BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS UNION LOCAL NO. 75

and

CITY OF MANITOWOC

Case 142
No. 56720
MA-10393

(Tom Blashka Grievance)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by **Ms. Andrea Hoeschen**, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

Mr. James Wyss, City Attorney, City of Manitowoc, P.O. Box 1597, Manitowoc, Wisconsin 54221-1507, appearing on behalf of the City.

ARBITRATION AWARD

Teamsters Union Local No. 75, hereinafter referred to as the Union, and City of Manitowoc, hereinafter referred to as the City or Employer, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide the Tom Blashka grievance. A hearing, which was not transcribed, was held on April 7, 1999 in Manitowoc, Wisconsin. Afterwards, the parties filed briefs, whereupon the record was closed July 14, 1999. Based on the entire record, the undersigned issues the following Award.

ISSUES

The parties were unable to stipulate to the issue to be decided in this case. The Union framed the issue as follows:

> Did the City have just cause to discipline Tom Blashka for getting take-out food on April 3, 1998? If not, what is the appropriate remedy?

The City framed the issue as follows:

> Did Mr. Blashka violate Article 5(2)(a) of the current collective bargaining agreement? If so, what is the appropriate remedy?

Having reviewed the record and arguments in this case, the undersigned finds the following issue appropriate for purposes of deciding this dispute:

> Was the grievant disciplined for just cause? If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE V

NORMAL WORK WEEK, NORMAL WORK DAY AND NORMAL WORK SHIFT

. . .

Section 2. Normal Work Day.

(a) Department of Public Works Employees and Clerk. For all Department of Public Works employees and clerks, except those employees listed below, the normal work day shall consist of eight (8) hours commencing at 7:00 a.m. and terminating at 3:00 p.m., except that one clerk may, in the discretion of the Employer, be assigned the hours of 8:30 a.m. to 4:30 p.m., depending upon Department needs. Employees shall be expected to carry their lunch and will not be permitted to stop at restaurants, taverns or similar places of business for their lunch breaks. Said break not to exceed twenty (20) minutes.

. . .

ARTICLE IX

DISCHARGE

Section 1. Procedure. The Employer will not suspend, demote or discharge any employee without just cause. Where just cause would not warrant a suspension, demotion or discharge, the Employer agrees to give at least one (1) written warning.

BACKGROUND

The City operates a Department of Public Works (hereafter DPW). The Union is the collective bargaining representative for the employes in the DPW and has been for many years. The Union and the City have been parties to a series of collective bargaining agreements, hereinafter CBA, one of whose provisions deal with the normal work day.

Prior to 1976, the normal work day for DPW employes was 7:00 a.m. to Noon and 12:30 to 3:30 p.m. The employes had a half-hour unpaid lunch break between Noon and 12:30 p.m. There was no language in the CBA or the Employer's work rules concerning where employes could eat their lunch. As a result, employes could eat their lunch wherever they wanted.

In the 1976 negotiations, the Union proposed that employes get a paid lunch break, as opposed to an unpaid lunch break. The Union reasoned that if employes had a paid lunch break, they would bring their lunch to the job site and this would increase productivity, shorten the work day and remove unnecessary disruptions. The City agreed to same. The actual contract language which the parties subsequently agreed on, and included in their 1976-77 CBA, provided that: (1) employes would get a 20-minute paid lunch break (instead of a 30-minute unpaid lunch break); (2) "employes shall be expected to carry their lunch and will not be permitted to stop at restaurants, taverns or similar places of business for their lunch breaks;" and (3) the normal work day ended at 3:00 p.m. (instead of 3:30 p.m.)

While the contract language just referenced has changed some since 1976, those changes have no bearing on this case. Thus, for all intents and purposes, the current contract language is the same as the language contained in the parties' 1976-1977 CBA.

The prohibition referenced above in item (2) against employes "stop[ping] at restaurants. . .for their lunch breaks" has never been applied to convenience stores or gas stations. Employes have long been allowed to go to same while on duty to use the bathroom and buy things, including food. Employes go to these stores on a daily basis. When they do

so, they go on their own volition; they do not have to get permission from a supervisor to do so. No employe has ever been disciplined for stopping at a convenience store or gas station and getting food.

