

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

AFSCME LOCAL 348

and

PORTAGE COUNTY

Case 120
No. 52671
MA-9071

Appearances:

Mr. James K. Ruhly and Mr. Devon Baumbach, Melli, Walker, Pease & Ruhly, S.C.,
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Mr. Michael J. Wilson, Representative at Large, and Mr. Jeffrey Wickland,
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ARBITRATION AWARD

On May 25, 1995, AFSCME Local 348 and Portage County filed a request with the Wisconsin Employment Relations Commission to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. The Commission, on July 14, 1995, appointed the undersigned to hear and decide this matter. A hearing was conducted on November 8 and 9, 1995, in Stevens Point, Wisconsin. A transcript of the proceedings was prepared and distributed by November 21, 1995. The parties submitted post-hearing briefs and reply briefs which were received and exchanged by January 16, 1996.

BACKGROUND AND FACTS

Michael Borski, the grievant, was employed by the Portage County Highway Department for a period in excess of 17 years as of the date of his discharge. For the two years immediately preceding discharge, Mr. Borski operated a Boom Mower, known to the parties as a Mo-Trim, a piece of equipment regularly used to clear brush. Borski, who worked alone, was regularly assigned to clear brush from alongside certain roads.

During the time frame immediately preceding his discharge, Mr. Borski was supervised by Ken Gliszinski, County Patrol Superintendent, who reviewed Borski's work, on an average of approximately twice per week. Included among ongoing operational instructions, Gliszinski had instructed Borski that County policy was that brush clearing should be limited to the County's right of way, a distance of 33 feet measured from the center of the road adjacent to the brush clearing. Additionally, Gliszinski had advised Borski that he was not to use the Mo-Trim to cut trees larger

than four inches in diameter. Those work directives had been given and reinforced. In June of 1994, Gliszinski observed that Borski had cut beyond the right of way and raised the subject. Borski indicated that the landowner had asked him to cut deeper. Gliszinski advised Borski that notwithstanding the landowner's preferences, he was not to cut beyond the County right of way, without prior approval from management officials. Prior to February, 1995, the County used the Mo-Trim to cut trees eight inches in diameter, or smaller. The machine broke down regularly. In an effort to keep the machine operational, it was determined that it should not be used to cut larger trees. In February of 1995, management officials determined that the use of the Mo-Trim would be limited to cutting trees four inches or smaller. Gliszinski advised Borski of that fact and directed him not to cut trees in excess of four inches with the machine.

The events giving rise to Mr. Borski's discharge occurred in the few days immediately preceding April 17, 1995. During that time period, Mr. Borski was operating the Mo-Trim in a brush clearing operation along County Highway "GG". Jeanne Tanghe, who resides in California, owns property along "GG". Her property was at the time rented by Sharon Ditmore, who was living on the premises. Mr. Borski cut deeper than 33 feet, and also took down trees well in excess of four inches in diameter. He did so along County "GG" including Ms. Tanghe's property.

When Ms. Ditmore saw what had occurred, she called Ms. Tanghe, and also called the County to complain. Her call to the County came at approximately 6:00 a.m. on April 17. Mr. Gliszinski, and Bill Weronke, Highway Commissioner, went out and inspected the site at approximately 7:00 a.m. Gliszinski had not previously inspected Borski's work on Highway "GG". 1/ The two men found that relatively large trees (trees well in excess of four inches in diameter) had been cut, that brushing had occurred beyond the right of way, standing trees had been damaged, and that two fences were damaged. The men could not determine if either fence was damaged by the Mo-Trim, but were relatively certain that one was not.

Jeanne Tanghe is active in a citizen's group, critical of the Portage County Highway Department's brushing and clearing operations. When Tanghe heard about the damage to her property, she sent the following fax, dated and received on April 17:

April 17, 1995

Portage County Highway Department
5684 County Trunk "B"
Stevens Point, Wisconsin 54481

RE: 9103 County Highway "GG", Almond, Wisconsin 54909;

1/ Weronke testified that he believed that Gliszinski had checked Borski's work on Highway "GG" and had found no problem with the work done. His testimony to this effect is not persuasive. There is no indication in the record that he has any basis for this conclusion.

ATTN: Highway Committee Chairman Robert Steinke, Highway
Commissioner William Weronke

On April 12, 1995, your crew trimmed tree branches along my barbed wire fence and cleared the ditch in that area. On April 13, 1995, they returned, removed the barbed wire fence, criminally entered my property, slashed, cut brush and small trees, including five trees measuring 10 inches. Three of these trees were 34, 35 and 35 1/2 feet from the center of the road. They also damaged some areas of my black wooden arena fence. The debris from that destruction was left for me to clean up.

On January 4, 1995, I wrote a letter to Mr. Weronke regarding the tree cutting policy and my forbidding you to enter my private property. I asked for notification regarding any work you deemed necessary for public safety. Neither I nor my tenant, Sharon Ann Ditmore, were notified. A neighbor stopped your crew from going any further on her property because she was home and told them to stop. Must people stand guard in front of their property?

I want an immediate reply. I want copies of all minutes where the discussion and decision regarding my property was made. The need to go beyond the agreed-upon policy of 29 feet from the center of the road, no straight line, some roads may go to 33 feet will surely be clearly stated. The need to remove my barbed wire fence and go in 35 1/2 feet from the center of the road must have had quite a bit of discussion as it constituted criminal trespass and destruction of private property. Mr. Ed Seefelt inspected my property, took pictures, measured the tree stumps and the footage. My tenant took pictures, and spoke to neighbors.

Please provide me with a copy of the tree cutting policy, copies of any minutes where my property was discussed or should have been discussed and a written explanation as to what went wrong. The barbed wire fence must be replaced and the wooden fence repaired where damaged. Replacement of the trees may have to wait until my arrival in Stevens Point the middle of May, 1995.

I am most anxious to hear from you,

Sincerely,

Jeanne V. Tanghe /s/

April 17, 1995, 10:05 Mr. Weronke has just called, informing me that he and Mr. Steinke will be viewing and measuring the damage done to my property this afternoon. I should expect a call from him later today or tomorrow morning. A work crew has been assigned to clean up all of the slash and cuttings from the area tomorrow.

Ms. Tanghe and her group of concerned citizens had previously, and on an ongoing basis, been active in defense of their property rights. Group members had regularly attended County Highway Department meetings and had urged/warned the County not to overcut or to intrude upon their private property. As noted in her April 17 fax, Ms. Tanghe had previously issued a fax warning dated January 4, 1995 which provided the following:

January 4, 1995

Portage County Highway Department
5684 County Trunk "B"
Stevens Point, Wisconsin 54481

ATTN: Mr. Bill Wrocke (sic)

Dear Mr. Wrocke:

Although I live in California, a part of me is always in Wisconsin. My husband and I spent six years looking for a future retirement home in Portage County. I love the people, the land, the history and the trees. The beauty of the land, water and trees kept drawing us back. We finally found an 87-acre farm with soft rolling hills and beautiful trees. In the year and a half we have owned it, we have planted nearly 100 trees and will be planting hundreds more. A renter takes wonderful care of the property.

The policy of the destruction of trees throughout Portage County is frightening, irresponsible and insane. Do you people really know

what you are doing? Come to California for a visit or a job and see the way we cut down large trees to replace them with ugly runts, tear down beautiful old buildings to put up squares of cement. Our hills were once covered by giant oak forests, now we have "golden hills" covered with scrub grass.

I receive the *Stevens Point Journal* and it appears that most accidents occur because of excessive speed and drunk driving. If you succeed in your destruction of all trees along our country roads, will the speeders and drunks go away? Creating speedways and blaming trees for the irresponsible behavior of some individuals will not solve these problems.

Our property is located at 9103 County Highway "GG", Almond, Wisconsin. I am notifying you that you do not have our permission to touch any of our trees. You do not have our permission to destroy the value of our property. You do not have permission to enter my private property.

If a tree branch is blocking driving vision, notify me and I will take care of it. I have taken pictures along the road and you had better be able to prove you had a need.

I reiterate - I expressly forbid you from entering my private property to destroy any of my trees. I may appear harsh, but I feel very strongly regarding property ownership and bureaucratic stupidity. This policy needs to be rethought so it makes sense. It seems that the people who pay the taxes, i.e., the bills, should be listened to.

Sincerely,

Jeanne V. Tanghe /s/

The mess left on Ms. Tanghe's property was cleaned up. Fence repairs were made, and new trees were planted. The clean-up was done to Ms. Tanghe's satisfaction.

Over the years a number of people had complained generally about the County's brushing and clearing practices. General complaints are not shared with employees. In this regard, Ms. Tanghe's January fax was not shared with any departmental employe, including Mr. Borski.

At approximately 10:15 on the morning of April 17 Weronke and Gliszinski returned to

the cutting site and reviewed not only Ms. Tanghe's property but a stretch of County Highway "GG" recently brushed by Borski. They found cuts beyond 33 feet and trees taken down in excess of four inches in diameter.

The Mo-Trim operation was shut down early in the afternoon of April 17. At approximately 3 p.m. that afternoon, Weronke convened a meeting which included himself, Gliszinski, Dale Peterson, the State Patrol Superintendent 2/, Mike Borski and Tom Moss, a union steward. Peterson took notes of the meeting. His notes and testimony and the testimony of Weronke and Gliszinski indicated that during the course of the meeting Weronke advised Borski of the complaints, and indicated that he and Gliszinski had reviewed the work site and that they saw fence damage, large trees cut outside the right of way, and indicated that this was a very serious matter. Weronke asked Borski why he had gone onto private property and cut such large trees. According to supervisory attendees, Borski indicated that he thought the areas looked better cut out so he went off the right of way to cut the "junk" trees. He indicated that he had cut larger trees than he had been directed because they were soft wood trees and he did not think they would harm the Mo-Trim. 3/ According to management witnesses, Weronke indicated that the Department was in trouble, and that the matter would not go away. Borski allegedly replied "You're not in trouble, this is my problem, and I will take full responsibility." Borski asked if Weronke wanted him to talk to the people involved. Weronke advised against that. Borski takes issue with a good deal of the substantive comment testified to by others.

Weronke and Robert Steinke, Chairman of both Personnel and Highway Committees of the County Board subsequently toured the site. Following completion of their inspections, Steinke directed Weronke to complete a full investigation of the matter.

As a part of the investigation, a second meeting was convened at approximately 12:30 on the afternoon of April 20. In attendance were Weronke, Gliszinski, Peterson, Borski, Tom Moss and employes Roger Roth, and Jim Shuvelson. Peterson was again the note taker. Peterson's notes indicate that Mr. Borski made the following statements:

- "Stated Ken told him to watch the 33-foot mark where cutting and he does if it involves nice trees, he tries to save nice trees even if they are on R/W. This was box elder and hanging over in front of a stop sign, he thought it was not that important so he only guesstimates when he cuts."

2/ Peterson is a county employe, a supervisor in charge of the maintenance of state highways traversing Portage County.

3/ Many of the larger trees in question are box elder trees, regarded by some as a "junk" tree.

- "Stated he talks to residents, if they want more cut or do not object to cutting more he does."
- "Stated he does not cut hard wood over four inches, but does cut soft wood larger than this by layering it."
- "Stated he was cloudy on limits expected of him, his policy differs from Ken's policy."

According to Peterson's notes, Gliszinski indicated that he had told Borski that there was a 33-foot maximum and had advised the man to measure if he was unsure of the distance. Gliszinski indicated that he had told Borski not to cut off the right of way, even with landowner permission and to not cut anything over four inches. Borski is alleged to have responded that he realized he was not to cut wood in excess of four inches but thought if it was not a valuable tree he would cut it if it was hanging over the right of way, blocking signs, or with the landowner's permission. Borski again offered to contact the people who complained, and to explain to them that this was his responsibility, that he had cut off the right of way, and that management had not instructed him to do so. Weronke again told Borski that he did not recommend calling those people. Borski takes issue with the accuracy of Peterson's notes and the testimony in support of those notes. He does not remember admissions of wrongdoing or the meeting having transpired as Peterson recorded.

Weronke subsequently reported the results of his investigation to Steinke. Steinke then indicated that this would become an agenda item on the next Highway Committee meeting.

On April 25, 1995, the Highway Committee met beginning at approximately 4 p.m. to consider discipline. During the course of the meeting, Highway Commissioner Weronke laid out the results of his investigation, including reciting the damage to the Tanghe property. Mr. Borski made a lengthy statement in defense of his actions, the essence of which was to say that he believed he was doing a good job, that he had received positive feedback from his supervision, and that the policies for which he was being disciplined were unclear to him. At the conclusion of the evidentiary portion of the meeting, the Committee went into closed session and determined that Borski would be fired. This was done without a recommendation from Weronke, or any other member of the Highway Department management.

At the arbitration hearing, the Union submitted evidence of Borski's work covering a period from December of 1994 through April of 1995. The evidence consisted of pictures taken at numerous locations for projects completed during that period of time in which Mr. Borski cut well beyond 33 feet and also cut trees well in excess of four inches in diameter. A number of those cuts exceed 40 feet, and range all the way to 46 feet from the center of the highway. Numerous trees, larger than four inches in diameter were cut, ranging all the way to 11 inches in diameter.

Mr. Borski's work history includes 10 prior incidents in which he either received discipline

or is alleged to have engaged in behavior that the employer regards as disciplinable. The first of those incidents occurred in October of 1983. At that time, Borski was given a mild warning letter in response to what management personnel understood to be an altercation with a foreman and a threat by Borski to "lay the man out".

The second disciplinary incident arose on November 23, 1983. The employer gave Borski a three-day suspension without pay for refusing to perform assigned work, and for engaging in a heated exchange with a lead worker, to whom Borski gave the finger. The matter was arbitrated, and the arbitrator reduced the suspension to a single day off, citing numerous mitigating circumstances.

The third event occurred on August 1, 1985. On that day, Borski was operating a grader and was asked to remove tree stumps from a landfill. The grievant used the blade of the grader to remove the stumps, and damaged the blade in so doing. The employer regarded the grievant's actions as negligent, and suspended Borski for a single day and additionally, demoted him. The matter was grieved and ultimately arbitrated. The arbitrator sustained the discipline, concluding that Borski did operate his equipment negligently. However, the arbitrator found a permanent demotion to be too severe and reinstated the grievant to his prior classification effective the date of the award.

The fourth noteworthy event occurred in January of 1986. The employer believed that Mr. Borski was abusing telephone privileges by making numerous phone calls, many of which occurred during work hours. This matter was brought to his attention, and he agreed to discontinue his objectionable use of the phone. The event is summarized in a memorandum dated January 13, 1986 by Michael D. Buss, Highway Commissioner.

The fifth episode of discipline arose on May 21, 1986 where Bruce G. Stelzner, Operations Supervisor, authored two letters very critical of Mr. Borski. The letters are critical of Mr. Borski's work performance, his failure to check his equipment, his failure to call for immediate repair of broken equipment, and his failure in notifying supervision of workplace problems. The letters were grieved, with Borski complaining of discriminatory management treatment. Mr. Borski's grievance was sustained by Mr. Buss.

Mr. Borski received both an oral and a written reprimand in February of 1990. On February 9 he was given a verbal reprimand for failing to carry out a work assignment in a timely manner. Borski was evidently engaged in social conversations that caused him to be late for a work assignment, and delayed the commencement of that project. On February 21, Mr. Borski was given a written reprimand for failing to prepare his vehicle to plow snow. The report refers back to February 15, alleges that he was given four hours to prepare his truck for a snowstorm forecast for February 16, and notes that his plow blade broke within one hour of the job. The resulting delay allowed a crisis to develop. Mr. Borski filed a grievance, which was denied.

The seventh matter noted in the personnel file occurred in July of 1993, when an allegation of sexual harassment was made. The employer investigated the allegation and concluded that there was insufficient proof that the alleged harassment occurred. There was a reassignment of Mr. Borski's job tasks with an acknowledgement that such reassignment did not constitute disciplinary action.

In October of 1994, the Department investigated a citizen complaint that Mr. Borski had initially tailgated his vehicle on a county trunk highway, and had subsequently passed his vehicle, slowed down, and on occasion had gone off the road and threw stones at the individuals' car. The complainant followed Mr. Borski to his destination, a gravel pit and asked for his name. Borski refused to provide it. It does not appear that this incident led to discipline.

The ninth incident reflected in Mr. Borski's personnel file involves a discipline imposed for his conduct on February 20, 1995. On that day, Borski was directed to take a vehicle and report to a brushing crew. It is the County's view that he failed to do so. The County regarded this as insubordination and imposed a one-day suspension on Mr. Borski. Ken Gliszinski, indicates that Borski thereafter told him that "someday you will get yours". The suspension was grieved. The grievance was ultimately withdrawn.

On March 15, 1995, Borski was involved in another confrontation, which ultimately led to a three-day suspension. According to Gliszinski, Borski approached him in an agitated state, indicated that he could "see right through you", and thereafter shoved Gliszinski in the chest causing Gliszinski to fall backward. After Gliszinski objected, and told Borski you can't shove a supervisor, according to Gliszinski, Borski replied, "You can't prove it. You don't have any witnesses." Following that, Gliszinski sent Borski home. According to Borski, all he did was poke Gliszinski in the stomach. When Gliszinski objected, Borski asked for a union representative, which was denied. Borski filed a grievance over his three-day suspension. The grievance was subsequently dropped.

Borski contests the accuracy of management accounts of the events and subsequent meetings involved in the February and March incidents.

ISSUE

The parties stipulated to the following issues:

1. Did the County have just cause for the action it took in April, discharging the grievant from employment?

2. If not, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

SECTION 2 - MANAGEMENT RIGHTS

- A. The County possesses the sole right to operate County government and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:

. . .

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

. .

POSITIONS OF THE PARTIES

The County contends that it had just cause for terminating the grievant's employment. The County argues that the grievant knew he was not to cut beyond the 33-foot right of way, or to cut trees larger than four inches in diameter. The grievant's violation of his supervisor's orders in April, 1995, occurred less than one month after his three-day suspension for pushing that same supervisor, and less than two months after his one-day suspension for failing to follow the orders of that supervisor. The grievant knew, because of what he was told when he was given his three-day suspension a month earlier, that if he engaged in further infractions, he would be subject to discharge.

While the grievant was initially allowed to cut items with the Mo-Trim larger than four inches in diameter, the limitation of only four inches was communicated to him in late February of 1995. According to the County, Gliszinski vividly recalled, in his un rebutted testimony, that he explained the new rule, as well as the reason for the new rule, to the grievant while viewing the mowing head of the Mo-Trim when it was in the shop being repaired. Gliszinski also communicated the 33-foot right of way rule to the grievant.

The Grievant never denied that he had been told to stay within the 33-foot right of way, or that he was not to cut anything over four inches in diameter. In fact, in the meetings on April 17 and 20, 1995, involving Weronke, Gliszinski, Peterson and several union representatives, the grievant impudently stated that he knew the rules, but chose not to follow them. Borski ignored the four-inch rule because he did not think cutting soft wood would harm the machine, and ignored the 33-foot rule because he felt the areas he cut looked better cut beyond the 33-foot right of way.

The Employer contends that Borski's testimony and cross-examination makes it clear that he was being cute and evasive, and that he did not have a sufficient recollection of the April 17

and 20 meetings to reasonably dispute the accuracy of Peterson's notes. Apparently sensing what a non-credible self-portrait he was painting the Grievant eventually admitted that he simply could not say whether Peterson's notes were accurate. Despite the fact that at least one union representative attended each meeting with the Grievant, the union offered no evidence or testimony to challenge or rebut the accuracy or content of Peterson's notes of those meetings. Several union representatives were present during the hearing, but nevertheless were not called to dispute the accuracy or content of Peterson's notes.

There is no contention that any County representative - or anyone for that matter - told Grievant to cut beyond the 33 foot right of way or to cut items larger than four inches in diameter. Grievant's only defense was that he had apparently breached the 33 foot and four-inch rules in the past, and had gotten away with it.

The Employer contends that the fact is that Gliszinski did not, and reasonably could not, catch every instance where Grievant cut off the right of way or breached the four-inch rule. It is inconceivable that Gliszinski would routinely go out and measure the rights of way or the sizes of stumps cut on every inch of County highway to ensure 100 percent compliance in order to impose discipline on the Grievant. The Grievant and Union cannot credibly argue that the County's failure to monitor every bit of his work or catch every deviation allows him to ignore the instructions he is given and deviate at will with impunity.

April was not the first time the Grievant has engaged in this type of misconduct. In February of 1995, the Grievant received a one-day suspension for failing to follow Gliszinski's order to report to a brushing operation. In March of 1995, the Grievant was suspended for three days for pushing his immediate supervisor, Mr. Gliszinski. In the County's view, one thing is clear from the February, March and April incidents: Mr. Borski is above the rules. No one tells Mike Borski anything. Borski knows best. The County summarizes the Grievant's disciplinary history and concludes that he has been engaged in similar instances throughout his career with the County. The County argues that the fact that the Grievant apparently disobeyed the 33-foot and four-inch rules in the past and got away with it does not mean that he now cannot be disciplined for disobeying his supervisor's orders.

The County cites arbitral authority for a number of propositions. They include the premise that once a violation has been established, as it clearly has in this case, an arbitrator should not disturb management's decision regarding the appropriate penalty unless management acted in a "arbitrary, capricious or discriminatory manner without regard to the rights of the employe." The County goes on to cite arbitral authority for the premise that "there is a presumption that management did not act in a discriminatory, arbitrary or capricious manner when it determined that discharge was appropriate."

The County notes that its 33-foot and its four-inch rules are extremely important rules. Concerns over the extent of brush and tree removal along Portage County highways led to

numerous discussions between a concerned citizens' group and a highway committee to ensure that the Highway Department was not encroaching beyond its 33-foot right of way. This is a very important issue to the citizens of Portage County. The rule is predicated upon citizen concern. Further, argues the County, this is not a case where the Grievant errantly strayed only slightly or inadvertently from the 33-foot right of way. Rather, he purposely deviated up to 10 and 11 feet off the right of way.

Due to the Mo-Trim unit's extensive breakdowns caused by cutting large diameter trees, the Highway Department managers determined that the machine should be limited to cutting material that was four inches in diameter or less. Some of the items the Grievant cut with the Mo-Trim were twice the size that he was supposed to cut. The Grievant presented no legitimate excuse for failing to follow the rules.

Other considerations are alleged to support the Employer's decision. The Grievant's discharge was within one month of a 3-day suspension for pushing his supervisor, at which time Weronke warned the Grievant, verbally and in writing, that one more violation would subject him to discharge. Finally, the County considered, as should the Arbitrator, the Grievant's past work record. The employe's work record history is relevant when making a discharge decision.

The County contends that even should I determine that just cause did not exist for the grievant's discharge, I should not reinstate him. His reinstatement would result in undue friction and controversy between the parties that would make reinstatement futile. The Grievant has demonstrated by his most recent misconduct, beginning in February of this year and culminating in his April discharge, that he cannot work with County highway department management. The Grievant challenges management at every turn.

It is the position of the Union that the Grievant's supervisor gave tacit approval to his aggressive brushing practices. This incident would never have escalated into discipline if Mrs. Tanghe had not registered a complaint even though the Grievant's supervisor was fully aware of the conditions at the site in question.

Mr. Weronke testified that Mr. Gliszinski had seen the Tanghe site after the Mo-Trim operation but before the complaint was received from Mrs. Tanghe and, that he, Gliszinski, was satisfied with the work. It was only after the complaint was received that Mr. Gliszinski's reaction to the work changed.

The Union goes on to argue that the undisputable fact is that regardless of what Mr. Gliszinski did or did not tell the Grievant about the 33-foot and four-inch rules, said rules were never enforced and accordingly, the Grievant was not put on notice of discipline for such rule violations.

The Union contends that Mrs. Tanghe's January 4, 1995, letter was not the first complaint regarding the Highway Department's cutting practices. A citizen's committee formed in response

to issues relating to the Highway Department's cutting practices. Yet, the Grievant is the only employe to ever be disciplined for violating related work rules. The Union asks "why"?

The Union reviews Mr. Borski's prior disciplinary record and concludes that the County has a history of imposing excessive discipline.

The Union contends that arguably the Tanghe property was restored to a better condition than that which existed prior to the Mo-Trim operation. It cites Ms. Ditmore's testimony to that effect.

The Union contends that the Grievant was discharged in part because of alleged damage to fences on the Tanghe property, notwithstanding the fact that no valid proof exists that the Grievant damaged either of the fences in question.

DISCUSSION

I believe the Grievant knew he was not supposed to cut beyond the 33-foot right of way, nor was he to cut trees larger than four inches in diameter. He drew a distinction between soft wood and hardwood trees. That distinction was not one that the Employer rule permitted him to draw. I accept Gliszinski's testimony that he advised Borski on separate occasions specifically with respect to each of these two policies. To the extent there is a suggestion in the record that these policies were not repeated daily or by the job, I find that of no consequence. There is no need to repeat standard, commonly-understood operating directives every day. Supervisors need not repeat and reaffirm the right of way distance every day.

Notwithstanding the Employer's testimony as to the importance of this rule, it is unclear to me how strictly either the 33 foot rule or the four inch rule was enforced. It is not uncommon for employes to disregard work rules regularly where the employes believe those work rules impede their ability to perform the work. While I am not suggesting that is the case here, I simply do not know. The Union introduced evidence showing months of roadside cutting that included areas cut much deeper than 33 feet and much deeper than the cuts made on the Tanghe property or elsewhere on County "GG". Those cuttings existed for several months prior to Borski's discharge and were either undetected or treated as acceptable by supervision.

Gliszinski would have reviewed most of the sites noted in the record without objection. This would include sites cut back as much as 46 feet from the center of the highway. It would also include sites in which trees and/or stumps substantially larger than 11 inches would have been left in the wake of the brush clearing operation. Either there was no meaningful review of the brush clearing work being performed (at least with respect to the 33-foot right of way rule and the four-inch diameter tree cut) or the review permitted a tolerance. No other employe has ever been disciplined for violating the 33-foot right of way or the four-inch cut standards. Whether this reflects consistent employe performance or a lack of standards enforcement is unclear.

The County contends that Mr. Borski is a man with an attitude. The County's contention in this regard appears to be true. Mr. Borski appeared to be a very headstrong employe who has trouble taking direction, and who is quite willing to lash out at supervision when he believes he has been wronged. His prior discipline is a comment on his relationship to supervision.

The Employer contends that Gliszinski cannot reasonably be expected to monitor Borski so as to catch every minor infraction. The contention, as stated is certainly true. However, it ignores the essence of the Union's claim. The Union is not claiming that an occasional deviation from the 33-foot right of way rule was overlooked. The Union's contention is that at least Mr. Borski systematically cut beyond 33 feet and also systematically cut trees in excess of four inches in diameter with his Mo-Trim and that his performance was acceptable to management. No infractions were noted.

The context in which this dispute is debated includes the Employer's perception that Mr. Borski has been a poor employe with bad work habits. Borski operates the Mo-Trim alone, he is not part of a brushing crew. The Employer contends that the 33-foot right of way and four-inch cut rules are very important. Indeed, Borski has been discharged for their violation. The record also indicates the existence of a citizen's group, formed over dissatisfaction with the Highway Department. These citizens wrote letters of complaint, attended Highway Commission meetings, and expressed their dissatisfaction with the way their private property rights were being ignored by County government. It is in this context that Gliszinski reviewed Borski's work. No complaint was forthcoming prior to Tanghe's complaint.

If Mr. Borski is to be discharged for cutting beyond the right of way and for the misuse of his equipment, I believe it is incumbent upon the Employer to impress that fact upon him. At a minimum, he is entitled to fair warning that his behavior in this regard could lead to discharge. I do not believe that warning was fairly provided.

The County contends that it has invoked progressive discipline and lays out Borski's disciplinary history. I believe that the record establishes that in 1983 Mr. Borski had a problem and was disciplined for his attitude toward management personnel and toward his job. I believe the record establishes that in 1985 Mr. Borski received discipline for abuse of his equipment. His 1990 written reprimand is relevant. I do not believe that the events set forth as having occurred in 1986, 1993, or 1994 are particularly relevant to this proceeding. The behavior is either unrelated or was not subject to effective discipline.

While it is true that Borski was disciplined for his behavior in 1983 and again in 1985, it is equally true that a portion of the discipline imposed was overturned by arbitrators. It is a fair reading of those arbitration awards to conclude that those arbitrators decided that management had gone too far, considering all the circumstances, in the discipline of Mr. Borski.

The discipline continued in 1995. In February, Borski was given a one-day suspension for

his failure to follow an order and for threatening his supervisor. Similarly, in March of 1995, Mr. Borski was given a three-day suspension for physically shoving his supervisor. These events represent occurrences of open defiance, and physical threats toward supervision. It is in that context that Borski was clearly and unequivocally advised that "future violations will be grounds for discipline up to and including discharge." The infraction described in the three-day suspension was "physically striking immediate supervisor".

I agree that Borski was clearly on notice that continuing transgressions would lead to his discharge. However, I do not believe that the behavior exhibited by Mr. Borski, for which he was discharged was a fair extension of that for which he was previously disciplined. There is no hint of physical threat and/or intimidation of his supervision present in his April brush clearing work performance. Neither was there open defiance of a directive to perform a task. He was working inconsistently with directions he had been given relative to the 33-foot right of way and the four-inch cutting limit. However, the context in which this was being done was that he was performing the brush clearing as he had always performed the brush clearing. He was doing so without supervisory admonition to the contrary.

