BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS UNION LOCAL NO. 695

and

WIS-PAK WATERTOWN, INC.

Case 20
No. 59185
A-5875

(Degner Grievance)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by **Mr. John J. Brennan**, on behalf of Teamsters Union Local No. 695.

Lindner & Marsack, S.C., Attorneys at Law, by **Mr. Dennis G. Lindner**, on behalf of Wis-Pak Watertown, Inc.

ARBITRATION AWARD

Teamsters Union Local No. 695, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Wis-Pak Watertown, Inc., hereinafter the Company, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The Company subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on November 21, 2000, in Watertown, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by February 2, 2001. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated there are no procedural issues and to the following statement of the substantive issue:

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

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited:

ARTICLE 2 – MANAGEMENT RIGHTS

2.1 Except to the extent expressly abridged by a specific provision of this Agreement, the Employer reserves and retains solely and exclusively all of its inherent rights to manage the business.

2.2 Without limiting the generality of the foregoing, the sole and exclusive rights of management which are not abridged by this Agreement include, but are not confined to, the right to hire, to maintain order and efficiency, to discharge for just cause (subject only to the provisions of Articles 3, 4 and 5), . . .

. . .

ARTICLE 5 – DISCIPLINE AND DISCHARGE

5.1 No employee shall be discharged or suspended except for dishonesty, insubordination, drunkenness, being under the influence of or in possession of illegal drugs, or the illegal use of dangerous drugs or other just cause. At least one (1) warning notice shall be given in writing to the Union and to the employee before discharge or suspension can be made except in cases of dishonesty, insubordination, drunkenness, being under the influence of or in possession of illegal drugs, or the illegal use of dangerous drugs or other serious offenses as calling for no advance notice of discharge. The first such warning notice shall be effective for a period of six (6) months. Any succeeding warning notice given to an employee for the same or similar offense shall be effective for a period of twelve (12) months, except that such a succeeding warning letter for attendance violations shall be effective for a period of nine (9) months.

. . .

BACKGROUND

The Company is in the business of bottling and canning soft drinks and bottled water products at its Watertown, Wisconsin plant. The Union is the collective bargaining representative of all of the employees at that plant, except for office clerical employees, guards and supervisory personnel.

At the time in question, August of 2000, Bill Hoffart was the Facility Manager at the Watertown plant, Jeff Priegnitz was the Quality Assurance Manager (also referred to as Technical Services Manager) and Khoun Lovan was the third shift production supervisor (then in training under the regular third shift supervisor, having started with the Company on July 10, 2000). The Grievant, Dennis Degner, had been employed by the Company since March of 1977, and had held the position of a Lead Lab Technician since May of 1996.

The Company operates three eight-hour shifts at its Watertown facility: first shift (6:00 a.m. – 2:00 p.m.); second shift (2:00 p.m. – 10:00 p.m.), and third shift (10:00 p.m. – 6:00 a.m.). The work week commences with the Sunday night third shift. There is a quality assurance complement on each shift: first shift – 1 lead lab technician, 4 line techs, 2 other lab techs, 2 blenders; second shift – 1 lead lab technician, 3 line techs, 2 blenders; and third shift – 1 lead technician (the Grievant), 4 line techs and 2 blenders. Priegnitz is the direct supervisor of the quality assurance personnel and directly supervises those personnel on the first shift and part of the second shift. There is no quality assurance supervisor present on the rest of the second shift or on the third shift. There is a warehouse supervisor and a production supervisor on the second and third shifts who also function as shift supervisors and provide "indirect supervision" of the maintenance and quality assurance personnel on those shifts. In some instances, if there is a problem in those areas on the second or third shift, the Quality Assurance Manager or the Maintenance Manager is called at home.

The job description for Lead Lab Technician contains, in relevant part:

> JOB SUMMARY:
> Under the supervision of the Technical Services Manager and Technical Services Supervisor, the Lead Technician directs the operational activities of the Technical Services Department to include: scheduling, ordering, training, and supervising.
>
> JOB DUTIES/ESSENTIAL FUNCTIONS: (**Note:** The job functions relate to the job, not the individual.)

1. Inspect, test and troubleshoot complex product quality related problems.

2. Under a minimum of supervision, coordinate and assign daily maintenance work to department staff. Ensure the employees fully understand the work to be completed, priorities, and methods of procedure.

3. Monitor and evaluate performance of each assigned employee. Assist in training the Technical Services employees. Provide leadership and direction in the department.

4. Record problems and provide detailed documentation of solution and/or procedures performed. Perform all other necessary T.S. reports. Pass pertinent information to next shift.

5. Ensure lab equipment is maintained and chemicals are not outdated. Maintain inventory of chemicals and order new supplies as needed.

6. Assist the Technical Services Manager in the system evaluation process, planning and personnel issues. May suggest design changes or recommend improvements in production methods.

7. Inspect and test water treating system.

8. Ensure that a clean and orderly work area is maintained and that all quality, GMP and safety procedures are followed. Report all unsafe operating conditions, practices and personnel to supervisor.

9. Monitor and maintain wastewater treatment.

10. Effectively communicate appropriate information to managers and supervisors in all areas of the plant.

. . .

QUALIFICATIONS:

Requires education generally equivalent to four years of high school with additional technical training in Chemistry or Chemical Engineering. Five years previous experience to become familiar with product, equipment and process.

Requires the ability to train and guide employees and ensure quality performance and standards.

On August 11, 2000, the Grievant was working an extended shift of twelve hours (from 6:00 p.m. on August 10 to 6:00 a.m. on August 11). 1/ At approximately 4:45 a.m. a tanker

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1/ The Grievant estimated he was working 75-80 hours/week at the time due to working voluntary overtime that was available.

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truck of ferric arrived at the plant. The driver was new and was unsure of how to unload it and what he had to do. Normally, ferric comes on the first shift, so no one in the plant on the third shift knew quite what to do. They looked for the Grievant because the lab uses the ferric. Lovan located him at around 4:50 a.m., already with the tanker driver. The Grievant told the driver what to do and to find him when he was done so he could sign the papers. The Grievant then left the building through door 1A at 5:05 a.m. and went to the wastewater treatment building to do the last of two nightly checks. The building is not usually occupied on the third shift and the lights are not "on" unless someone is in there. The Grievant testified the second check is usually just a "walk through", but that morning he noticed a problem with a Ph meter after flushing the lines and emptying the water traps, which he did at approximately 5:10 a.m. The Ph meter was reading higher than the desired level and the Grievant adjusted it accordingly at approximately 5:20 a.m. and then sat down to wait for the level to go down. While waiting for the Ph level to lower, the Grievant dozed off until he was awakened by Lovan. The Grievant testified that it is very loud and very warm (90 degrees) in the building due to the motors.

Lovan testified he found the driver looking for the Grievant for help around 5:00 a.m. and paged the Grievant in the plant. Lovan conceded that the Grievant would not have heard the page in the wastewater treatment building. Lovan testified he looked in the window of the wastewater treatment building. The lights were on and he observed the Grievant seated in a chair, leaning against the wall with his eyes shut. He watched the Grievant for about a minute and then tapped on the window to get his attention. Unsuccessful, Lovan then entered the building, the door being unlocked, and called the Grievant's name. Getting no response, Lovan then walked over to the Grievant and tapped him on the leg. Lovan estimated the time to be between 5:20 to 5:25 a.m. The Grievant awakened and admitted he had fallen asleep waiting for the Ph level to lower. The Grievant then accompanied Lovan to assist the tanker driver, reentering the plant at 5:27 a.m., according to Company records.

Lovan sent Priegnitz the following e-mail on August 11th reporting finding the Grievant asleep:

> Late in the shift I observed Dennis in the wastewater treatment facility sleeping. I watched him from the window for a minute before knocking on the door. I entered and bump him to wake him up. I, along with lab tech, were looking for him because the sulfiric acid delivery man had a question about pumping the acid into the hold tank. Since this is the first incident I have with Dennis, my suggestion would be a documented verbal warning. I would like to stay consistent with any first time offender by giving him/her a verbal warning first. If you have any other questions, please feel free to ask.