The record indicates that on two occasions, employes were formally disciplined for violating the prohibition referenced in item (2) above against "stop[ping] at restaurants. . .for their lunch breaks." The first instance occurred in 1991 when three unit employes sat down and ate lunch in a bar and overstayed their 20-minute lunch break. They each received a four-hour suspension and a written reprimand. The second such instance occurred in 1994 when three unit employes had a one-hour lunch in a restaurant with a Business Representative of Teamsters Local No. 75. These employes received a one hour suspension and a warning letter. In these two instances, the employes sat down and ate their lunch in a tavern and/or restaurant.

In addition to the two instances just noted where employes were formally disciplined for violating the prohibition in Article V, Section 2(a) against "stop[ping] at restaurants. . . for their lunch breaks", several employes have been told by supervisors to not go into fast food restaurants. In one instance, unit employe Terry Hubbart was "hollered at" by a supervisor for going into a McDonald's and in another instance, an unidentified transit employe was told to henceforth not go to Hardee's. Additionally, DPW Supervisor Dempski has told the same thing to a couple of employes who he did not identify.

Prior to the incident involved herein, no employe has ever been disciplined for getting take-out food from a restaurant or a convenience store.

Notwithstanding the contractual prohibition against employes "stop[ping] at restaurants. . .for their lunch breaks", the record indicates that numerous unit employes have gotten take-out food from numerous restaurants on numerous occasions. One of those employes was Tom Blashka. Unit employes have gotten take-out food from the following restaurants in Manitowoc: Late's, White Capp, McDonald's, Burger King, Tony's Pizza Gallery, Dairy Queen, the Subway attached to the Cenex gas station, the pizza joint attached to another Cenex gas station and several bakeries. Some of the restaurants just noted can be characterized as sit down restaurants, while others are fast food restaurants. Late's is a sit-down restaurant. Blashka has previously gotten take-out food from Late's. When employes get their take-out food, they sometimes have permission from supervisors to do so. Usually, though, they do not; they simply go to the food establishment on their own volition. On occasion, employes have gotten take-out food and brought it back to the DPW shop where they ate it. Some supervisors have seen employes eat take-out food in the DPW shop. Menus from various restaurants, including Late's Restaurant, are posted on the bulletin board at the DPW shop.

The City acknowledges that over time, certain exceptions have arisen to the prohibition stated in Article V, Section 2(a) against employees "stop[ping] at restaurants. . .for their lunch breaks." Thus, the City acknowledges that some employes have "stop[ped] at restaurants. . .for their lunch break" without any discipline being imposed for same. The City submits these exceptions have been granted in the following circumstances: 1) when the employe is called into work without notice; 2) when an employe works overtime; 3) when an employe has a supervisor's permission, and 4) when an employe is required to work in exceptionally hot or inclement weather.

The DPW holds a training session for unit employes once a year at which time a supervisor reviews various DPW policies and procedures. One of the items which is reviewed at the training session concerns restaurants. Employes have been told during the training session that they cannot eat lunch in restaurants or stop at restaurants. Employes have never been told during this training session that they are not to go into restaurants to pick up food to go.

FACTS

This case involves the discipline meted out to Tom Blashka for stopping at a restaurant and picking up a take-out food order.

Blashka works in the DPW's Street Division. He has worked for the City since 1990. He normally works 7:00 a.m. to 3:00 p.m.

The week of March 30, 1998, Blashka and a fellow employe, Brian Marshall, were assigned the task of cleaning winter debris such as sand and salt from City streets, medians and sidewalks. This cleaning process was accomplished with a mechanical sweeper and City truck; one person operated the sweeper and the other swept by hand and loaded the truck with debris. This particular project was considered a special project, so Blashka and Marshall worked special hours that week, namely 3 to 11:00 a.m.

April 3, 1998 was the last day that Blashka worked the special schedule. That day, he reported to work at 3:00 a.m. and started his assigned cleaning duty (i.e. sweeping winter debris). About 4:00 a.m. Blashka returned to the DPW shop to use the bathroom. While he was there, Blashka phoned a local restaurant, Late's Bar-B-Q, and placed a take-out order for two breakfast sandwiches to be picked up about 5:00 a.m. Blashka did not bring his lunch to work that day.

