, you have seniority, don't worry about it, I'll talk to him."

Marcin testified that in the following week Gawarensky started making rude gestures to him, and that he thought this was because Homuth had talked to Gawarensky and Gawarensky was now mad at him. On September 13, near the end of the day, Marcin testified that he had just finished washing his truck and had taken the truck back into its spot and saw Gawarensky climbing back into his truck. Gawarensky saw Marcin and made a rude gesture. Marcin moved his personal pickup truck so that it was halfway into the shop, in order to pump up a flat front tire. He got out and walked around his truck, and saw Gawarensky standing nearby. Gawarensky made another rude gesture and grabbed his crotch. Marcin stated that with this, he decided that he had to find out what this was all about, and walked over to Gawarensky's car and waited for him. He was leaning on it when Gawarensky walked up, carrying his lunch box in his right hand, as well as a drill, and carrying a socket wrench ratchet in his left hand. According to Marcin, when Gawarensky saw him he said "What the hell are you doing?" and Marcin said "We've got to talk." Gawarensky then said "Get the hell away from my car." Marcin took a step away from Gawarensky's car and said again "We've got to talk." An argument then ensued, at the conclusion of which, according to Marcin, he responded to an epithet hurled by the grievant by replying "Why, because I drive this truck?" Marcin testified that at this point he turned away, and then the grievant struck him with the socket wrench. Marcin testified that the two stared at each other for a few seconds and Marcin then yelled for Norm, because he knew there were a few guys in the shop. He stated that the grievant then said "Oh, you would say that" and took off running, and that Marcin chased after him. According to Marcin, they ran up behind the pickup truck, which was in the door of the shop, and at this point the grievant turned and looked like he was going to hit him again, but then went on into the shop. Marcin followed him and they "scuffled a little bit" and the grievant then hit him again on the left side of the head, "not as hard as the first time." Marcin stated that he said "If you hit me with that ratchet again I'm going to take your head off." Marcin grabbed the grievant by the shoulders, and then Helmer grabbed Marcin and said "I've had enough of this, let's get this straightened out, we're going to the office right now." Marcin testified that he agreed and stepped away, but then Gawarensky swung at him back-handed, and Marcin then grabbed Gawarensky's arm and kicked at his stomach. Helmer grabbed him again and said "let's go, now!" He and Helmer then went up to the office. The grievant did not accompany them immediately.

A moment later, the grievant came up to the office in his car, and came in and laid a drill or some other tool on the counter. The grievant then told Marcin "you're in a lot of trouble now, buddy, you've had it" and turned around and walked out. Marcin chased after him. Gawarensky got into his car, and Marcin yelled that they had to go back in the office and get this settled right now. Marcin couldn't hear what Gawarensky replied but as the grievant pulled off, Marcin kicked at the car. Marcin then walked back into the office and told the secretary to call the police.

On cross-examination, Marcin testified that he may have tried to hit the grievant in the face in the garage, and that he has no clear recollection because Helmer pulled him off just then and this all lasted only seconds. He believed he might have grazed the grievant with his fist. Other than that, his only contact was the kick to the stomach or chest.

Marcin further testified on cross-examination that when he came out of the office after the grievant, Tom Rehrauer, a salesman, was right behind him, and could see what happened.

Tom Rehrauer

Rehrauer testified that his first knowledge of the incident was shortly after 3:00 p.m. on September 13, when he saw Marcin and Helmer come running across the parking lot. When they came in the office door, Marcin was bleeding across his ear and down his shirt, and yelled "Call the Union and call the police right now!" Rehrauer stated that when he asked what happened, both Marcin and Helmer said that the grievant had hit Marcin with a ratchet, and Marcin added "for no reason whatsoever, I just wanted to talk to him and he came at me with a ratchet and blind-sided me."

A secretary then called the Union and left a message for Lee Wenker. They also called the County Sheriff's Department, and helped Marcin clean up. According to Rehrauer, when the grievant came in he tossed his paperwork in the basket and went straight out again, and Marcin followed him. Rehrauer testified that Marcin tried to get in the grievant's car and the grievant drove off with Marcin kicking at the car. Shortly thereafter a Sheriff's Deputy, Officer Wondra, arrived and began taking statements.

Norm Helmer:

Helmer testified that the first he saw of the incident was that a few minutes after noticing that Marcin's truck was parked in the doorway, with a flat tire but without Marcin, Gawaresky came running around the back of the pickup and into the garage. Helmer testified that the grievant was hollering and screaming "Norm, Norm, keep that son of a bitch away from me, he's crazy." Thirty seconds or a minute later Marcin came running around the pickup, also hollering and screaming. Marcin yelled "The fucker hit me in the side of the head with a ratchet when I wasn't looking." By this time Gawaresky was three to four feet from Helmer, and Marcin was yelling "He cheap-shotted me." Marcin was bleeding down his right-hand side from his head. The two employees hollered and screamed at each other for a few seconds and kicked and punched at each other. Helmer hollered at them to knock it off, and they went at it a little bit again. Helmer told them to knock it off and go to the office, and they quit fighting. At the office, Marcin was hollering and screaming that he wanted the cops, and he wanted Gawaresky arrested for hitting him with the ratchet. Helmer called the Sheriff's Department and then called Union Representative Lee Wenker to let him know what was going on. Wenker was not in, and he left a message. When the grievant came into the office he dropped something off, but Helmer did not see what happened outside after the grievant went out followed by Marcin.

In cross-examination, Helmer testified that when Gawaresky came in running, he had his lunch box, possibly a cardboard box, and a water jug. Helmer testified that at least two other

employees were still in the garage, as well as himself, Marcin and the grievant, but that neither of those attempted to break up the fight.

Helmer testified that immediately prior to the incident, the grievant had been putting a rain cap on the exhaust pipe on the truck assigned to him. He stated that this would require a wrench or a ratchet and possibly a drill, and that he assumed that the grievant had a ratchet because he was working on the truck. He also testified that he thought Marcin took one or more swings at the grievant, as well as kicking at him, during the part of the fight which he saw, but that he was confused himself and it took him a couple of minutes to get it under control.

Helmer stated that the grievant had had no real work problems and no disciplinary problems prior to this incident, and that there had been one incident of words between the grievant and another employee, which ended when he and another foreman went over and told them to knock it off.

In redirect examination, Helmer testified that he was not sure whether the grievant had the ratchet when he came into the garage, but he saw it in his hand a minute later. He testified, however, that Marcin was bleeding when he came in.

Daniel Homuth:

Homuth testified that he heard about the incident from Rehrauer which occurred immediately after the incident and which he received while out of town. When he drove back to the plant and went into the office, Sheriff's Deputy Wondra was still there and was talking to the employees. Homuth observed Marcin bleeding from his ear, and advised Marcin to go to the Fond du Lac Clinic. Homuth testified that Rehrauer told him that the grievant had come up, got in a confrontation with Marcin, and hit him on the head with a socket wrench. Homuth decided that he could not tolerate that and would terminate the grievant. Homuth stated that he made the decision to terminate the grievant on that day, although he had not yet talked to the grievant at the time. Subsequently, he met with the grievant on September 19th, along with a friend of the grievant. Homuth stated that the grievant seemed to know that he had been discharged, but no letter of discharge was written.

Marc Gawaresky:

The grievant went immediately from the plant to the Fond du Lac County Sheriff's Department, and spoke to a detective Hardgrove. The grievant testified that he wanted to press charges against Marcin for battery. Hardgrove did not take his statement at the time, but took it on the following day. Since it is comprehensive and consistent with his testimony, it is reprinted here:

SH: Marc, where were you born at?

MG: Oshkosh, Wisconsin.

SH: Okay, and Marc's date of birth is February 11, '53, address Post Office Box 3312, Oshkosh, 54903. Marc, where are you employed?

MG: At Fond du Lac Stone Company.

SH: Is that company located on Highway 175, south of Fond du Lac, in Fond du Lac County?

MG: Yes, it is.

SH: Okay. Were you employed there yesterday, September 13th?

MG: Yes, I was.

SH: Were you involved in a physical altercation at the Fond du Lac Stone Company yesterday?

MG: Yes, I was.

SH: Was it during your work hours, or after your work hours?

MG: It was at the end of the day as I was walking to my car to wrap up my day's work at three o'clock.

SH: Okay. Are you co-employed with another man named Tom Marcin?

MG: Yes, I am.

SH: Are you employed there as a truck driver?

MG: Yes, I am.

SH: Is Tom Marcin also?

MG: Yes.