At the time he was given his warning that further violations could lead to his discharge, he was, on a daily basis cutting beyond the 33-foot right of way and was cutting trees larger than four inches with the Mo-Trim. Gliszinski, who was acutely aware of Borski's status, was reviewing his work. To the extent that that behavior constituted a kind of infraction which could lead to his discharge, I believe that it was incumbent upon the Employer to point out that fact. I do not believe that is fairly drawn from either of the disciplinary letters which he was given.

The intervening event was the complaint from Ms. Tanghe. Her complaint led to a closer scrutiny of Borski's work. That scrutiny ultimately led to his discharge. The complaint placed the Employer in an embarrassing light. So much so that decisions were removed from the department, and the matter was taken up by the Highway Committee. The decision to discharge Borski applied a standard not previously applied by the department.

At least with respect to the Tanghe property, Borski is alleged to have cut trees that were one, two, and two and 1/2 feet beyond the right of way. Standing alone, that does not seem to be a transgression so severe as to warrant discharge. The County points out that much deeper cuts were made further up County Highway "GG". These cuts were no deeper than those put into evidence by the Union as commonly made by Borski. I do not believe the right of way standard was rigidly enforced. It cannot form the basis for discharge.

It is true that Borski cut large trees with the Mo-Trim. The trees were of the same size Mr. Borski had cut elsewhere. The four-inch rule is an effort to define the appropriate use of County equipment. Mr. Borski had previously been disciplined for the abuse of equipment, but that was many years earlier. There is no indication that this constituted the last straw in a failed effort to get Borski to take better care of his equipment.

The County takes issue with Borski's contention that he historically cut beyond the right of way and that he historically cut trees in excess of four inches with his Mo-Trim. The County speculates that utility companies, which also do brush clearing for line maintenance, may have made the deeper cuts. There is no evidence of that. To the contrary, the evidence is that Mr. Borski made those cuts. Beyond that, the County suggests a bizarre scenario in which an employe discharged for his poor work performance goes out of his way to fabricate evidence of prior poor work performance in defense of his job. It eludes me as to the advantage a discharged employe would perceive himself to have to bring forward poor work performance by others and claim it as his own.

The Employer argues that I should apply an arbitrary and capricious standard. I do not regard that as the appropriate level of review in this proceeding. That is particularly so where as here, there was no recommendation from departmental management with respect to the propriety of the discharge. At the time of discharge, Weronke believed Gliszinski had reviewed Borski's work along County Highway "GG" and had been satisfied. The only question in Weronke's mind was whether or not the work had been completed, i.e., the final layering cuts made, at the time of Gliszinski's review.

None of this is to say that the Grievant is an innocent victim of circumstance. He has brought himself to the brink of discharge. This Award merely concludes that he was not given proper notice that his method of cutting and clearing brush could lead to his discharge. He may be held to the same standards and tolerances with respect to cutting off the right of way as are his co-workers. Similarly, with respect to the Mo-Trim, he can be directed as to which trees he is free to cut and which he is not. Nothing in this Award should be read to sanction the Grievant's physical aggression toward his supervision, his inclination to disregard directives, or to authorize him to abuse equipment to which he is assigned.

AWARD

The grievance is sustained.

I do not believe there existed just cause for the discharge of Michael Borski. I hereby direct the Employer to reinstate him within thirty (30) days of the date of this Award.

REMEDY

All prior discipline continues to stand. The record indicates that Mr. Borski had secured interim employment during the period of his discharge. For that reason, and due to his own culpability in this matter, I am not directing backpay, either in the form of wages or benefits. I am not directing the Employer to credit Borski with seniority for the period he has been off work though he retains the seniority accrued as of his discharge. The Employer must restore Mr.

Borski to a job whose pay grade is the equivalent to that which he was earning as of the date of his discharge. The Employer is not required to reinstate Mr. Borski to the Mo-Trim. The County has argued that reinstatement is an inappropriate remedy given Mr. Borski's attitude toward his supervision. Under the terms of this contract, I believe he is entitled to his job until such time as the Employer establishes cause for his termination.

JURISDICTION

I will retain jurisdiction over this proceeding for a period of thirty (30) days from the date of this Award to resolve any reinstatement issues which may arise.

Dated at Madison, Wisconsin, this 27th day of August, 1996.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator