BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

RACINE WATERWORKS COMMISSION

and

AFSCME LOCAL 63

Case #763
No. 66467
MA-13534

(Mario Malacara Discharge)

Appearances:

Davis & Kuelthau, S.C. by Mr. Mark Olson and Mr. Daniel Chanen, Attorneys at Law, appearing on behalf of the Utility.

Wisconsin Council 40, AFSCME, AFL-CIO, by Mr. Thomas Berger and Mr. Laurence Rodenstein, Staff Representatives, appearing on behalf of the Union.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, AFSCME Local 63 (hereinafter referred to as the Union) and the Racine Waterworks Commission (hereinafter referred to as the Employer or the Utility) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen as arbitrator of a dispute over the discharge of Mario Malacara. Hearings were held on January 5 and February 12, 2007 in Racine, Wisconsin at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. A site visit was made to the control room at the water plant on February 15. The parties submitted post-hearing briefs and reply briefs, the last of which were exchanged through the arbitrator on June 25, 2007, whereupon the record was closed.

Now, having considered the testimony, exhibits, and other evidence, the arguments of the parties, and the record as a whole, and being fully advised in the premises, the undersigned makes the following Award.

I. ISSUE

The parties agreed that the following issue should be determined herein:

Did the Employer have just cause to discharge the Grievant, Mario Malacara? If not, what is the appropriate remedy?

The parties further agreed that the matter was properly before the arbitrator.

II. FACTUAL BACKGROUND

The Employer is a utility affiliated with the City of Racine, but governed by an independent commission, which provides water services to the citizens of Racine. The Union is the exclusive bargaining representative for the Utility's blue collar employees. The Grievant, Mario Malacara, started with the Water Utility in 1988. From 1995 through his discharge in October of 2006, he worked as a Water Plant Operator. At the time of his discharge, he was working on the third shift.

The Grievant was terminated for causing eight water main breaks at just after six o'clock on the morning of September 24, 2006. An operator can cause a water main break in two principal ways. He can simply over-pressurize the system, placing stress on old pipes until they break, or he can cause a water hammer. A water hammer occurs when an altitude valve on a water tank closes suddenly, creating a wave of back pressure moving through the pipes at a time when there is low demand drawing water out of the system, leading to a sharp spike in pressure throughout the system. The severity of this event will vary, depending upon how high the pressure is in the system, and the amount of storage capacity left in the system. The Grievant was accused of doing both at the same time.

September 24th was a Sunday, and weekend days in autumn place very low demands on the water distribution system, since most businesses are not drawing on the water supply, and the end of summer reduces residential demand. When there is little demand for water, the operator need not pump as much water into the system in order to maintain water pressure. As of 5:00 a.m. on the 24th, the storage capacity of the tanks nearly had been reached, and the pressure in the system was at 91.1 pounds per square inch. At the time of the main breaks, just over an hour later, the water system was pressurized to 99.4 pounds per square inch, which is considered extremely high pressure when there is little demand drawing off water from the system.[1] Notwithstanding the high pressure, the Grievant was still pumping water into the system, continuing to fill the Perry Avenue storage tank. Each tank is equipped with an altitude valve, designed to shutoff the flow of water if the tank nears the point of overflowing.

[1] In the non-summer months, the system pressure is supposed to be kept at or below 92 pounds per square inch.

The Perry Avenue tank overflows at 62 and one half feet. The altitude valve in the Perry Avenue tank shut when the Grievant allowed the water level to reach 60 feet, and this triggered a water hammer in the system.

Water Plant Superintendent Mike Kosterman investigated the water main breaks, and he concluded that they were caused by the Grievant's negligence in not reacting to the buildup of pressure in the system, and his failure to heed a log entry from the preceding July, ordering operators not to fill the Perry Avenue tank past 53 feet.[2] The entry had been made after an incident in which the altitude valve at Perry Avenue closed unexpectedly, causing several main breaks. It was determined that filling that tank to 59 feet would cause the valve to close, whereas it had previously been thought that the valve would stay open until the water level was closer to the overflow point of 62 and one half feet.[3] Kosterman also attributed the incident to the Grievant's reluctance to switch to a smaller pump when pressures built in the system, and in his report on the incident, he suggested that the Grievant was seeking to avoid the work associated with making a pump change.

The Grievant was advised that the Utility was planning to terminate him based upon his negligence, and his record of past discipline for similar events. In October 1999, he was disciplined for allowing overpressure in the system, leading to a water hammer and six water main breaks.[4] In October 2004, he was reprimanded for allowing overpressure in the system, and a water hammer leading to three water main breaks. In December 2005, he was disciplined for an incident in which he was alleged to have allowed overpressure in the system, and a water hammer, leading to thirteen water main breaks. The December main breaks cost the Utility $60,000 in repair costs. After that incident, Bunker imposed a ten day suspension and warned him that if he "screwed up again" he would be terminated. The ten day suspension was the longest suspension ever imposed on any employee. While the Union had initially filed a grievance challenging the ten day suspension, the grievance was dropped when the Grievant decided instead to pursue a claim of racial discrimination against the Utility's managers through the City's Affirmative Action Officer. The Grievant claimed that the discrimination resulted from the Utility's hostility to his involvement in the selection of the first Hispanic supervisor at the Utility, approximately fifteen years earlier. The discrimination claim was investigated and dismissed.

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[2] The entry read: "Keep Perry Av. tank no higher than 53'. (Max. Level) The altitude valve may have closed at somewhere around 59 feet. ???"

[3] For a lengthy period of time prior to late 2005 or early 2006, the Perry Avenue storage tank had not normally been filled much above 40 feet, because of problems with a valve in the supply system, which restricted the flow of water into the tank.

[4] This discipline was reduced in the grievance procedure from a one day suspension to a reprimand, and was removed from his record after the passage of one year. It was admitted into the record of this hearing as evidence of prior knowledge of the rules, and the possible consequences of allowing pressure to build within the system, but given no weight for purpose of demonstrating progressive discipline, or justifying the selection of the penalty in this case.

Bunker met with the Grievant and representatives of the Union on October 2nd. At the meeting, the Grievant did not offer any explanation for the water main breaks on September 24th, other than to say that it was not deliberate and to apologize. He was given seven days to present whatever evidence he could of mitigating factors, or reasons for the Utility to do other than terminate him. Four days later, on the 6th, the Grievant submitted a letter to Bunker, asking for an opportunity to continue his employment in the position of meter reader, or any other non-operator position at the Utility. Bunker was not persuaded and the Grievant was terminated effective October 10th. The instant grievance was thereafter filed. It was not resolved in the lower levels of the grievance procedure and was referred to arbitration. At the hearings, in addition to the facts recited above, the Union presented the testimony of Operator David Brueggeman, who expressed the opinion that the December 2005 main breaks attributed to the Grievant's negligence in allowing the Coolidge Avenue tank to close were actually the result of a previously undetected equipment malfunction at the Perry Avenue water tank. Brueggeman stated that his evaluation of the records suggested that the altitude valve shut prematurely at Perry, probably as a result of the pressure in the system. He noted that the pounds per square inch of water pressure can trigger the closing of a valve as easily as altitude can, but that no one had ever been able to determine what p.s.i. would cause the Perry Avenue valve to shut. Turning to the September incident, Brueggeman noted that the records showed other instances between July 28 and September in which operators had exceeded 53 feet at Perry Avenue – some going as high as 57 feet - without any adverse consequences or discipline.

On cross examination, Brueggeman acknowledged that he had been present at the meeting when Bunker warned the Grievant that another incident would result in his discharge, and that the grievance over that discipline had been dropped because of the Grievant's insistence on pursuing a discrimination claim instead of a grievance. It was the dropping of the grievance that caused him not to investigate the December 2005 incident further until after the September 2006 problem, and thus not to realize that there was a mechanical problem at Perry Avenue. He acknowledged that management had reviewed his analysis of the December 2005 incident, and had still concluded that the main breaks in December were the result of the Grievant's negligence rather than some undetected equipment malfunction. Brueggeman also agreed that, whatever the underlying cause, it was general knowledge by mid-2006 that the Perry Avenue valve would close before 60 feet, and that anyone filling the tank to that level would have to expect a water hammer to occur. He said that September would have been a "winter" month in the Utility's lexicon, and that the maximum water pressure in the system in a winter month should have been 92 p.s.i., rather than the 99 p.s.i. that the Grievant allowed. Asked for his opinion of a situation in which pressure was rising in the system, the other tanks were full, there was dropping demand, and Perry Avenue was at 60 feet, Brueggeman conceded that any experienced operator would have seen the potential for water main breaks.

Union President and Operator Bruce Rowlands testified that he and Operations Manager James Moss had debated the 53 foot limitation on Perry Avenue before it was imposed, and that Moss had initially wanted to use a lower number, while Rowlands had suggested a higher

number, because operators always want a little more room to work with in a tank. The selection of 53 feet was a compromise, and after the log entry on July 28th, Rowlands knew of operators who had exceeded 53 feet without receiving any discipline or causing any main breaks.

The Grievant, Mario Malacara, testified that he believed he was singled out for discipline in December 2005 as a result of his efforts in 1991 or so to secure the appointment of the first Hispanic supervisor in the Water Utility, at a time of great racial tensions. He had done his best in December, the same as he had on his other shifts, and simply did not realize that the valve was defective and was flipping shut.

According to the Grievant, he did nothing out of the ordinary on September 24, 2006. While he knew the log said not to fill the Perry Avenue tank above 53 feet, he knew that others had done so without incident, and he thought the logbook entry was more along the lines of advice than an order, and was related to a different problem with the Regency Mall tank, which had been resolved. He stated his opinion that the pressure in the system was not excessive, nor was the fact that the supply was 7.2 million gallons more than the demand, because both simply indicated that the tanks were being filled, which is the job of the third shift operator. He also stated that filling Perry Avenue to 60 feet should not have been a problem, and that he had filled it to that level many times over the preceding decade. He acknowledged that no other operator had gone beyond 57 feet after the July 28th log entry.

Called in rebuttal, Michael Kosterman testified that filling Perry Avenue to 60 feet might or might not cause main breaks, depending upon the pressure in the system and the room elsewhere in the system to accommodate water. He expressed the opinion that the water pressure at 6:00 a.m. on September 24 was dangerously high, and that there was no room left in the system.

Kosterman stated that he had investigated the Union's claim that the altitude valve on the Perry Avenue tank was faulty, and concluded that it was functioning properly. He said that there is always a bit of variance in where an altitude valve will trigger, and that he did not consider a valve closing at 59 feet to be premature in a tank with an overflow level of 62 and one half feet. Kosterman noted that it was a very rare occurrence for Perry Avenue to be filled to 60 feet, since there had long been problems with the supply lines to that tank, and operators were generally content if they could get the tank to 50 feet.

Kosterman denied any discrimination or hostility towards the Grievant, and said he found the charge to be offensive. He noted that he was working in the laboratory, and not as a member of management, when Ramos was promoted in the early 1990's, and had no involvement in that decision. Kosterman said that he had always been helpful to the Grievant in his career.

Additional facts, as necessary, will be set forth below.

III. THE POSITIONS OF THE PARTIES

A. The Position of the Utility

The Utility takes the position that it had ample cause to terminate the Grievant. The cause for his discharge is easily summarized. Main breaks are expensive for the Utility, and dangerous to the health of the citizenry. The Grievant was responsible for 27 preventable main breaks during his employment. All other operators, combined, account for zero preventable main breaks. His last incident came nine months after he was suspended for the same conduct, and warned that further preventable main breaks would lead to discharge. It was caused by his gross neglect of a clear order limiting the height to which the Perry Avenue tank was to be filled. The reason for the order was to prevent main breaks. There could not be a clearer case for discharge.

The Utility dismisses the various excuses offered by the Grievant and the Union. The Union contends that the Grievant was not trained properly, but the facts show that he received the same, on-going training as every other operator, and the same opportunity for consultation with colleagues and guidance from supervisors. The Utility points out that over-pressurizing the system is not some technical detail or obscure hazard. Moreover, since he had been previously disciplined for exactly the same errors, the corrective effect of that discipline should have served to warn him that he had to avoid over-pressurizing the system.

The Utility also dismisses the Union's suggestion that retaliation played a role in the Grievant's disciplinary history. The Grievant identified an incident, 15 years earlier, in which he "was instrumental in getting the first Hispanic supervisor at the water plant", and he claims that some simmering resentment for that underlay the discipline assessed against him. This ignores the fact that the supervisors who initiated discipline in 2005 and 2006 were not supervisors 15 years earlier, and had no reason to retaliate against him. It also ignores the complete lack of evidence of any management animus against the Grievant. The retaliation claim is an assertion, nothing more, and merely by making it the Grievant undermines his own already weak credibility.

The Utility dismisses as fantasy the Union's claim that a stuck valve was the cause of the Grievant's problems. There is no evidence in the record of a stuck altitude valve. The valves are designed to close once the water reaches a critical level, and that is what the Perry Avenue valve did. It functioned exactly the way it was supposed to function. There is some variation in the altitude that triggers closing, but if it closes between 59 feet and 61 feet, it is operating normally. On September 24, it closed at 60 feet. This was not some unexpected result, triggered by a malfunction. It was the result the system was designed to produce. The Union's unfounded speculation that some phantom valve somehow malfunctioned has no basis in the record, and has to be ignored.

Finally, the Utility points out that the Union mischaracterizes the history of how the Utility has used the Perry Avenue tank. The Union premises much of its argument on 60 feet as the level to which the tank was normally filled. In fact, however, 60 feet was identified as the maximum level to which that tank could be filled, and historically the tank was filled to a maximum of 50 feet. In 2006, no operator other than the Grievant ever exceeded 59 feet. More to the point in this case, after the July 2006 order to fill the tank to no more than 53 feet, no operator other than the Grievant even approached 60 feet. The Grievant is not being disciplined for bad luck, or for stepping slightly over the line. He paid no attention to the limit placed on the Perry Avenue tank, no attention to the situation of declining demand and increasing pressure, and no attention to his job. The predictable result was a catastrophic pressure wave, serious damage to the system, and the end of the Grievant's employment.

B. The Position of the Union

The Union takes the position that there was no misconduct in this case, simply a series of errors and mishaps, some of them the Utility's own doing. The Union points out that the Utility has never claimed that the Grievant acted intentionally to cause water main breaks. Instead, it admits that any problem here was caused by a performance failure. These are exactly the same circumstances leading to a previous problem with water main breaks. Yet there is no evidence of any steps by the Utility to retrain the Grievant or otherwise correct these performance problems, other than to warn him not to "screw up" again. That guidance is no guidance at all. In order to have value as a corrective measure, discipline must be accompanied by some sort of effort to help the employee avoid repeating his mistakes.

Given the cost of these main breaks - $65,000 in 2005 and $42,000 in 2006 – the Utility's passivity is hard to understand, if one assumes that they acted in good faith. There is evidence, though, that the Utility consciously chose to leave the Grievant inadequately trained, specifically for the purpose of allowing another accident, and thereby justifying his termination. The Grievant raised serious charges of racial discrimination and retaliation against the Utility management in the wake of the 2005 incident, and filed a complaint with the City's Affirmative Action Officer over his suspension. The Utility's effort to cast the discrimination claim as old news, or concerned with an event from 15 years earlier, is a serious mischaracterization of events. The Grievant's filing in 2006 is what the Utility is retaliating against him for. His immediate supervisor, Mike Kosterman, admitted being personally offended at having been named in that action, and the animus flowing from that sense of betrayal is palpable. The Utility's response was to give the Grievant a supply of rope, and let him hang, rather than following the normal and responsible course of retraining him to avoid further problems. The Union points out that, by filing a discrimination complaint, the Grievant was engaged in classic protected activity, and it urges the arbitrator to analyze the Utility's actions under the familiar in-part Muskego-Norway test.

The Union also draws the arbitrator's attention to substantial evidence that the main breaks attributed to the Grievant's alleged negligence in the 2005 incident were actually the result of an equipment malfunction. Expert testimony from Operator David Brueggeman established that a prematurely closing valve was the most likely cause of the sudden pressure rise at Perry Avenue in 2005. Brueggeman reviewed data for all of 2005, and noted other instances in which the water level exceeded the level at which the valve snapped shut on the Grievant in December 2005. He expressed the opinion that a properly functioning valve should close at a consistent level. Thus it appears that the ten day suspension and final warning to the Grievant as a result of the December 2005 incident were issued on the basis of mistaken facts, and were unwarranted. The arbitrator cannot disturb the ten day suspension, but he can - and, as a matter of simple fairness, he should - discount that suspension as a step in the contractually required progression of discipline. He must therefore analyze the September 2006 incident on its own merits, and make an independent judgment as to whether it justifies the discharge of a long service employee. Plainly it does not.

The Utility's case depends upon demonizing the Grievant and magnifying these incidents. The Utility seeks to paint the Grievant as grossly negligent in his approach to his job, but the record simply does not support that claim. The job of an Operator is as much an art as it is a science, and these employees are expected to use discretion and make judgment calls. The fact that a problem occurred is not evidence of negligence. It is evidence that no system is perfect, and not every judgment call works out. In the 2005 incident, the pressure rise was likely caused by a valve problem, but whatever the cause, it was hardly actionable negligence to fill the tank as full as possible, when Moss's memo of one month earlier directed Operators to fill the tank as full as possible. In September of 2006, the Grievant concedes that he exceeded the 53 foot limit requested in the July log entry, but so did many other Operators. No one was disciplined for this, and there was no problem where the Operators' judgment was that 53 feet should be exceeded. Taking the same action as other trained professionals were taking, an action which is consistent with what has historically been expected and allowed, in violation of a rule which is not being enforced, is not negligence.

Even if the Grievant was negligent in over-filling the Perry Avenue tank, the penalty of discharge is simply too harsh. This is an employee with 18 years of good service. He does not have history of misconduct or trouble. In October 2006, when he met with management about these issues, he asked to be demoted to meter reader, so that he could remain employed, and management's concerns about his performance as an Operator could be allayed. Given all of this, the very profound doubts about management's true motives, and the lack of any effort to retrain or rehabilitate the Grievant, the arbitrator must conclude that the penalty of discharge is purely punitive, and is inconsistent with the corrective purpose of discipline under a just cause standard.

IV. DISCUSSION

The grievant was disciplined for causing eight main breaks through negligent operation of the water distribution system. He contends that he was not negligent, and was the victim of a previously unknown equipment defect, and of discrimination. The Union echoes those claims and asserts that, even if there was cause for discipline, the measure of discipline imposed was excessive and inconsistent with a system of progressive and corrective discipline.

A. Was There Just Cause for Discipline?

The Utility's theory of the water main breaks is that the Grievant erred in allowing pressure to build too high in the system, and over-filling the storage tank at Perry Avenue, causing the altitude valve to close and create a water hammer of back pressure through the system. There is no question but that there was a water hammer on the Grievant's watch, and that it was precipitated primarily by the closing of the altitude valve at Perry Avenue. If, as the Grievant claims, this was an event that could not have been anticipated, it is by definition not an act of negligence. I conclude, however, that the Grievant could have and should have anticipated this occurrence, and that his failure to do so constituted carelessness in the performance of his duties.

The Union does an excellent job of painting a scenario in which the altitude valve at Perry Avenue was unreliable, and prone to closing unexpectedly. The implication is that the Grievant cannot be held responsible for what is essentially a random occurrence. However, there is a substantial problem with that line of analysis, and that is that the operators knew what the danger zone was for filling the tank. At the end of July, the Utility had issued written instructions to the operators, telling them not to go above 53 feet at Perry Avenue. The July 28th log entry was clear, and despite the efforts of some witnesses to minimize it or characterize it as something other than an order, all eventually had to concede that log entries are the standard way to communicate instructions and information across the three shifts.

The stronger argument against holding the Grievant to strict compliance with the log entry is that he and others had exceeded 53 feet after July 28th, without being disciplined. That would be a compelling argument if the Grievant was being held to strict compliance with the log entry – i.e., if what the Grievant was disciplined for was simply exceeding 53 feet. He is not – the discipline is for performing his duties carelessly and causing main breaks. The log entry does not stop at telling operators not to exceed 53 feet. It goes on to explain the reason – "The altitude valve may have closed at somewhere around 59 feet." This is significant in two ways. First, it tells the operators that there is probably some wiggle room in the 53 foot maximum, and plainly they read it that way. More importantly for the purposes of this discipline, though, it gives the operators clear notice that whatever wiggle room there is, once they approach 59 feet, it is very likely that the valve will close. As steward Dave Brueggeman reluctantly conceded, by September of 2006 the operators knew that filling Perry Avenue to a level of 60 feet would almost certainly create a water hammer.[5]

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[5] Transcript, pps. 262-263: Q: "So anybody who allowed the tank to get to 60 feet of altitude, knowing [of the faulty valve] would have known that there would be a water hammer created by it, correct?" A: "Correct."

Certainly the Grievant did not intend to cause main breaks on September 24th. The record suggests that the Grievant was probably trying to nurse the system along until the end of his shift, so that he would not have to do the extra work associated with switching to a smaller pump. The other possibility is that he simply was not paying sufficient attention to the conditions in the system – high pressure, low demand, and nearly full tanks. Whatever the reasons for his conduct, he was in control of the pressure and the tank level, and created a situation in which a reasonable person with his background should have foreseen that a water hammer was almost certain to occur. The inevitable result of a water hammer is damage to the system. Causing damage by carelessness in the performance of duties is commonly understood to constitute cause for discipline, and I therefore find that the Utility did have just cause to discipline the Grievant as a result of the September 24th incident.

B. Were The Water Main Breaks Simply a Pretext to Disguise Retaliation?

I have concluded that the September water main breaks were the result of carelessness, and that this satisfies the just cause standard for imposing discipline. The Grievant and the Union argue, however, that the discipline here was motivated at least in part by hostility to the Grievant for having filed racial discrimination charges over the ten day suspension he served after the water main breaks in December 2005. Indeed, the Union argues, it is most likely that the Utility had avoided retraining or otherwise rehabilitating the Grievant after the December incident, specifically in the hope that he would repeat his prior mistakes and give them a reason to terminate him.

The notion that the Utility would have retrained the Grievant but for his filing of discrimination charges is inconsistent with his own history, and with the nature of his job performance problem. The Union's premise is that allowing a main break will lead to retraining, absent some dark motive by the management of the Utility. On the contrary, over the span of the Grievant's employment he had had two previous incidents in which he was held responsible for water main breaks. In neither case did he file discrimination charges, and in neither case was he retrained. Thus it does not appear that, absent retaliation, there is a causal connection between allowing a water main break and being retrained. Moreover, in the December incident, he was assessed a ten day suspension and warned that his next "screw up" would lead to discharge. No effort was undertaken to retrain him as part of the management response, all of which was finalized by January 10th. It bears remembering that he did not file the discrimination claim in that case until the middle of March. It is obviously difficult to tie management's reaction in December and January to their supposed hostility to his filing of the charge with the Affirmative Action Officer, when two months elapsed between alleged act of retaliation and the occurrence of the act supposedly giving rise to the retaliation.

Beyond the inconsistent timing of the alleged retaliation and the filing, there is a more fundamental problem with the Union's theory that the Utility was obligated to retrain the Grievant to help him overcome his mistakes. The mistakes the Grievant was making were not highly technical errors or close professional judgments. In the simplest terms, he was

intermittently not paying attention to the basic elements of the job. There is no elaborate retraining program required to drive home to someone the need to be careful, particularly where the person has been disciplined three times before for not being careful, and placed on notice of discharge if he does it again. Contrary to the Union's argument, "don't screw up again" is an adequate warning in those circumstances, because as a practical matter, the responsibility for improving performance rests with the individual.

I find nothing suspicious in the Utility's response to the Grievant's prior problems with water main breaks, and no evidence whatsoever to suggest that its treatment of him before, during or after the September 24th water main breaks was influenced by hostility to him because of his race, or because of his activities in the 1990's to secure the promotion of a Hispanic employee to a supervisor's position, or because he had filed a complaint with the Affirmative Action Officer in March of 2006. On a thorough review of the record, I conclude that there is no basis for the charge of retaliation, and I instead affirm my earlier conclusion that the September 24 water main breaks were caused by the Grievant's carelessness, and that that carelessness provides just cause for discipline.

C. Was There Just Cause for Discharge?

Where the standard is "just cause", the issue is not solely whether there was cause for some discipline. Even if there was, just cause typically also encompasses the question of whether the measure of discipline imposed was appropriate. The Union contends that it was not, on several grounds, including the argument that retraining must be part and parcel of progressive and corrective discipline for performance problems. That argument has been discussed above, and I have concluded that retraining is not mandatory where an experienced employee's performance problem consists of not paying attention to basic duties.

In addition to the retraining argument, the Union submits that the normal progression of discipline in this case is tainted by its discovery that the water main breaks in December of 2005 were likely caused by a heretofore undiscovered defect in the valve at the Perry Avenue tank, rather than the closing of the Coolidge Avenue valve as was originally thought. The Union does not seek the reversal of the ten day suspension. Instead it asserts that the arbitrator should discount the suspension as a factor in determining whether discharge is too harsh a penalty for the September incident, because the Grievant was not truly guilty of misconduct in December. I disagree.

The Union's conclusion that the December incident was due to a problem with the Perry Avenue valve is based upon David Brueggeman's analysis of the system records showing pressure changes during the event. The Union filed a grievance on the Grievant's behalf to challenge the December discipline. However, the Grievant decided to drop the grievance and instead pursue a discrimination claim. Had the Grievant allowed the Union to proceed with the grievance, presumably Brueggeman would have had occasion to analyze the records at that time, and to raise the issue of a possible equipment defect. That he did not is due to the

Grievant's decision to drop the grievance. Where discipline is imposed, and is not grieved, it is thereafter conclusively presumed to have been imposed for just cause, and the Union acknowledges that, in accepting that the ten day suspension itself cannot be disturbed. However, to say that the discipline stands but should not be counted for purposes of progressive discipline, is inconsistent with that fairly fundamental precept. Beyond that, there is no good analytical reason to find that the termination was not consistent with progressive discipline, even if I were to conclude that events in December had been misconstrued.[6]

The purpose of progressive discipline is to correct behavior, by imposing increasingly severe sanctions on an employee, and thereby drive home to the employee the need for improvement before things get to the point of termination. In the December incident, the Grievant was disciplined for neglecting his duties, in the same manner as he had in two prior occurrences of water main breaks. He did not deny the basic facts. Indeed, in his complaint of racial discrimination, he did not challenge the discipline on the basis of innocence – he said that his actions caused the damage but were inadvertent. The basis of his complaint was that other employees had also caused damage from time to time, but did not receive discipline. Thus leading into the events of September, the Grievant knew that he had been assessed a ten day suspension – the longest suspension in the history of the Utility – for negligent performance of his duties, leading to water main breaks. He knew he had been warned that he would be discharged for any future incident. He and other operators had been warned that the Perry Avenue tank altitude valve would shut off at about 59 feet, and they also knew that the result of that would be a water hammer and water main breakage. With that as background, he filled the Perry Avenue tank to 60 feet, causing the valve to close, triggering a water hammer in the system and the breakage of eight water mains.

The Union's appeal in this case is not that the Grievant wasn't given fair warning of the consequences of another incident, and ample opportunity to correct his approach to his job. It is that an employee is entitled to a "legitimate" suspension before he can be discharged. Even if progressive discipline was subject to such a cookbook sort of approach, and even if I was persuaded that Brueggeman was correct in his analysis, and even if the delay in analyzing this data was not due to the Grievant's own decision to drop his grievance, the fact would remain that the December suspension was "legitimate." It was not challenged at the time, and was therefore imposed for just cause. For all of these reasons, I find that the penalty of termination is completely consistent with the principles of corrective and progressive discipline.

Finally, the Union claims that the termination is simply too severe a penalty for an employee with 18 years of good service, particularly where he has offered to accept any other job at the Utility in order to remain employed. It is commonly understood that an arbitrator has the inherent authority to modify the penalty if circumstances warrant and the contract does not forbid such modifications. Such a modification is not an act of leniency, since leniency is within the province of an employer. Instead it turns on mitigating factors and such fundamental notions of fairness as equality of treatment and proportionality.

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[6] The Utility disagrees with Brueggeman's analysis.

I cannot say that termination is out of proportion to the conduct where the Grievant has repeatedly caused a considerable monetary loss to the Utility, as well as the threats to public health and safety that attend water main breaks. Certainly the Grievant has long service, and that is a mitigating factor, but it has not been as unblemished as the Union suggests. In the course of that long service, he has been disciplined three times for the same conduct that caused him to be discharged, as well as several other incidents. At the end of the day, the Union's appeal is for leniency, and that is not within the scope of the arbitrator's legitimate authority.[7]

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The Employer had just cause to discharge the grievant, Mario Malacara. The grievance is denied.

Signed at Racine, Wisconsin, this 14th day of November, 2007.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

[7] The suggestion of placing the Grievant in a meter reader job or other non-operator position does not answer the basic problem of his inattention to his duties.

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