SH: Okay. Explain to me in your own words, as accurately as

possible, exactly what happened between you and Tom Marcin at around three o'clock, when you were going to your car.

MG: As I, I locked, I rolled the windows up and took the key and everything out of my truck, I walked to the shop, hung my key up, set down my lunch bucket and water bucket, ah I was going' to get my car out from the parking area there where it was parked behind Tom Marcin's truck, a hough loader that doesn't run anymore and another one of the quad axle dump trucks. Tom was leanin' on my car and I got between Tom's truck and Greg's Bronco, which were parked the opposite way of the way I was parked behind them. Ah, Tom was leanin' on my car and I said you're, would you please get off my car, leanin' on my car, and he says you're not taking my job away from me, and I said Tom, it has nothing to do with that. He cam over and pushed me in the chest and he said I'm warning you, you're not taking my job away from me, and he hit me with a closed fist in the chest. I turned around and went out into the area in front of the garage door where the, ah, there was five people and a supervisor in the shop could get a sight on me, and Tom Marcin was hitting me. I headed into the shop and he was behind me, hitting me and kicking me as I was going into the shop. I asked Norm to get the, get him off me, do somethin', get him off me. He continued to hit me in the shop. We were by the oil barrels where there was a ratchet laying, by the drain tray, and I got it in my hand and hit him upside the head to stop the fight. Tom when he got hit in the hear, Norm hollered real loud, that's enough of this, both of you people to the office, and he got Tom directed towards the garage door goin' out and walked with him towards the office. I picked up my water container and my lunch bucket, got in my car and drove up to the office where when I got out of my car and I opened up the door, Tom Marcin came rushin' out, attacked me again and Tom, the salesman, was trying to pull him off of me. I got in my car, started, put it in gear to get away. When I finally got the door closed and as I was pullin' away he kicked the car in the quarter panel. I drove immediately to the police station.

SH: Alright. When you say Norm, do you know Norm's last name?

MG: No, I don't.

SH: Okay, what job does Norm have out there?

MG: Norm is ah supposedly the supervisor of the plant.

SH: Would he be a supervisor of yours?

MG: Yes.

SH: And Tom Marcin's also?

MG: Tom Marcin is another employee the same as I am.

SH: Okay.

MG: He has no authority.

SH: Okay, and then when you mentioned Tom, the salesman, do you know his last name?

MG: No. I know it begins with a R.

SH: Okay. Did you speak with Tom, the salesman, last night, sometime after you saw me?

MG: Approximately eight o'clock on the 13th my father and I drove to his house. I asked him, and he said he seen everything at the office, that happened at the office and admitted seeing me get hit and the car get kicked, but he did not see anything at all that that (sic) happened at the garage.

SH: Okay. Then am I correct, earlier in your statement, did you say that Tom, the salesman, had to physically pull Tom Marcin off of you?

MG: Yes.

SH: Okay, so then is it correct that Tom Marcin was striking you

without your permission at the time the salesman pulled him off you?

MG: Correct.

SH: Can you tell me the names of the people who saw any violence whatsoever, whether you know their complete names or not?

MG: Yes. I can say the foreman of the crushing crew, his name is Bill.

SH: Okay.

MG: Ahm, a truck driver there named Dog. Ahm, there's another driver that I don't know his name and I believe the loader operator, and I do not know his name either. He drives with the large dresser, ahm pay loader.

SH: Okay.

MG: And Norm, the supervisor, were in there.

SH: Okay. Yesterday when I saw you, approximately 30 minutes after this altercation took place, I observed several areas of your body which appeared to show contusions. Is that correct?

MG: Correct.

SH: And since that time, did you receive any medical treatment?

MG: Yes, I did, at approximately five o'clock last night I was at the La Salle Clinic in Oshkosh.

SH: Okay, that's La Salle?

MG: Correct.

SH: Did you see a doctor?

MG: Dr. Smrecek.

SH: Okay, I'm looking at the, at the.....

MG: S-M-R-E-C-E-K. Smrecek.

SH: Yesterday when I saw you, I observed a laceration on your lower left lip, a possible loose tooth, a contusion around your left knee area, a possible bruise on your left neck area and a swollen nose.

MG: And my elbow, or the blood, there was something right here.

SH: Some blood on your lower left arm. Do the injuries that I saw yesterday coincide with what the doctor observed when you saw him?

MG: Yes, they do. All of them do.

SH: Okay, in looking at your paperwork from the La Salle Clinic, I see that the doctor diagnosed you as having a nose contusion, a lip laceration, a neck contusion, and a thigh contusion. What, if anything, did the doctor say to you about the contusion to your nose?

SH: That he didn't see anything exactly that it has to go to the radiologist because he can't see yet but that my nose is crooked, and it looks like there's possible damage somewhere but he, it didn't show up, it didn't stand out in the x-rays from what he read.

SH: Okay.

MG: So he needs a better opinion on, or sight into it.

SH: And did you give anyone permission yesterday to strike you?

MG: No, I didn't.

SH: Had you had any kind of a problem at all with Tom Marcin before September 17th?

MG: 17th?

SH: I'm sorry, September 13th?

MG: Ah, a week ago would have been the 7th? 6th? The 6th? The 6th of September I was changing my oil, at approximately three o'clock in the afternoon, it was Wednesday, and Tom had been not sayin' hi, waving, talking or doing anything for about a week, and he came into the shop and started asking me a bunch of questions, what am I doing, and it looked pretty obvious that I was changing the oil in my truck, and I didn't talk to him, and as it went on, he kept gettin' madder and madder and he finally hit the fender on my truck and said, I know what you're doin', you're trying to take my job away from me, I'm gonna' make it miserable for you here at work, and shortly after that the foremans, a foreman that has no, no power over me at all, started swearing, jumping on me for every little thing, that I wasn't movin' fast enough for him and so on, and ah I in no way did I make any kind of gestures or said anything to Tom, and in no way until he was at my car on the 13th at three o'clock.

SH: Okay. Early in your statement you said that for some period of time during your employment with Tom Marcin, you and he got along because you said you would exchange greetings, wave at each other on the road, etc. Is that right?

MG: Correct.

SH: Okay, and then you talked about a day about a week ago in which you were changing your oil that he spoke to you but you didn't speak back. I'm a little unclear on why you didn't speak back.

MG: Okay. I, for approximately a week before the 6th, he had been cold-shouldered towards me. I would wave to him when I seen him on the road, you know, say good morning to him, he would never say a word to me. He just, he didn't say anything, and when I was changing my oil I more or less did the same thing 'cause I didn't know why he

wasn't talking to me. He, there was nobody, he never gave me a reason or anything, and then when he blew up and said that I was after his job, that I'm not gonna' get, you know, that I'm trying to take his job away from him, which I wasn't trying to do at all. I had no intentions, I didn't know that that's what it was until he hit the fender hard and said I know what you're trying to do, you're trying to take my job away from me, and I'm gonna' make it miserable for you here.

SH: Okay.

MG: And he walked out of the garage.

SH: Alright. How many times in all yesterday did Tom Marcin attack you?

MG: Three times.

SH: And where was the first time? Where was the first place?

MG: The first one was between Tom's dump truck and Greg's Bronco.

SH: In the employee parking lot?

MG: Correct.

SH: Okay, where was the second place?

MG: It started in front of the overhead garage door and I, I ran from him and he chased me into the garage and finished me off in the garage is the worst beating that I took was in the garage.

SH: Okay.

MG: And at that time in self-defense I hit him with the ratchet aside of the head.

SH: Okay, do (sic) know if he was bleeding from that?

MG: He, blood was gushing out of his head when I hit him in the garage.

SH: Alright was there any other fighting started by him that day?

MG: Yes, when I got to the office, when we were supposed to go into the office, he rushed out the door and attacked me again where I got, hitting me and I go....I'm makin' my way into my car, trying to get my door closed, as I'm takin' punches again, ju...just all over, back, front, anywhere he could, he could hit me. As I drove off he kicked the quarter panel in my vehicle and Tom, the salesman, was trying to pull him off of me and that's how I got my door closed so I could get outta' there.

SH: Okay, did Tom come out from inside the office to do that, do you know?

MG: Yes. Tom was right behind him because he could, because Tom, the salesman was right behind him because Tom Marcin was irate and in a violent stage yet from the time I got to the, I wanted to go in through the door, he just came out violently raging again at me.

SH: Okay, who all, if you know, was in the office that would have seen that take place?

MG: Tom, the salesman, has admitted to my father and myself, ahm I would say Joanne was pretty observant from what I could see, but claims she didn't see anything. Joanne is the office girl that works by the counter.

SH: Alright, who was in the garage that would have seen this all take place?

MG: And also Norm would have seen it 'cause he was in the office.

SH: Okay, how about the garage?

MG: In the garage it would have been Norm, ah Bill, Dog, ahm the truck driver, the loader operator and the, I'm trying to think if there's, I don't, I think I got them all.

SH: Earlier you mentioned a guy named Dog. Was he in the garage at the time?

MG: Dog. Yes, I did mention Dog.

SH: Okay.

MG: Dog.....

SH: That's right, you did.

MG: Bill, the loader operator, the other truck driver, There's possibly another person in there, too, and Norm.

SH: Anybody see what happened out in the parking lot when it all started?

MG: Nobody was, the only persons that were there were between the, Tom was at my vehicle, I was between Tom's truck and Greg's Bronco. We were the only two in the parking lot. As soon as he came at me is when I got into the open so people could see what was going on because he started in on me immediately.

SH: Is everything that you've said to me true and correct, to the best of your knowledge?

MG: Yes it is.

From the Sheriff's Department, the grievant proceeded towards his home in Oshkosh, but stopped at the Union hall on the way. By the time he reached there, Wenker had returned, and looked at the car. While he was there, Helmer called the union hall and said that Officer Wondra was at the plant, and Wondra and the grievant spoke. The grievant testified that he told Wondra that he had been hit and his car kicked, and that he was bleeding and that there were witnesses. From the union hall, the grievant went on to the La Salle Clinic in Oshkosh. The doctor's slip

presented by the Union indicates that at 5:00 p.m. on September 13, the physician at Le Salle Clinic observed a nose contusion, a lip laceration, a back contusion and a thigh contusion on the grievant. The grievant testified that he had to have a CAT scan subsequently, because his nose was swollen and bent and he was getting headaches, and that he was informed that he had the middle one of three degrees of concussion.

The grievant testified that he picked up the ratchet and hit Marcin with it only after Marcin had been beating him up both in the garage and previously out in the yard, and that he only hit Marcin after Helmer and the other employees present had done nothing to end the beating. The grievant testified that once he hit Marcin back, Helmer then stopped the fight. He estimated that Marcin took twenty-five or more swings at him and five or six kicks.

#### Criminal Prosecution:

The grievant was prosecuted for alleged assault upon Marcin. At the time of the hearing, the criminal trial had not yet been held, and the Company requested that the record be held open to permit addition of evidence of the trial's result. The Union agreed provided that the evidence be admitted either way. I reserved ruling as to whether I would ultimately admit such evidence, but agreed to allow it to be forwarded pending my review of arbitral precedent on admission of such material. The Union subsequently forwarded a notice of acquittal of the grievant on the charge of assault.

### The Parties' Positions:

The Company did not file a brief, but argued at the hearing essentially to the effect that the grievant should not be credited where his version of events differs from that of other witnesses, on the ground that he has an obvious reason to lie. The Company contends that notwithstanding the language in the collective bargaining agreement referring to fighting and setting penalties for it, attacking another employe with a socket wrench is beyond the intended meaning of fighting within the contract and is an action which cannot be tolerated. The Company requests that the grievance be denied.

The Union contends that the contract provides for a three-day suspension in the event that an employe is found to have been the aggressor in a fight, and a written warning for the defender in a fight. The Union argues that there is no other contract language governing any aspect of this matter, and that therefore the terms bargained between the parties require at most a three-day suspension for the grievant in this case. The Union contends that the grievant should be credited over the other employes because of evidence that the other employes socialize together and that the grievant is the outsider, and also because of certain inconsistencies between the testimony of the Company witnesses. The Union contends that several things indicate that the grievant is telling the truth. One is the fact that he went immediately to the police, which is inconsistent with someone who had acted in the manner the Company contends. Also, the medical reports confirm that the grievant was seriously beaten, while Marcin claims that he barely landed a punch. Also, the Union argues, it is relevant to credibility that none of the employes in the shop did anything to stop the fight until Marcin was himself struck. Finally, the Union argues that the Company relied on its concept that what took place was an assault in making the determination to discharge, and a jury has found otherwise. The Union contends that the grievant acted in self-defense, and that even if the Arbitrator were to interpret the facts such as to find the grievant the aggressor, no more than a three-day suspension could be warranted under the terms of the collective bargaining agreement. The Union requests that the grievance be sustained and the Company ordered to make the grievant whole.

### Discussion

I must initially note that at the hearing I cautioned both parties when the issue was stipulated that in view of the fact that the Company was not represented by counsel, I would not interpret the stipulated issue literally so as to exclude the core of the case which the Company appeared to be making, i.e. that the events here represented something other than fighting and deserved to be treated as an assault. I also indicated that I was prepared to consider receiving evidence of the results of the criminal proceeding against the grievant, a matter initially urged by the Company and now urged by the Union.

Review of arbitral precedent indicates that in many cases, a jury finding in parallel to conduct considered by an employer to be a dischargeable or disciplinable offense has been found

relevant and admitted into evidence in an arbitration proceeding. Here, I conclude that there is a particular reason why this evidence should be admitted: In essence, upon reviewing the

record, I find that the Company essentially "hung its hat on" the concept that what the grievant had done was an assault upon Marcin. To refuse to admit thereafter the results of a proceeding which has significant safeguards for all parties would be inappropriate.

The consequence is that this matter may be regarded as an alleged assault upon another employe, not merely as falling within the clause governing penalties for fighting in the agreement. That clause sets, as the Union argues, limitations on the penalties which may be applied by the Company in an instance of fighting. I do not believe that the agreement, even though it lists a comprehensive series of penalties for different specified offenses, can reasonably be read so as to eliminate entirely the possibility of immediate discharge for egregious conduct. It would make no sense to conclude, for example, that an employe who murdered another employe should be treated merely as the aggressor in a "fight" and given no more than a three-day suspension on the technical conclusion that the parties had written language in which the most analogous form of conduct was the instigator of a fight. Clearly, some allowance must be made for the Company to deal with situations which are so outrageous as to constitute inherent grounds for discharge even where the agreement lacks specific reference to such a right. I note further that there are some conflicts between the explicit language of Article 11 of the agreement (which provides a general just cause standard along with a requirement of one warning notice prior to discharge, and makes no reference in that section to immediate suspension) and the list of penalties for specific offenses in Exhibit B of the agreement, which do provide for immediate suspension in certain instances. The collective bargaining agreement, in its totality, does not provide for so ironclad a list of specific penalties that conduct apparently exceeding anything the parties imagined at the time of its negotiation would be reduced in effective severity by these terms.

With that said, the fact remains here that the Company has indeed "hung its hat on" the allegation of assault. I note that Homuth admitted that he made the decision to terminate the grievant based on the claims of the other employe involved and the observations of Rehrauer and Helmer, without contacting the grievant to get his side of the story. Homuth characterized the incident as an assault from that time forward. I find the credibility determination between the grievant and the other witnesses to be a difficult one, in which it is true both that there are inconsistencies between the Company's witnesses and some improbability in Helmer's testimony, and that the grievant would have a reason to lie exceeding that of the other witnesses (except for Marcin). But the controlling factor is the nature of the Company's determination. In this case, it is clear that the Company did not perform a thorough investigation of what the grievant claimed was a fight which began with an attack on him, not on Marcin. The Company accepted Marcin's claim that an assault had occurred, and considered its investigation essentially concluded at the point. In so doing, the Company inextricably bound its own investigation and conclusion that discharge was appropriate to whether the issue of whether the grievant had engaged in criminally punishable conduct. The fact that the grievant was subsequently acquitted of that conduct in a jury

trial therefore carries more weight than a similar acquittal might carry in circumstances where an employer had carefully and neutrally investigated the alleged incidents and reached conclusions not solely dependent on a criminal concept. I therefore conclude that consistent with the outcome in the criminal proceeding, the Company's rationale for its action here cannot be sustained.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the Company violated the collective bargaining agreement by discharging the grievant.
2. That as remedy, the Company shall, forthwith upon receipt of a copy of this Award, reinstate the grievant to his position or a substantially equivalent position; shall make him whole for losses incurred as a result of his discharge, by payment to him of a sum of money equal to wages and benefits he would have received if he had not been discharged, less interim earnings, if any; and shall correct its records accordingly.
3. That the undersigned reserves jurisdiction in this matter for at least sixty days from the date below, in the event of a dispute concerning the remedy.

Dated at Madison, Wisconsin this 20th day of June, 1996

By Christopher Honeyman /s/  
Christopher Honeyman, Arbitrator