Priegnitz discussed the matter with Hoffart. Hoffart testified that he makes the final decision on all discipline in the facility, and did so in this case. Hoffart testified he used the guidelines in the Company's Guidance Manual in making his decision, and sleeping on the job is considered a "major violation" in the Manual, for which suspension or discharge is warranted. According to Hoffart, he is not aware of an instance where the Company imposed less than a suspension where it had proof the employee had been sleeping on duty.

Since 1991, the Company's Guidance Manual, in relevant part, has contained the following with regard to discipline:

> **Disciplinary System**
>
> Wis-Pak values responsible conduct on the part of every employee, and expects every employee to conduct themselves in such a way as to promote mutual respect, personal dignity and business effectiveness.
>
> All offenses which lead to discipline are not of the same degree of seriousness. Violations are either of a major or minor type. Major violations are of such a nature that immediate suspension or dismissal is warranted, even for the first offense. Minor violations are of such a nature that they must be repetitive and/or cumulative before suspension or discharge is warranted.
>
> The rules discussed herein are not all inclusive. The Company may discipline or discharge employees for other reasons as it deems necessary.
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> Disciplinary action will rest with the supervisor and/or the Facility Manager as the situation warrants.

Major Violations

These are serious violations which generally follow the rules of society. Major violations may result in discharge or a disciplinary suspension, depending on the circumstances surrounding the violation and the employee's prior record. Some – **but not all** – of them are:

. . .

4. Insubordination – Refusal to perform duties assigned by a supervisor, or an offensive and abusive attitude toward a supervisor, or refusal to obey any reasonable order of those in charge of the employees work.

. . .

7. Sleeping while on duty.

. . .

19. Violations of law and/or off premises conduct which would have an adverse bearing on the employee's relationship to the Company or employees.

20. Promotion of organized gambling, money lending schemes, etc.

The Grievant received and signed for the 1991 Guidance Manual and the update in 1996.

Hoffart imposed a three-day suspension without pay, of which the Grievant was notified by a written notice from Priegnitz, which read, in relevant part, as follows:

THREE-DAY SUSPENSION
JOB PERFORMANCE

TO: Dennis Degner
Third Shift Lab Lead

During your shift on 8/11/00, you were observed sleeping in the waste water treatment facility. As you know, this is a very serious job performance issue and is inexcusable.

> Job performance such as this is costly and impedes our efforts to meet productivity, efficiency, quality goals and standards, and service to our Shareholders.
>
> Due to the seriousness of this incident, you are being suspended from work without pay for three days. Your suspension will be served on Tuesday, Wednesday and Thursday, 8/22, 8/23, and 8/24. This incident will remain on your record for one year, or until 2/11/01.
>
> Future job performance incidents may result in further disciplinary action, up to and including termination from employment.
>
> Jeffrey Priegnitz /s/
> Jeffrey Priegnitz
> Technical Services Manager

The suspension was served and was grieved by Degner. The matter was processed through the parties' grievance procedure, and being unable to resolve their dispute, the parties proceeded to arbitrate the dispute before the undersigned.

POSITIONS OF THE PARTIES

Company

The Company takes the position that it had just cause to suspend the Grievant for three days for sleeping on duty. The Company notes that Section 5.1 of the Agreement states that at least one warning notice shall be given before discharge or suspension can be made "except in cases of dishonesty, insubordination. . .or other serious offenses as calling for no advance notice." The Company's major rule violations clearly encompass serious offenses that justify immediate termination or suspension with no requirement of advance warning or progressive discipline. Sleeping falls within that category of "other serious offenses". The Company cites numerous arbitral awards in support of this position. It notes that in a number of those awards, even in cases where termination was considered to have been excessive punishment for various reasons, the resulting penalty has been reinstatement without backpay or a meaningful suspension.

Based upon the arbitral precedent cited, and the rationale discussed therein, the Company asserts that it is clear that many arbitrators have sustained termination for a first-time sleeping incident. Even in cases where a long-term employee with a good work record fell

asleep inadvertently, arbitrators have either sustained lengthy suspensions or supported reinstatement without backpay. In none of the cases cited was any disciplinary action reduced to a written warning where the Company had adequate proof of the employee's sleeping on the job. No reasonable argument may be made that sleeping on the job is not a serious offense and requires progressive discipline.

Enforcement of the sleeping rule is a major infraction and was particularly vital in this case because of the Grievant's job responsibilities, similar to suspensions sustained in CONTINENTAL OIL CO., 54 LA 96 (1969, Hill). The arbitrator in that case noted that the suspended employees worked the night shift without direct supervision and were responsible for important processes in a control room, and held that the company could not be expected to tolerate even the briefest of catnaps. In this case, the Grievant is a Lead Lab Technician on the third shift who is responsible for the performance of six technical service employees and for product integrity and quality on his shift. The Grievant functioned as a quasi-supervisor to ensure that other employees under his direction and control did what they were supposed to and functioned adequately. The Grievant was expected to lead by precept and example. Not only was he not supposed to fall asleep on his watch, he was to report any other employee who did. Degner admitted that he was wrong in falling asleep and knew that he should not have done so.

The Union asserts that the suspension is, nevertheless, inappropriate because other employees allegedly received written warnings for an initial occurrence of sleeping on the job. The Union introduced an employee warning report dated May 16, 1981 of a three-day disciplinary layoff for a second occurrence of sleeping on the job. Such 19-year old discipline is ancient history, and entirely inconsistent with the discipline enforced in the Company's modern era, at least in the last four years. Hoffart made it clear that every first-time sleeping episode during his four-year tenure as the Facility Manager in Watertown has resulted in a suspension or discharge when the Company had appropriate evidence. The Union also introduced written warnings given to employees Kletsch in 1997 and Metzger in 1998, "who appeared to be sleeping". Hoffart testified that the reason those employees were not suspended was because the Company could not prove they were sleeping, and they would not admit to it. Thus, it was a case of one person's word against another's. Hoffart understood that the Company has the burden of proof in a disciplinary action, and if the Company could have proved the employees had been sleeping, they would have been, at a minimum, suspended for three days, consistent with the Company's uniform enforcement of the rule. The Union also offered testimony by Union Steward Jones that a third shift production employee was on occasion told to wake up by other employees and that he had observed a supervisor shake the bottom of the employee's shoes while he appeared to be asleep. Supervisor Lovan testified that about two weeks after he started with the Company, he observed the employee sitting on a container, and did not know if he had been asleep, but asked him what was the matter. Later that morning, Lovan and the regular third-shift supervisor questioned the employee as to

whether he had a problem, and were told that he was having a migraine headache, but he denied he was sleeping. Thus, the Company did not have proof that the employee had in fact been asleep on the job. The most persuasive and critical testimony regarding sleeping on the job came from the Grievant himself, who testified that he had never witnessed a third-shift employee sleeping. The fact that no other quality assurance employee was ever observed sleeping underscores that they clearly understood their responsibility regarding maintaining product integrity. The reputation of the Company as a Pepsi producer, along with the health of the consuming public, was obviously at stake. The Grievant, who should have been the most responsible, was the only quality assurance employee who proved to be derelict in his duties.

The Union also argues that the Grievant's sleeping on the job should be condoned because he had worked significant overtime, averaging between 75 and 80 hours per week for the three weeks culminating in the week in question. Degner claimed he worked such hours because another lead person on the second shift was off on medical leave. Had the Grievant been mandated by the Company to work the hours he did, it could be argued that a suspension for sleeping might be excessive, and that the mandatory overtime could contribute to the employee's physical condition. Even in such cases, arbitrators have not considered the employee to be blameless. CONTICO INTERNATIONAL, 93 LA 530 (1989, Oldham) (Discharge reduced to a 30-day suspension). In this case, the Grievant was not required to work excessive overtime. The overtime opportunity provision in the Agreement states that overtime opportunity will first be offered by seniority among employees performing the primary job on that shift. If the quality assurance lead on the second shift was absent, the quality assurance leads on the first and third shifts would have had first choice as the only other leads to overlap the absence on the second shift. Further, even if they were mandated to work overtime, they could not be compelled to work more than 56 hours in a week, pursuant to the Agreement.

The Grievant, in fact, was not mandated to work any overtime during the three-week period referred to. Further, under the Agreement, the Company could have, and on many occasions has, temporarily transferred quality assurance technicians to function as leads. The Grievant is a workaholic who conceded that he worked every second of overtime he could garner. Thus, the sleeping on duty arbitration cases involving voluntary overtime should be considered controlling in this case. In that regard, the Company cites a number of awards where the arbitrator noted that the employee had voluntarily, by his own actions, placed himself in a situation where it could reasonably be anticipated that he would fall asleep. By failing to take steps to extricate himself from such a situation by turning down the overtime, that employee demonstrated a high degree of irresponsibility. In this case, the Grievant fell asleep during the third week of voluntary excessive overtime simply because he was exhausted.

Unable to prove that the Company was arbitrary and had abused its managerial discretion regarding the sleeping rule, the Union attempted to show arbitrary enforcement by the Company regarding other major rule violations, but failed miserably. The Union introduced a written warning given to an employee for refusing to perform a duty directed by a lead person, alleging that was a violation of Rule 4 - Insubordination. Priegnitz testified that the Company has never during his 23 years, considered failure to follow a lead person's directive to be in the same vein as refusal to follow a supervisor's order. The reason being that a lead person is a member of the bargaining unit, and does not have the authority of a supervisor, and cannot take direct disciplinary action. The Union then attacked enforcement of Rule 19 – Violations of law and/or off-premises conduct, which would have an adverse bearing on the employee's relationship to the Company or its employees. The Union then questioned Priegnitz as to whether or not the Company had an employee working under the Huber Law who had been convicted of a sexual assault. Priegnitz testified he did know the circumstances of the sexual assault, but knew that it did not involve an employee of the Company. The simple fact of a conviction for an off-premises sexual assault or any criminal conviction could not trigger any major discipline unless the Company could prove that the off-premises conduct would have an adverse bearing on the employee's relationship to the Company or other employees. That prerequisite is not only mandated by the Company's rules, but it is also a matter of Wisconsin law. Section 111.321, Stats.

Last, the Union asserts that the Company has been arbitrary in its enforcement of major rules in that Rule 20 – Promotion of organized gambling, money lending schemes, etc., has not been enforced because the Company has tolerated football pools. The Company questions what office does not tolerate such pools and asserts the Union's irrational reach does not justify any further response.

The Company concludes that the Grievant's insatiable appetite for overtime caused him to fall asleep while on duty, and created a serious and intolerable conflict of interest. Working 75 to 80 hours per week, the Grievant could not reasonably fulfill his primary responsibility for maintaining product integrity, nor adequately fulfill his responsibilities to his crew, and appeared willing to sacrifice the needs of his team and the Company, as well as the protection of the consuming public, for his own personal gain. The Grievant should consider himself fortunate for only receiving a three-day suspension. The Company requests that the grievance be denied.

Union

The Union takes the position that the Grievant's dozing off for a couple of minutes at the end of a 12-hour shift is not the type of "serious offense" contemplated in Section 5.1 of the Agreement for which immediate suspension or discharge may occur; rather, it is the type of offense which requires an initial written warning.

In addition to being in his twelfth consecutive hour of work when he dozed off, the Grievant was regularly working 75 to 80 hours per week due to vacations and other absences around that time. Further, the evidence establishes that the Grievant could not have been asleep very long and that he did not intend to fall asleep. The third shift supervisor, Lovan, testified that he went to look for the Grievant in the wastewater treatment facility and arrived there between 5:20 and 5:25 a.m. Since the evidence establishes that the Grievant made an adjustment to the Ph meter at approximately 5:20 a.m., he could not have been asleep very long. The wastewater treatment building is very loud and very hot, so loud that the Grievant testified he would not have heard someone tapping at the window even if he had been awake and not had his earplugs in. While the heat in the building would tend to induce sleep, the fact that the Grievant did not turn off the lights in the building shows that he did not intend to fall asleep.

The Grievant's supervisor, Lovan, who had extensive experience in management, and was aware of the responsibilities of the lead person, recommended a verbal warning. Although the net effect of the Grievant's having dozed off for a couple of minutes could best be measured by his supervisor, the recommendation was rejected by Priegnitz and Hoffart in favor of a three-day suspension. Priegnitz, however, admitted that he rarely uses work rules for disciplinary purposes and that supervisory personnel have discretion as to whether or not to discharge, suspend or give a lesser penalty. While it is possible that something extraordinary requiring the Grievant's immediate attention could have occurred in the two or three minutes that he dozed off, the severity of the discipline ought to be measured against the likelihood of that occurring, i.e., the severity of the dereliction. Measured against past incidents, it appears a three-day suspension was overly severe.

The Company's work rules differentiate between major and minor violations; however, to the extent that conflicts with the Agreement, the Agreement must prevail. A major violation under the work rules is insubordination, including "refusal to obey any reasonable order of those in charge of the employee's work." It is undisputed that lead persons are, at times, in charge of other employees' work. In 1997, employee Miller violated that major work rule, but was given only a written warning. Another employee who was convicted of off-premises conduct in the nature of a sexual assault received no discipline whatsoever despite the existence of major rule violation Rule 19. Employees also regularly and openly engage in organized gambling, contrary to the prohibition of such under Rule 20. In that regard, parlay cards, unlike generic football pools, are underwritten by actual bookmakers and are not self-financed by employee entry fees. The fact that the penalties even for major violations are discretionary is underscored by the language in the work rules themselves, "Major violations <u>may</u> result in discharge or a disciplinary suspension, depending on the circumstances surrounding the violation and the employee's prior record." In that regard, the Grievant has nearly 23 years of spotless service. As to the circumstances surrounding the violation, he was dozing for a couple of minutes near the end of a 12-hour shift in a well-lit room. Thus, a written warning is the appropriate discipline.

The history of Company discipline for sleeping on the job confirms that a written warning is the appropriate discipline. In August, 1997, employee Kletsch was caught apparently sleeping on the job. It is not clear from the documentation how long he had been in that position, but he was given only a written warning, allegedly because he did not admit being asleep. In October, 1998, employee Metzger was observed in a reclining position with his eyes closed, appearing to be asleep. For the same reasons given in the prior case, Metzger was given only a written warning. In May of 1981, an employee was observed sleeping on the job for a period of ten minutes. It was his second offense of sleeping on the job, yet he only received a three-day suspension. Finally in this regard, both the Grievant and Union Steward Jones testified they have heard individuals waking workers up over the intercom on more than one occasion. Jones in fact, has seen a supervisor actually wake up an employee who was sleeping with no discipline resulting.

The above shows that the Company has a history of enforcing the "no sleeping while on duty" rule by use of written warning for the first offense, or no discipline at all. The only difference in this case is that the Grievant was honest enough to admit that he had dozed off. Further, the time the employees were asleep in those prior instances which triggered written warnings could easily have been much longer than the Grievant's.

Moreover, the parties' Agreement requires one written warning prior to disciplinary suspensions for everything except the most egregious of circumstances. While "making a nest" in a dark secluded area of the plant and deliberately going to sleep might fall within the most serious offenses, unintentionally dozing off waiting for a meter to register for a short period of time does not. Thus, a written warning was necessary prior to imposing a disciplinary suspension, and is the appropriate penalty in this case. The Union requests that the Grievant be made whole in accord with the remedy requested in the grievance. It is undisputed that the Grievant would have undoubtedly worked the available overtime offered on two of his three days off. Thus, the remedy requested in the grievance itself is appropriate.

DISCUSSION

There is no dispute in this case that the Grievant engaged in the conduct for which he was disciplined. The record establishes, and the Grievant admits, that the Grievant dozed off for several minutes while waiting for the level on the Ph meter to lower. The remaining issue is whether that conduct warranted a three-day suspension without pay under the just cause standard in the parties' Agreement.

The parties dispute whether sleeping on duty constitutes a "serious offense" within the meaning of Section 5.1 of their Agreement, so as to except it from the minimum of one prior written warning notice requirement before a suspension or discharge may be imposed. The Company notes that sleeping on duty is listed as a "major violation" under the Company's

work rules. The Company also cites numerous awards wherein arbitrators considered sleeping on the job to be a serious offense meriting severe discipline (suspension or discharge). The undersigned has no disagreement with those awards for the most part. It appears from the Company's actions, however, that until this case, it has not treated such conduct as warranting anything more than a written warning for the first offense.

While Facility Manager Hoffart testified that, to his knowledge, no one has received less than a suspension where the Company had evidence of the employee sleeping on the job, the Company offered no specific instance where it had suspended or terminated an employee for a first offense of sleeping on the job. The only evidence as to specific instances involving sleeping on the job was the written warnings issued to Kletsch in August of 1997 and to Metzger in October of 1998. 1/ The Company attempts to distinguish those instances from the

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1/ There was also a three-day suspension for a second offense issued in 1981, however given the length of time that has passed and the fact that it predates the present work rules, makes it of little relevance, especially where evidence as to more recent instances is available.

Grievant's situation on the basis that those employees denied they were sleeping, while the Grievant admitted he was asleep. That distinction is not persuasive. Ignoring for the moment the message that is sent to employees by imposing more severe discipline if one admits to his misconduct, than if he denies it, it is noted that the Company did have evidence in both Kletsch's and Metzger's cases that they had been sleeping on duty. Both written warnings state that the employee was "observed by management personnel in a reclining position with your eyes closed." The Company claims that was not sufficient to prove the employee was sleeping because it would have been the employee's word against the management person's. 2/

2/ That also would have been the case here, had the Grievant denied he was asleep when Lovan found him. While the undersigned has had cases where an employee received more severe discipline than would otherwise have been imposed because the employee lied about his/her actions when confronted by management, he cannot recall an instance where the employee was punished more severely because he admitted the violation, rather than denying it. That is in effect what the Company has done in this case. There is no evidence in the record that would justify that action by the Company.

It is noted, however, that the Company did, in fact, discipline those employees for sleeping on duty, albeit by issuing a written warning. It also appears from those written warnings that Hoffart was involved in both of those cases, or at least was apprised of them at the time.

In determining whether there is just cause for the discipline imposed, it is appropriate to consider the level of discipline the employer has imposed in the past for such conduct. As discussed above, that has been a written warning for the first offense. If the Company wishes to enforce its rule that sleeping on duty is a "major violation" warranting immediate suspension or discharge, it must, at a minimum, put the Union and the employees on notice of its intentions.

For the foregoing reasons, it is concluded that the Company did not have just cause to discipline the Grievant as it did. The suspension is reduced to a written warning consistent with the requirements of Sec. 5.1 of the Agreement. The grievance requests, and the Union reiterates the request, that the Grievant be made whole by being awarded the three days of wages he lost, plus pay for the hours of overtime he would have worked on August 21 and August 22, had he not been suspended. The record evidence is that the Grievant works the overtime available at almost every opportunity, and there is nothing in the record to indicate that would not have been the case on those days. Thus, pay for those overtime hours are included in the remedy.

Based upon the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is sustained. The Company is directed to immediately remove the suspension from the Grievant's personnel records and place a written warning in its stead, and to make the Grievant whole by paying him the three (3) days' pay he would have received but for the suspension, and by paying him the contractual rate for the overtime hours on August 21 and August 22, 2000 that he would have worked but for the suspension, and by paying him any additional overtime pay he would have had coming had he actually worked the three days he was suspended and the overtime hours awarded for August 21 and August 22, 2000.

Dated at Madison, Wisconsin this 5th day of June, 2001.

David E. Shaw /s/

David E. Shaw, Arbitrator

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