Blashka then returned to work cleaning up sand and salt from streets south of downtown. In the course of doing so, he drove down Lakeside Boulevard which is south of downtown Manitowoc. Late's Restaurant is located near that street. At 4:50 a.m., Blashka

went to Late's Restaurant and parked his City truck outside in the parking lot. He then entered the restaurant, picked up his food order, paid for it, and left the restaurant. Blashka did not have to wait for his food order because the food was already prepared. After Blashka got his food, he returned to his truck where he ate it. Blashka estimated he was inside the restaurant for one minute.

Unbeknownst to Blashka at the time, DPW Supervisor Jerry Dempski happened to be walking his dog about 4:50 a.m. on Lakeside Boulevard when a City truck drove past him. Dempski recognized the truck as a City truck because of the yellow color and the fact that it had the number 26 on it. Dempski continued to walk from Lakeside Boulevard to Dewey Street, and then to 9th Street, which is parallel to Lake Michigan. Dempski then took a short cut by Late's Restaurant which faces 9th Street. As he was doing so, Dempski saw a City truck in the back parking lot of Late's Restaurant. From Dempski's perspective, this was not an everyday occurrence; it was atypical to see a City truck in a restaurant parking lot. The truck in the parking lot was No. 26, the same truck which had passed him earlier on Lakeside Boulevard. From a distance of about 30 feet, Dempski saw Blashka enter Late's Restaurant. Dempski knew Blashka by sight since he has been Blashka's supervisor for six years. Dempski did not approach Blashka to ask him why he was going into the restaurant, or say anything to him. Dempski did not wait to see how long Blashka remained in the restaurant.

After Dempski went to work at 6:00 a.m., he reported to Public Works Superintendent Garry John that he had seen Blashka enter a restaurant that morning. John then arranged for a meeting to be held later that morning with Blashka concerning same.

Prior to the meeting, Dempski filled out a standardized form entitled "Notice of Employee Warning." This form lists 32 possible offenses. Dempski checked the box for "Lunching at Improper Time," crossed out the words "Improper Time," and wrote "Restaurant" in its place. He also checked the box entitled "Other". He then wrote in longhand that he had seen Blashka go into Late's Restaurant. It is standard operating procedure for Dempski to complete this form prior to holding a meeting with an employe concerning possible discipline.

About 9:00 a.m., Blashka was called into a meeting with management. Present at this meeting were Blashka, Dempski, John, Director of Public Works Bill Handlos and Union Steward Greg Wuensch. In this meeting, Handlos told Blashka that he (Blashka) had been seen entering Late's Restaurant earlier that morning. Blashka admitted that he had indeed gone into that restaurant at 5:00 a.m. and picked up some food to go. Blashka then said that he did not eat the food in the restaurant. Handlos responded to this by saying that did not matter. A heated verbal exchange then ensued regarding the propriety of going into a restaurant to pick up food, with the management representatives contending that it was prohibited by the labor agreement, and the employe representatives disputing that assertion.

Blashka was not remorseful or apologetic for his conduct at this meeting. At the end of the meeting, Handlos told Blashka that management would discuss the matter and decide what discipline to impose.

After the meeting ended, management representatives discussed the matter and decided to impose a three-day suspension on Blashka for stopping at a restaurant.

At the end of the work day, the following letter was hand delivered to Blashka by John, who read the letter's contents out loud to Blashka:

> Dear Tom:
>
> On Friday morning April 3, 1998, you were observed entering a restaurant on South 9th Street. The labor agreement has language that clearly prohibits this type of action.
>
> Due to the fact that you violated the provision in the labor agreement, I am giving you this written warning letter and three (3) day suspension without pay. Your suspension will begin on Monday, April 6, 1998 and continue through Wednesday, April 8, 1998. You are required to return to work on Thursday, April 9, 1998.
>
> Sincerely,
>
> Garry C. John
> Supt. Of Public Works

On April 6, 1998, Handlos called Blashka at his home and spoke with him about the discipline. In this conversation, Blashka was remorseful and apologetic about his conduct in stopping at the restaurant, and he told Handlos it would not happen again. As a result of that conversation, Handlos reduced the suspension from three days to one day.

On April 8, John sent the following letter to Blashka:

> Dear Tom:
>
> This letter is a follow-up to our discussion on Tuesday, April 7, 1998, with Bill Handlos and Greg Wuensch. During the course of our meeting, all parties agreed to reduce your written warning letter, dated April 3, 1998 and three (3) day suspension without pay to a written warning letter and one (1) day suspension without pay.

> This was done because you showed remorse over the infraction of the labor agreement. You admitted to the infraction and told us you would not do this again. The original warning letter will be removed from your file and replaced with this communication.
>
> Sincerely,
>
> Garry C. John
> Supt. Of Public Works

Blashka grieved his one-day suspension, and the grievance was ultimately appealed to arbitration.

POSITIONS OF THE PARTIES

Union

The Union contends that the City did not have just cause to discipline the grievant for going into a restaurant and getting a food order to go. In its view, the discipline is unjust and should be rescinded in its entirety. It makes the following arguments to support these contentions.

First, the Union notes at the outset that the contract language contained in Article V, Section 2(a) has been in the contract for many years. It asserts that over time, a past practice has developed concerning how that language is interpreted and applied. According to the Union, the practice is this: employes are prohibited from eating in restaurants during their (20-minute) lunch break, but are allowed to get take-out food from eating establishments. Thus, the Union believes that the existing practice is that employes can get take-out food from an eating establishment, but cannot eat the food there (i.e. in the eating establishment). To support the existence of this (alleged) practice, the Union avers as follows: 1) that employes have long gotten take-out food from restaurants; 2) that when this happened, employes did so without getting permission from a supervisor; 3) that supervisors were aware that employes routinely got take-out food orders from restaurants; and 4) that until this instance arose, no employe had ever been formally disciplined for going into a restaurant and getting a take-out food order.

The Union elaborates on these points as follows. With regard to the first point just referenced, the Union calls the arbitrator's attention to the testimony of all four union witnesses that unit employes have gotten take-out food from Late's Restaurant, White Capp

Restaurant, McDonald's, Burger King, the Subway at the Cenex gas station, the pizza joint in another Cenex, the Hot Stuff store attached to a gas station and local bakeries. With regard to the second point, it submits that when the employes got food from these establishments, they did not ask permission from management; instead, they simply went and got the food. With regard to the third point referenced above, the Union asserts that after the employes got their food from various restaurants, they sometimes brought it back to the DPW shop where they ate it. The Union maintains that some supervisors have seen employes eat take-out food in the DPW shop. That being so, the Union believes the City has tolerated employes bringing take-out food to the DPW shop. The Union also notes that menus from three restaurants, including Late's Restaurant, were posted on the bulletin board at the DPW shop. The Union believes this proves that the City tolerated having take-out menus openly displayed in the DPW shop. With regard to the fourth point referenced above, the Union acknowledges that two employes have been called to task for eating take-out food. It acknowledges in this regard that unit employe Terry Hubbart was "hollered at" for going into a McDonald's, and that an unidentified transit employe was verbally admonished about going into a Hardee's. The Union points out that neither employe received a written warning or suspension for going into a restaurant.

The Union believes that the testimony referenced above establishes the existence of a practice concerning how Article V, Section 2(a) has come to be interpreted and applied, namely that employes are allowed to get take-out food from food establishments. According to the Union, this practice is the best evidence of the parties' interpretation of that contract language. In its view, there should be strong and compelling reasons for an arbitrator to change a practice interpreting a contract provision, and it believes that strong and compelling reasons do not exist here.

Next, the Union addresses the 1991 and 1994 incidents where employes received discipline for eating in restaurants. The Union notes that the employes who were disciplined in the 1991 incident sat down and ate their food in a bar and overstayed their 20-minute lunch break; they got a four-hour suspension. The Union compares these facts to Blashka's, and notes that Blashka did not eat inside or overstay his break, and yet he got twice as lengthy a suspension as they did. Next, the Union notes that the employes who were disciplined in the 1994 incident also ate their meal in a restaurant and overstayed their lunch break, and yet they got docked just one hour of pay.

The Union's second main argument is that the City's new interpretation of Article V, Section 2(a) is vague, inconsistent and undocumented. To support this proposition, it cites the testimony of Dempski and John. According to the Union, these management representatives offered differing responses to the question of whether employes could go to restaurants which are attached to convenience stores, with Dempski answering in the affirmative and John answering in the negative. In the Union's view, their conflicting testimony on this point

establishes that the City's interpretation of Article V, Section 2(a) lacks clarity, consistency, and consensus among the City's own representatives.

The Union's third main argument is that even if the City's new interpretation of the contract language is correct, the City should not be able to enforce that new interpretation without notice. As the Union sees it, since the City has long tolerated employes getting take-out food, it must give clear notice to the employes that they are prohibited from getting take-out food before it starts exacting discipline for same. The Union submits that since that did not happen here (i.e. the City did not give notice of its new contract interpretation before it disciplined Blashka), his discipline should be overturned.

The Union therefore asks that the grievance be sustained, Blashka's discipline rescinded in its entirety, and Blashka made whole for the day he was suspended.

City

The City contends it had just cause to discipline the grievant for stopping at a restaurant. According to the City, the grievant knew he was not to go into a restaurant, and yet he did in express contravention of Article V, Section 2(a), so discipline was warranted. It makes the following arguments to support these contentions.

First, the City notes at the outset that there is no question that the grievant did what he was charged with doing (i.e. going into a restaurant to get food). It avers that that conduct is expressly prohibited by a negotiated contract provision, namely Article V, Section 2(a). As the City sees it, that contract provision is clear, understandable and unambiguous in prohibiting employes from stopping at restaurants. The City nevertheless acknowledges that over time, some exceptions have arisen to the absolute prohibition stated in the contract. According to the City, the exceptions are as follows: 1) when an employe is called into work without notice; 2) if the employe has to work overtime; 3) when an employe has a supervisor's permission, and 4) when the employe is required to work in exceptionally hot or inclement weather. In the City's view, none of these exceptions apply here, so the general prohibition against stopping at restaurants applies.

Second, the City asserts that the grievant knew he was not go to into a restaurant. To support this premise, the City notes that the DPW has a training session for unit employes each year at which time it reviews various departmental procedures, one of which is that employes are not to stop at restaurants. Given this training, the City characterizes the grievant's going into a restaurant as "willful, blatant and deliberate", and disregarded the Employer's interest. As the City sees it, the grievant knew from this training that stopping at restaurants was prohibited by the labor agreement, yet he chose to do so anyway.

Third, the City maintains that since the grievant's conduct violated a contract provision, his "conduct goes beyond a refusal to obey a management directive or work rule." The City avers that since an employe's failure to comply with a work rule is insubordination, an employe's failure to comply with a contract provision must be insubordination as well. The City notes that arbitrators routinely find insubordination to be grounds for discipline.

Fourth, anticipating that the Union will attack the City's investigation as flawed, the City contends that the investigation which it performed before it imposed discipline was reasonable, fair and objective. To support this premise, it calls attention to the fact that the grievant admitted that he stopped at Late's Restaurant. In the City's view, this admission makes the grievant "guilty as charged".

Next, the City addresses the Union's contention that numerous bargaining unit employes have stopped at restaurants to pick up food. The City acknowledges at the outset that if an employer condones an employe's violation of a contract provision, this "may cause the employer to waive the right to discipline an employe for a violation absent notice that the contract will be enforced." The City asserts that the Union has not proven that is the case here. According to the City, the fact that numerous employes have stopped at restaurants does not prove that supervisors condoned that conduct. The City argues they have never condoned same. The City submits that the only incidents where employes stopped at restaurants which supervisors were aware of were the 1991 and 1994 incidents where discipline was imposed on the employes. The Employer asserts that these two instances established the general principle that when employes stop at restaurants, and management learns of same, the discipline which followed "always includes suspension without pay and a written reprimand."

Finally, with regard to the level of discipline which was imposed, the Employer contends that a one-day suspension was appropriate under the circumstances. First, it argues that the level of discipline which it imposed here was not discriminatory and did not constitute disparate treatment. It avers that the 1991 and 1994 instances where the employes received less suspension time than here can be factually distinguished. Second, it calls attention to the fact that the Employer has already reduced the amount of suspension time from three days to one day. In its view, this leniency should be taken into account. Third, it submits that while some labor contracts specify that the Employer must follow a certain procedure in imposing discipline, this particular CBA does not contain such language. That being the case, the City believes it can impose whatever discipline it believes is appropriate. In the City's view, a one-day suspension was appropriate. As it puts it, "anything more would have been abusive; anything less is non-responsive, and would not have made its point." The Employer therefore contends that the grievance should be denied and the discipline upheld.

DISCUSSION

Article IX, Section 1 of the parties' labor agreement contains what is commonly known as a "just cause" provision. It provides that the City will not discipline or discharge an employe without just cause. What happened here is that the grievant was suspended by the City for one day. Given this disciplinary action, the obvious question to be answered here is whether the City had just cause for doing so.

As is normally the case, the term "just cause" is not defined in the parties' labor agreement. While the term is undefined, a widely understood and applied analytical framework has been developed over the years through the common law of labor arbitration. That analytical framework consists of two basic elements: the first is whether the employer proved the employe's misconduct, and the second, assuming this showing of wrongdoing is made, is whether the employer established that the discipline which it imposed was justified under all the relevant facts and circumstances. The relevant facts and circumstances which are usually considered are the notions of progressive discipline, due process protections, and disparate treatment.

As just noted, the first part of a just cause analysis requires that the City prove the grievant's misconduct. In the context of this case, there are two separate subparts to making this call: (1) did the grievant do what he is charged with doing (i.e. stopping at a restaurant during his work hours); and (2) assuming he did, did he know he was not to do so.

The first point is not in issue. The City charged the grievant with stopping at a restaurant during his work hours. The grievant readily admitted that he did so. Specifically, he went into Late's Restaurant, picked up an order he had previously called in, and left the restaurant with the food. He ate the food outside in his City truck. Given this admission, there is no question that the grievant did what he is charged with doing (i.e. stopping at a restaurant).

The focus now turns to the second point referenced above, namely whether the grievant knew he was not to go into a restaurant to pick up a to-go food order. The City contends he knew he was not to do so, while the Union disputes that assertion. The City's premise that the grievant knew he was not to go into a restaurant is based on the following assertions: 1) that the contract language expressly prohibits same; and 2) that employes have been told, either directly by supervisors or at the yearly training meeting, that they are not to go into restaurants for any purpose. These points are addressed below in the order just listed.

My analysis of the first point begins by noting the following context. The City essentially contends that the grievant engaged in inappropriate workplace conduct on April 3, 1998. Oftentimes when an employe is charged with committing inappropriate workplace

conduct, an employer contends that the employe's conduct violated a unilaterally adopted policy or work rule. That is not the case here. In this case, the City relies on a provision contained in the parties' CBA, particularly a portion of Article V, Section 2(a). According to the City, the grievant violated that contractual provision on April 3, 1998. Given that position, it is apparent that contract language is involved here – not any unilaterally adopted policy or work rule. That contract language will now be reviewed to discern its meaning and application herein.

The contract language applicable here is found in Article V, Section 2(a). Section 2(a) contains three sentences. The sentence pertinent here is the second sentence which reads as follows: "Employes shall be expected to carry their lunch and will not be permitted to stop at restaurants, taverns and similar places of business for their lunch breaks." On its face, this sentence prohibits employes from stopping at restaurants and taverns for their lunch breaks.

The word "stop" which is used in this sentence is not defined. The contract simply uses the word "stop" without defining it. It is a general principle of contract interpretation that when a word is not contractually defined, the word is to be given its generally understood or ordinary meaning. In accordance with this principle, arbitrators usually give words their ordinary meaning in the absence of anything indicating that they were used in a different sense or that the parties intended some special meaning. Oftentimes, a dictionary is used to supply the usual or ordinary meaning for a term. The dictionary which the undersigned consulted, *The American Heritage Dictionary*, defines "stop" as "to interrupt one's course or journey for a brief visit or stay; often used with off or over: stop off at the store."

The City believes the term "stop" means that employes are not to be in or around a restaurant; employes are not to even be in a restaurant parking lot, as that would constitute "stopping" at a restaurant. Under the City's interpretation, employes cannot either (1) sit down and eat in a restaurant or (2) go into a restaurant and get food to go; the City believes either constitutes "stopping" at a restaurant.

There is nothing inherently unreasonable with the City's proposed interpretation/meaning of the word "stop". That word can certainly be construed (as the City proposes) to cover both of the situations identified by the Employer. Additionally, it is noted that the Union does not suggest an alternative or more restrictive meaning of the term. That being the case, it is assumed for the purpose of discussion herein that the word "stop" has the meaning proposed by the City. Thus, employes are prohibited, via Article V, Section 2(a) from either (1) sitting down and eating in a restaurant or (2) going into a restaurant and getting a food order to go. In the discussion which follows, these two meanings will be referenced as meaning (1) and meaning (2).

While the contract language contained in Article V, Section 2(a) is clear and unambiguous, the Employer has nevertheless created an ambiguity by its previous application of that language. It did this by not always applying the contract language uniformly. The following record evidence shows this.

First, there is no question that meaning (1) has been applied by the City in the past. The 1991 and 1994 incidents where employes were disciplined for eating lunch in a tavern and restaurant, respectively, put bargaining unit employes on notice that if they sat down in a restaurant or tavern to eat lunch, they would be disciplined for same. All the unit employes who testified at the hearing concerning same acknowledged that they knew that sitting down and eating lunch in a restaurant or tavern was prohibited by the contract language and would result in discipline. However, this case marks the first time the City has applied meaning (2) to an employe. Thus, in no prior instance has an employe been formally disciplined for going into a restaurant and getting a food order to go. The problem with this is that numerous unit employes have gotten take out food from numerous restaurants on numerous occasions. When they did so, they oftentimes did not get permission from supervisors; instead, they simply went out and got the food on their own volition. Furthermore, the employes sometimes brought their food back to the DPW shop where they ate it in front of supervisors. Given all the foregoing, the Employer is hard-pressed to claim, as it does, that it was unaware that employes routinely go into restaurants to get food to go. I conclude that department supervisors were aware of it and tolerated same.

Second, the City acknowledges that it has long allowed employes to go into convenience stores and gas stations to buy things, including food. Thus, the Employer has not applied the prohibition against employes "stop[ping] at restaurants and taverns" to convenience stores and gas stations. This means that the City considers it acceptable for employes to get food from convenience stores and gas stations, but unacceptable for employes to get food from restaurants and taverns. In some situations though, the food that employes can get at a convenience store or gas station is the same as, or similar to, food available at a restaurant. For example, the food which the grievant got from Late's Restaurant on April 3, 1998 is identified in the record as a "breakfast sandwich". While obviously the grievant's "breakfast sandwich" was restaurant food, packaged breakfast sandwiches are also available at some convenience stores and large gas stations. Aside from that, some chain restaurants are now located inside, and share space with, convenience stores and large gas stations. As an example, it is noted that one of the restaurants patronized by unit employes is a Subway which is attached to a Cenex gas station. That particular gas station was selected so that the undersigned could make the following point. As previously noted, the Employer considers it acceptable for employes to go inside gas stations to "buy things". That being so, employes can presumably go into that particular gas station (i.e. Cenex) to "buy things". Once inside that building though, the employe can purchase items from either Cenex or the Subway

Restaurant which is located therein. The City appears to be saying that it is permissible for employes to buy a submarine sandwich at that particular Subway because it is attached to a gas station, but if an employe bought an identical submarine sandwich at a Subway that was in a stand-alone building not attached to a gas station, they would be in violation of Article V, Section 2(a) for "stop[ping] at [a] restaurant." In my view, these outcomes conflict and cannot be reconciled.

Third, the Employer further acknowledges that in certain circumstances, it has allowed employes to "stop at restaurants" in contravention of Article V, Section 2(a). Thus, the Employer admits that it has allowed exceptions to the rule that employes are not to "stop at restaurants". The Employer then goes on to identify what it believes the four exceptions are, and to argue that none of the exceptions apply here. In my view, it is not important that none of the four exceptions apply here. Instead, what I think is important is that there are any exceptions to the contract language at all. By the Employer's own admission, it has allowed some exceptions to the prohibition contained in Article V, Section 2(a) that employes are not to "stop at restaurants." Having opened the proverbial door to at least four exceptions to the prohibition against employes stopping at restaurants, the Employer has created some ambiguity concerning when employes can and cannot "stop at restaurants".

Attention is now turned to the City's contention that employes have been told, either directly by supervisors or at the yearly training meeting, that they are not to go into restaurants for any purpose. First, the City notes that Terry Hubbart and an unidentified transit employe were told by department supervisors not to go into fast food restaurants. Additionally, Supervisor Dempski has told the same thing to a couple of employes who he did not identify. If the grievant had been personally notified in this fashion by a supervisor, then he would certainly have been on notice that he was not to go into restaurants for any purpose. However, the fact of the matter is that the grievant is not one of the employes personally notified of same by department supervisors. Since the grievant's name is not on the short list of employes personally notified, the Employer has not shown that the grievant received notice from a supervisor prior to his being disciplined that he was not to go into restaurants to get food to go.

Second, there is a problem with using the annual training meeting as a basis to ascribe notice to the grievant that he was not to go into a restaurant to pick up a food order to go. The problem is this: employes were not told at this meeting that they could not go into restaurants for any purpose; instead, they were told they could not eat in restaurants or stop at restaurants. If the Employer wanted the phrase "stop at restaurants" to apply to going into restaurants to pick up food to go, this would have been an ideal time to let all employes know that that is what the Employer intended the phrase "stop at restaurants" to cover (in addition to sitting down and eating in restaurants.) Had the Employer specifically said so at the training session,

this would have put all employes, including the grievant, on notice that no matter what had been allowed previously, the City was interpreting Article V, Section 2(a) to mean that employes could not go into restaurants to pick up a food order to go. Once again, the fact of the matter is that that did not happen. That being so, the City is hard-pressed to claim, as it does, that the yearly training session put the grievant on notice that he was not to go into a restaurant to pick up food to go.

It is an accepted arbitral principle that an employer cannot enforce a new contractual interpretation without notice to employes. In this case, the City has, over a period of time, condoned employes going into restaurants to pick up food to go. In other words, it has tolerated employes getting take-out food from restaurants. While the Union characterizes what happened previously concerning same as a practice, the undersigned is unwilling to call it that because the City was not aware, until this case was litigated, of the extent to which employes went to restaurants to pick up food to go. I therefore find that what happened previously is not entitled to contractual enforcement. It has already been held that Article V, Section 2(a) can be read to prohibit employes from going into restaurants to pick up food to go. However, given the ambiguity that exists concerning the City's past application of this language, the Employer must give clear notice to employes that they are prohibited from getting take-out food from restaurants before it starts imposing discipline for same. In this case, the City never gave Blashka notice before it imposed discipline herein that Article V, Section 2(a) precludes employes from going into a restaurant to get food to go. The record establishes that prior to the grievant's suspension, numerous employes had done exactly what the grievant did (namely, go into a restaurant to pick up food to go) and none of them were formally disciplined, much less suspended, for doing so. This hardly lays the foundation for that level of discipline here. To the contrary, it establishes that what the grievant did was then considered by the grievant's co-workers to be acceptable conduct. While the grievant's co-workers were put on notice via the grievant's suspension that they were not to go into a restaurant to get food to go, the grievant did not receive such notice prior to his discipline.

Inasmuch as the grievant did not have notice that he was not to go into a restaurant to pick up food to go, the City has not proven the first element of just cause. That being so, it is unnecessary to address the parties' arguments with respect to the second element of just cause (i.e. whether the Employer established that the penalty imposed was contractually appropriate). Therefore, the City did not have just cause to suspend the grievant for one day and give him a written warning. Accordingly, the grievant's discipline is overturned.

Any matter which has not been addressed in this decision has been deemed to lack sufficient merit to warrant individual attention.

In light of the above, it is my

AWARD

That the grievant was not disciplined for just cause. In order to remedy this contractual violation, the City shall rescind his written warning and make him whole for the one day he was suspended.

Dated at Madison, Wisconsin this 7th day of October, 1999.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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