BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 150, SERVICE EMPLOYEES
INTERNATIONAL UNION

and

MILWAUKEE ATHLETIC CLUB

Case 1
No. 53864
A-5458

Appearances:

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

Mr. Mark W. Guirlinger, General Manager, and Mr. Richard Fisher, Personnel Director, 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 discharge grievances of Pinky Linton, Jr. and Marrio Harding.

The undersigned was appointed and held a hearing on May 1, 1996 in Milwaukee, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on June 5, 1996.

Stipulated Issues

1. Were the grievants discharged for just cause?

2. If not, what shall the remedy be?

Relevant Contract Provisions

ARTICLE IV

MANAGEMENT RIGHTS

> The Club possesses the right to operate the Club and all management rights repose in it. These rights include, but are not limited to, the following:

. . .

D. To suspend, demote, discharge and take other disciplinary action against employees for just cause;

. . .

ARTICLE XXII

DISCIPLINARY ACTION

22.01 The offenses listed below will be considered grounds for discharge of an employee without warning or notice. The listing which follows shall be considered to be representative and shall not be considered to be all-inclusive: dishonesty, possession, consumption or working under the influence of alcoholic beverages or illegal drugs on Club premises, discourtesy to a member or guest, recklessness or deliberate misconduct resulting in damage to any person or property. (Sleeping on the job, falsification of information to the Club, and falsification of reports or records are forms of dishonesty.) For other offenses, the Club will give the employee at least one (1) written notice, stating the nature of the misconduct and warning the employee that in the event of further misconduct the employee may either be given a disciplinary suspension or may be discharged, as the Club determines. However, if no further related disciplinary action notices are issued within the next eighteen (18) month period, the notice will be removed from the employee's personnel file.

Discussion

Pinky Linton, Jr., a waiter with nine years' experience at the Milwaukee Athletic Club, and Marrio Harding, a busman with one year's experience, were discharged as a result of a January 5, 1996 incident, in which they concededly ordered food from the club's restaurant without paying for it. Neither had any discipline on his record previously. The disputed facts in this case center on the degree of culpability of this act and the actions which the grievants took to avoid its discovery, and the comparison of these actions with those of other employes similarly situated in the past. The ordering of the food itself, however, was admitted by both grievants relatively promptly in the Company's investigation.

Several Company witnesses testified essentially to the same effect: The matter came to light when on January 5, 1996 an order for food to be delivered to the club's sixth floor pool area, known as "the tank", was received in the club's main restaurant. The tank is known as a men-only area in which the more athletically inclined of the club's members have a cafeteria with a salad bar available, but do not generally eat heavily, being more inclined toward exercise. Jackie Martens, a restaurant supervisor, became suspicious when she received a telephone call

from Marrio Harding ordering, ostensibly on behalf of one member, a bowl of soup, a cheeseburger, two twelve inch pizzas, and a plate of pasta. She called the club's bookkeeping office and asked whether members were in the habit of ordering so much food from the tank. The bookkeeping office replied that they were not. Martens then called Harding back and said that the order would be filled but that she would have to see a ticket for it. Harding shortly thereafter brought down a trolley to collect the food, with a ticket. Martens testified that she looked at the ticket, which listed all of the food in question, and gave Harding all of the food, but retained the ticket. She testified that Harding made strenuous efforts to persuade her to turn over the ticket, but that she refused. Shortly thereafter, Linton came down to the restaurant to remonstrate with her. She testified that when she refused to turn over the ticket, Linton left, but she subsequently heard from a restaurant busman that Harding had asked him to retrieve the ticket and return it to him, which the busman had refused to do. The busman was not named.

Within a few minutes Martens, via another supervisor, had alerted Kara Caya, the food service supervisor, who in turn had become thoroughly suspicious about the matter. But as a woman, Caya was not permitted to investigate anything on the men-only sixth floor. She called Lorenzo Vicini, the operations manager, and asked him to investigate whether the food was served to a member. Vicini went to the sixth floor and was unable to locate the member in question, or the food. It is undisputed that (except for the bowl of soup) the food was, in fact, intended for the consumption of employes, and that it was never consumed by employes because Linton and Harding caused it to be disposed of before Vicini arrived. The two grievants were subsequently questioned by Vicini and Caya at the end of the shift, along with Personnel Director Richard Fisher. Toward the end of the meeting, General Manager Mark Guirlinger also joined the meeting. During this meeting, the two grievants admitted knowing that it was wrong to order food for their own consumption from the members' menu without paying for it, and admitted having done so before. Both employes denied having written on the ticket given to the restaurant, and Harding stated that he had never looked at the ticket but had merely placed it face down on the trolley and wheeled the trolley along to the restaurant.

The grievants testified consistently to the effect that they had no knowledge of who had written on the ticket, while admitting that they had ordered food for their personal use from the members' menu and that this was not the first time they had done so. Both alleged that other employes did this quite frequently, but did not identify such other employes except for three instances in which employes had previously been disciplined for similar offenses. There is no dispute about these incidents. In one incident, an employe was known to have ordered food and ascribed the expense of that food to a member's bill. The employe ascribing the food to a member's bill was discharged. A second employe complicit in the same incident, who ate the food and knew what was going on, received a three-day suspension. In another incident, a different employe was caught by General Manager Guirlinger eating food which clearly had come from the members' menu. Guirlinger caused that employe to be given a written warning. Grievant Harding was present and observed that employe receiving a written warning for ordering food off

the members' menu.

It is undisputed that the club maintains a cafeteria for the exclusive use of employes, and while the grievants testified to the effect that employes frequently are allowed to order food from the members' menu, the management witnesses testified without exception that employes universally know that they are not to do this without the explicit agreement of a supervisor. The management witnesses conceded that such agreement is frequently forthcoming, particularly in instances when the working hours of the employes conflict with those of the employe cafeteria or when there is leftover food after a banquet. There is no dispute that the employe cafeteria was available at the time of this incident.

The Company contends that both grievants have admitted that they knew it was wrong to order food from the members' menu and admitted that they had done this before. The Company argues that dishonesty and falsification of records (such as the charge ticket) are offenses punishable by immediate discharge under the agreement, and contends that the grievants' claim not to know who wrote down the items which might then have been charged to a member is not credible. The Company requests that the grievance be denied.

The Union contends that the record proves an established practice of employes eating food from the restaurant menu, and that supervisory personnel were aware of the practice and condoned it. The Union also argues that the discipline meted out to the grievants was significantly more severe than that given to other employes who have been caught eating food off the restaurant's menu. The Union contends that the sole instance of discharge for such an offense was in the case of the one employe who admitted falsifying a member's name on a job ticket for such food. The Union contends that the Company has not established falsification of records in this case, because one of the supervisors in question admitted that the handwriting did not look like Linton's, while the ticket clearly came from Linton's pad. The Union argues that because the falsification of a check is not proven, the worst that can be said of these employes is that they ordered food they were not entitled to, and that the discharge is far beyond the level of severity imposed in the past for this offense. The Union requests that the discharges be overturned and the grievants awarded a make-whole remedy.

I must initially note that the question of credibility of the grievants' explanations is a significant part of the determination in this matter, but cannot account entirely for a fair decision. I find the grievants' explanations to be unpersuasive as a whole. For the grievants to claim that they have no knowledge of how the order came to include anything more than the bowl of soup apparently written on the ticket by the member in question is inherently improbable. By the time the ticket was demanded, both grievants knew that supervisor Martens was showing a greater than usual interest in having a written ticket. Furthermore, they made strenuous efforts thereafter to recover that ticket. If they had not known that the writing upon that ticket contained more than the bowl of soup, these efforts would be inexplicable.

At the same time, the fact that the Company has not convincingly demonstrated which of the grievants, or even if one of the grievants (as opposed to a third employe), wrote on the ticket, does not dispose of the seriousness of that offense. I note in this connection that the quantity of food ordered by the grievants so far exceeds what they were likely to have consumed between them that it strongly suggests the participation of an additional employe, if not multiple employes. And the efforts taken to attempt to retrieve the ticket, even though asking another busman to retrieve it for them was denied by Harding, are of sufficient intensity to convince me that both grievants knew that the offense of ordering food and ascribing the cost to a member would be severely punished.

Yet that is not the whole of the issue. I must note, as partial mitigation of the grievants' offenses, that the same course of action which demonstrates that their story is not credible also demonstrates that they had no intention of causing any member to have to pay for the food in question. Indeed, one might say that the grievants became caught up in an offense greater than any they originally intended because of Martens' demand for a written ticket, which was unusual. Arguably, but for that (perfectly reasonable) demand, neither of the grievants would have been involved in any falsification beyond the ordering of the food itself by phone. This suggests that despite the quantity of food at issue, on this ground at least, the incident is distinguishable from the one incident in which an employe had previously been discharged for ordering food off the menu and charging it to a member.

In turn this raises the question of how serious an offense employes have been given to understand "ordering food for personal consumption" is. I am troubled by the fact that on two previous occasions, conduct fairly similar to that of the grievants' was punished by a written warning in one instance and a three-day suspension in the other. I am also troubled by the clear evidence that the club as a matter of principle did not require any standard of consistency among its supervisors in handling such offenses. While it is widely accepted that for many purposes, enlightened management may wish to push responsibility down a chain of command and give more authority to more people, and while this may in many instances be a laudable goal, where employe discipline is concerned it is not sufficient to the purpose. One of the accepted purposes of employe discipline is as a guide to employes generally, so that they will know what is unacceptable conduct and to what degree. Otherwise, all offenses could be punished by any degree of discipline which any individual supervisor cared to impose. Here, the testimony suggests that the club made a point of giving individual supervisors the final authority as to the level of discipline to be imposed, even where higher management had previously been involved in arguably similar incidents which resulted in lesser discipline. Because the present acts of the employes, even though I am inclined to discredit their testimony, do not rise to the level of dishonesty of the one employe discharged previously for such an offense, and because they have apparently been influenced in their view of the severity of this conduct at least partly by the previous incidents in which management has imposed much lesser discipline, I cannot sustain the discharges in this matter outright.

In previous awards over the years, I have had occasion to discuss the remedy of reinstatement without backpay. This remedy is frequently criticized by arbitrators and parties alike because of its unsatisfactory qualities on several grounds. I have earlier stated, and will here reiterate, that I believe there are certain circumstances in which reinstatement without backpay is the only just result. In essence, these include situations in which the discharge would be sustained, but for either management conduct which in some way contributed to the situation, or management conduct which was in some way materially inconsistent in its treatment of the employes affected as compared to others. Here, I find that both conditions apply. I am influenced partly by the evidence that neither grievant really intended for a member to be charged with the cost of the food. I am also influenced by the fact that neither grievant has prior discipline on his record, and by the fact that in arguably similar instances two other employes received comparatively minor discipline.

At the same time, I cannot find that this discharge should be reduced to a suspension, both because the grievants had committed the offense before even though not caught, and because of their less than credible attempt to explain away the written ticket. For all of these reasons, I conclude that the club had just cause for severe discipline just short of outright discharge, and that reinstatement but with no backpay is the appropriate remedy.

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

AWARD

1. That Milwaukee Athletic Club did not have just cause to discharge either Pinky Linton, Jr. or Marrio Harding.

2. That as remedy, the Company shall, forthwith upon receipt of a copy of this Award, reinstate both the grievants to their former positions or substantially equivalent positions, and shall correct its records accordingly. Backpay is not required.

Dated at Madison, Wisconsin this 26th day of June, 1996.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator