

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**TEAMSTERS LOCAL UNION 662
INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

and

GREAT LAKES CALCIUM CORPORATION

Case 3
No. 68431
A-6345

(Beaten Termination Grievance)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, by **Attorney Yingtao Ho**, 1555 North Rivercenter Drive, Milwaukee, WI 53212-0993, appearing on behalf of the Union.

Liebmann, Conway, Olejniczak & Jerry, S.C., by **Attorney Ross W. Townsend**, 231 South Adams Street, Green Bay, Wisconsin 54301, appearing on behalf of the Employer.

ARBITRATION AWARD

The Teamsters Local 662, International Brotherhood of Teamsters, hereinafter referred to as the Union, and Great Lakes Calcium Corporation, hereinafter referred to as the Employer or the Company, are parties to a collective bargaining agreement (CBA or Agreement) which provides for final and binding arbitration of certain disputes, which Agreement was in full force and effect at all times mentioned herein. The parties asked the Wisconsin Employment Relations Commission to assign an arbitrator to hear and resolve the Union's grievance regarding the termination of Bryan Beaten, hereinafter referred to as the Grievant. The undersigned was selected from a list of five WERC staff arbitrators and appointed as the Arbitrator. A hearing into the matter was held in Green Bay, Wisconsin, on February 19, 2009, at which time the parties were given the opportunity to present evidence and arguments. The hearing was transcribed and is the official record of the hearing. The parties filed post-hearing briefs by April 9, 2009 at which time the record was closed. Based upon the evidence and the arguments of the parties, I issue the following decision and Award.

ISSUE

The parties stipulated to a statement of the issue as follows:

Is there just cause for the discharge of the Grievant?

If not, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 7. LABOR MANAGEMENT RELATIONS

- (a) The management of the Great Lakes Calcium Corporation, the direction of the labor force and the right to hire and discharge employees for cause is vested exclusively in the Employer, except as specifically limited by this Agreement. The Union will not abridge such rights. The Union will be advised of the reason for discharge if it requests the information. The Employer shall have the right to implement and enforce reasonable work and safety rules. The decision of the management upon all questions of policy and of management shall be final.

. . .

- (e) The Employer shall not discharge or suspend any employee without just cause.

OTHER RELEVANT PROVISIONS (IN PERTINENT PART)

GLC Code of Conduct

. . .

Commitments to Our Employees

We promise to maintain a safe and healthy workplace for all of our Employees and to treat everyone with respect and dignity. . .

Commitments to Our Customers

Our customers are the Company's life force and we are indebted to them for helping us grow and succeed. We strive to go the extra mile in building strong customer relationships . . .

...

GLC Employee Policies

Harassment Policy

What is Harassment?

Harassment can take many forms. It may be, but is not limited to: words, signs, jokes, pranks, intimidation, physical contact, or violence.. Harassment is not necessarily sexual in nature.

Responsibility

All Great Lakes Calcium employees. . .have a responsibility for keeping our work environment free of harassment. . .

...

GLC Values

The employees of Great Lakes Calcium are its most valued assets. The future success of GLC depends upon the effort and the skill that its employees contribute daily. To maximize employee contribution to the common goals of this organization, the employees and shareholders of GLC are committed to a number of business values that guide our decision and behaviors. They are:

> Passion

We are committed to entering each day with a positive attitude, focusing on the good in our people and processes. We expect the “best” from ourselves in all of our actions and work to place our customers and coworkers in position to reach their “best.”

> Integrity

The foundation of our business is based upon integrity. All interactions with customers, vendors, suppliers, strategic partners, distributors, shareholders and fellow employees will be conducted with integrity and mutual respect.

> Respect

We promote and support a diverse, yet unified team. We honor the rights and beliefs of our fellow associates, customers, shareholders,

and partners. We treat others with the highest degree of dignity, equality, and trust.

> **Accountability**

We accept our individual and team responsibilities and we meet our commitments on schedule. We take responsibility for our performance in all of our decisions and actions. We will always meet or exceed the expectations of every business partner, every day.

. . .

> **Quality**

We are committed to providing quality products and services that meet or exceed our customer's expectations. . .

GLC GOAL

Our fundamental goal is to build positive, long-term relationships with our internal and external customers. These relationships are characterized by mutual respect, courtesy and integrity, by a helpful, effective response to customer needs and concerns, and by a strong commitment to providing products and services of the highest quality, values and usefulness.

GLC Progressive Discipline Policy

. . .

Step Three: Third Work Rule Violation - Decision-Making Leave

If your performance does not improve immediately following a Written Reminder (Step Two), or if you are again in violation of Great Lakes Calcium practices, rules or standards of conduct, your manager, after reviewing the situation with their manager, will discuss the problem with you, emphasizing the seriousness of the problem and the need for you to immediately remedy the problem.

Decision Making Leave is an un-paid, one-day disciplinary suspension. Employees on Decision Making Leave will spend the following day away from work deciding whether to correct the immediate problem and conform to all of the company's practices, rules and standards of conduct, or to quit and terminate their employment with Great Lakes Calcium.

If your decision following the Decision Making Leave is to return to work and abide by Great Lakes Calcium practices and standards of conduct, your manager will write a letter to you explaining your commitment and the consequences of failing to meet this commitment. You will be required to sign the letter to acknowledge receipt. A copy of the letter will be routed to senior managers in your chain of command, and a copy will be placed in your personnel file.

You will be allowed to return to work with the understanding that if a positive change in behavior does not occur, or if another disciplinary problem occurs within the next 24 months, you will be terminated.

If you are unwilling to make such a commitment, you may be terminated.

...

BACKGROUND

The Company operates a plant in Green Bay, Wisconsin and supplies various calcium related products to its customers. At all times herein the Grievant was employed by the Company as a second shift payload operator. A part of his responsibilities included loading the Company's various products into trucks driven to the Company's facility by its customers.

On Friday, October 25, 2008 the Grievant was operating his payloader in the performance of his duties. Sometime prior to the beginning of his shift at 2:00 o'clock p.m. three dump trucks owned and operated by W.J. Filtz Trucking Company in Stevens Point, Wisconsin, arrived at the Great Lakes Calcium facility. They were there for two purposes. First, they were to operate as contractors, and second, they were to operate as customers. As contractors they were to carry loads of G-stone (small stone about three-eighths of an inch in diameter), from one location on the Company's premises to another. As customers they were to pick up loads of ag lime, (a white or greyish powdery substance made from crushed rock), at the end of the day and bring the loads back to Stevens Point. Thus, at some point in time they shifted from being contractors paid by Great Lakes Calcium, to customers paid by Filtz.

The beds of the Filtz dump trucks were loaded with G-stone by the Company's payload operator, the Grievant. His job was to scoop up a load of G-stone in his payloader bucket from the G-stone pile and transfer that load to the bed of the truck until the truck was full. The record reflects that each bucket load of G-stone weighs about 8000 pounds. The Grievant is alleged to have, among other things, caused damage to the trucks during the process of loading the G-stone. He is also alleged to have been rude to the Filtz drivers during this loading process and over the course of the rest of the day.

Near the end of the day the Filtz drivers were to load their trucks with ag lime. According to the testimony of several witnesses, Grievant was to get a weight ticket from each driver before he loaded their trucks with ag lime. Grievant failed to get the tickets from the Filtz drivers. He

also is alleged to have caused some delay in loading the ag lime by parking his payloader near the break room and entering the break room, locking it behind him. After one of the Filtz drivers found the Grievant somewhere in the rear of the building, words were exchanged and the Grievant eventually came out and loaded the trucks. According to the Filtz drivers, the Grievant was rude and surety and loaded their trucks in such a way as to cause them to have to take extra time to dump part of their loads, (which the Grievant had overloaded), and to have to shovel some of the product in an effort to level the load, (which Grievant had dumped in one pile in the middle of the truck bed), in order to allow them to place the tarps over the truck bed. After dumping the ag lime into the Filtz trucks the Grievant, the last employee left at the facility, left through the main gate and closed the gates placing the chains around them. He did not lock the clasp of the lock which ordinarily would hold the chain in place but it appeared to the Filtz drivers as though he had done so. He then left the facility. It appeared to the Filtz drivers as though he had locked them inside.

During the course of the day the drivers reported various actions of the Grievant to their boss, William Filtz, the owner of Filtz Trucking, complaining about the treatment they were receiving from him and advising their boss of the damage the Grievant had done to the trucks. They reported that the Grievant seemed to be in an “agitated state of mind”, that he had an “attitude”, and that he was “snotty.” On the following day, Filtz inspected the trucks and confirmed that they had received “excessive” damage to the paint work. He then called his contact at Great Lakes, Mike Flaig, and informed him of the damage and of the fact that his drivers were treated with disrespect.

Great Lakes officials conducted an investigation into the matter and subsequently terminated the Grievant’s employment. This grievance followed.

THE PARTIES’ POSITIONS

The Employer

The Grievant could, at times, be a valuable and productive employee. However, he was moody and when he was in a “bad mood” he was rude, angry, insulting and hostile to those with whom he came into contact. He had progressed through the disciplinary stages because of his “bad moods” in the past and on February 27, 2008 his hostile and insulting conduct earned him a “decision making leave” (an unpaid suspension) for a day pursuant to Step 3 of the company’s Progressive Disciplinary Policy. He returned from this leave with the understanding that “. . .if a positive change in behavior does not occur, or if another disciplinary problem occurs within the next 24 months. . .” the Grievant’s employment would be terminated.

Although the term “just cause” is not defined by the CBA, an acceptable analytical framework is:

That analytical framework consists of two basic elements: the first is whether the employer proved the employee’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. (IN RE: GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL 577-M AND S&M ROTOGRAVURE SERVICE, INC., A-5720 (Jones, 6/1999).

The Employer has proven that the Grievant's conduct violated numerous work rules, policies, codes and values maintained and held by the Company. He intentionally or negligently damaged tools and equipment by the way he loaded the Filtz trucks. He allowed stone to cascade down on the outside of the trucks causing excessive rock pitting and wear and tear, even after the Filtz drivers asked him to stop. When he loaded the ag lime he violated at least six work rules, policies, codes and values. His interactions with the Filtz drivers were inappropriate. He ignored and hid from the Filtz drivers at the end of the day; he ignored the request of Mr. McClure to put sand in his truck before loading ag lime; He ignored Mr. Genz and Mr. McClure when they each attempted to give him their scale tickets (prior to loading the ag lime); he intentionally overloaded the Filtz trucks; he stacked the load too high; he loaded two Filtz trucks without a scale ticket; he failed to lock the gate when he left (for the night); he left while customers were still on site; and he intentionally gave the customers the false impression that he had locked them inside the gate.

Under all of the relevant circumstances the Company has established that the discipline it imposed was justified. He was given progressive discipline; he was clearly given due process; and there is no evidence of disparate treatment.

The grievance should be denied.

The Union

Termination is the most severe penalty which can be imposed in industrial jurisprudence. For this reason the employer must prove just cause by clear and convincing evidence. As such, the employer must prove a version of events that is consistent with its theory of Beaten's guilt and inconsistent with any possible explanation showing that he did not commit the misconduct as charged. In other words, an employer must prove that it had just cause by "clear and convincing" evidence. The Employer admitted that some G-stones will "rain down" on the sides of trucks during normal operation. The two Filtz drivers' testimony was inconsistent. One claimed that his vehicle was damaged after loading occurred because the Grievant failed to jiggle the bucket before withdrawing it. Another said the damage was caused because the stones fell out as the Grievant drove the payloader towards his truck before loading occurred and the third claimed that both his and another driver's truck were damaged both as the Grievant approached the trucks and when the bucket was withdrawn. Because of these inconsistencies the testimony of the drivers is not credible. Also, the testimony shows that the stones were wet and, hence, would stick together and not fall out until the bucket was tilted forward, which would not occur until the bucket was inside the truck. In addition, the Lutz truck only took one load before he left with a load of ag lime, whereas the other two trucks took more than one load so the Lutz truck should have less damage than the other two. Because the photographs show similar and extensive levels of damage on all

three trucks the damage was likely caused by a series of assignments over time, rather than by the Grievant. Therefore the photographs cannot prove that the Grievant damaged the trucks excessively.

The claims by Genz and McClure that the Grievant overloaded their trucks with ag lime by 13,000 and 7000-9000 pounds respectively is absurd and physically impossible. In order for the truck to be overloaded by 7000 pounds the triangular pile of the ag lime would have to be 2.43 feet high, while McClure testified that his 7000-9000 pound overload was only one foot over the top of the box. Hence, the 7000-9000 pound overload could not have been physically possible. The Employer's claims that the Grievant was angry, and that his conduct was out of the ordinary cannot prove intentional conduct. "An employer's suspicion that an employee committed misconduct intentionally is not proof of intentional misconduct." (MARINE CORPS AIR STATION, 82 LA 28 (1984))

The Grievant cannot be disciplined for his manner of dealing with the Filtz drivers relating to the comment "what good will that fucking do" and his comment to McClure that he didn't give a shit what McClure wanted. This is because Lutz's allegation did not appear in his statement or the interview, thus he is not credible, and the McClure statement, because the profanity was used as an adjective and did not directly target him, is nothing more than shop talk, and arbitrators have consistently held that the use of profanity in shop talk cannot result in discipline. Besides, Lutz testified that they would frequently use profane language when talking to each other.

Because the Employer cited only two examples of the Grievant's inappropriate interactions with a "customer", i.e. use of profanity and the alleged overloading of the trucks with ag lime, the Grievant cannot be disciplined for either one because he cannot be disciplined for the use of profanity and because it cannot prove that the Grievant overloaded the trucks or did it intentionally. A discharge can only be justified using reasons relied upon at the time of discharge, and cannot be justified by other unstated but arguably related charges.

The Employer failed to prove that the Grievant knowingly ignored the Filtz drivers because he (Grievant) testified that Genz never approached him and asked him to come back and because the driver's testimony should be discredited because of the inconsistencies relating to the overloading situation and the Grievant's testimony should be credited. There are other inconsistencies by the Filtz drivers: they testified that their arrival times were different in one statement versus the other, and that Lutz testified that a driver could hear the bucket of the payloader jiggle from the inside of the cab with the windows up, the radio on, and someone talking on the CB while Genz did not notice whether it jiggled. Hence, the Grievant's testimony should be credited while the Filtz driver's testimony should not.

The Grievant may not be charged with, and the Company may not rely upon the fact that Grievant loaded trucks without a load ticket in hand. This is because the Company is barred from expanding the charges against him from those set forth in the notice of discipline and because the Company has not proven that the Grievant had notice of the fact that he was supposed to do that. The Grievant testified that he never received notice from the Company that he was not supposed to

load trucks without first obtaining a Load ticket. And Vandebusch testified that the rule was frequently communicated when Great Lakes got into computers and that the last communication was one year ago. The Company never provided testimony as to when it got into computers; it failed to produce any evidence that the same people conducted the meetings in the morning, when Vandebusch would have attended and been advised of the rule, and in the afternoon when Grievant would have allegedly attended the meeting or that the same script was used in both meetings; or that the Company ever communicated to the manager holding the afternoon meeting that he should talk about the rule. The Arbitrator should find that the Company failed to prove that it ever gave the Grievant notice of the fact that he needed to get a ticket before loading a truck and this part of the basis for giving him discipline should fail. Besides, he did not need a ticket to load the trucks because he had been told by Vandebusch that he would need to load them with ag lime; he did not see the drivers approach him with the tickets; he did not need to know the empty weight of the trucks because the trucks had air gauges which can monitor vehicle weight; and the outbound tickets the drivers drop in the mailbox as they leave contains all the information the Company needs to bill its customers. An employee's reasonable but incorrect work conduct cannot trigger discipline.

The Grievant cannot be disciplined for leaving work at the end of his shift because there is no evidence that the Company ever communicated to him that if he was the last employee to leave he must remain on site until other personnel (the Filtz drivers in this case) left. The fact that he remained on site the week before until other personnel left before locking the gate does not prove he was on notice to do so. The fact that he knew he was to lock the gate, and he also knew that the Filtz drivers could get out of another gate. So, “. . .the requirement of locking the Great Lakes gate did not place Beaten on notice that he must wait for all other personnel to leave before leaving himself.” Besides, the Filtz drivers could have stayed on site for hours creating more overtime for the Company while he did nothing but sit and wait. He could have been accused of padding his work hours in that event.

In making the Company's gate appear to be locked, the Grievant acted reasonably. His decision to make the gate appear locked “. . .represented the best of both worlds: The gate appeared shut to everyone outside; but could be opened if the Filtz drivers could not find another way out.” If he locked the gate he could be disciplined for locking the Filtz drivers inside and if he failed to lock the gate he could be disciplined for that. He did the best he could under the circumstances.

As for the daily loader report for October 25 he did not report any problems with the payloader and he drew a line through the vast majority of check points. He had no reason to believe his report was unacceptable and Nelson testified that if there were problems with the equipment the Company would expect the employee to describe the problem and to notify the supervisor of it. The lines he drew failed to reach every category of problem, i.e. brakes, parking breaks and headlights. If the Company never notified him that the lines he drew must reach every category, it cannot discipline him for failing to do so. Besides, the Grievant testified that he had completed this form the same way in the past and no one ever told him it was wrong even though he assumed a supervisor would review the form.

The Company cannot discipline the Grievant for reasons unstated on the disciplinary notice. The Company cannot, therefore, use his working elsewhere for the first hour and a half before beginning to load the Filtz trucks with G-stone nor for not putting sand in the bottom of McClure's truck before loading ag lime.

In any event, the evidence shows that the Filtz drivers main work was to move G-stone and in order for them to be able to do that, according to the Grievant, he had to move some stone out of the area to make room for them to dump it at the new location. As for the sand in the bottom of McClure's truck bed, the drivers sometimes shovel their own sand into their trucks. Also, the Grievant could not see the bed of the truck from his vantage point. Since the testimony of the Filtz drivers is not credible the Arbitrator should accept the Grievant's testimony that McClure never asked for sand.

The Grievant should be reinstated with full pay and benefits.

DISCUSSION

The issue in this case is whether the Company had just cause to terminate the Grievant's employment. As is normally the case the parties' collective bargaining agreement does not define the term just cause, in which case the Arbitrator is called upon to define it. The undersigned views the elements of just cause in the same way as the majority of arbitrators do. Just cause is comprised of two elements, both of which must be established. First, did the employer prove that the employee committed the conduct for which he or she is being disciplined. Second, if the conduct has been proven, was the discipline imposed commensurate with the offense under all the circumstances. GREAT LAKES CALCIUM CORPORATION, A-6289, (Jones 1/22/08).

The Union argues that because discharge is the "most severe penalty that can be imposed in industrial jurisprudence" the Employer must prove it by clear and convincing evidence. In order to meet that standard it must prove a version of events that is consistent with its theory of the Grievant's guilt, and inconsistent with any possible explanation showing that he did not commit the misconduct as charged. There is some disagreement among arbitrators as to the appropriate standard to apply in discharge cases. Arbitrators generally agree that the highest standard, proof beyond a reasonable doubt, is reserved for charges which are grounded in acts which, if proven in the criminal courts, could result in the loss of one's freedom. That is not the case here. The undersigned agrees with Arbitrator Nielsen that articulating a standard of proof is an artificial exercise because, in the end, the quantum of proof required for an employer to prove it's case in support of a decision to discharge is that required to convince the arbitrator of the Grievant's guilt. "To the extent that a standard can be accurately stated, I am persuaded that the appropriate balance between the compelling interests of the grievant in her job and her good name and the very strong interest of the Employer in detecting and deterring serious misconduct is best struck by requiring that the charges be proved by the clear and convincing preponderance of the evidence." BAY AREA MEDICAL CENTER, A-5723 (Nielsen, 8/18/99)

With regard to the allegation that the Grievant intentionally damaged the sides of the Filtz trucks, the Union argues that this charge cannot be proved because “even Great Lakes does not dispute that some G-stones will rain down on the sides of trucks during normal operation of the payloader. . . and “Beaten testified that he was not dumping stones excessively on the sides of the Filtz trucks on October 25, and that he did not see a problem with how he was loading. The testimony of the Filtz drivers should not be credited.” It argues that the so-called “Shulman Principle”, which presumes the grievant to be less credible, should be “summarily dismissed from arbitral thinking.” The undersigned agrees with the Union in this regard and in this case rejects it. The rejection of Arbitrator Shulman’s theory does not, however, mean that I automatically reject all testimony other than the Grievant’s. Sometimes grievants come to the table with testimony which is less than completely truthful and it is the job of the arbitrator to sort out the wheat from the chaff, so to speak.

The record as a whole convinces the Arbitrator that the Grievant had, on occasion, a propensity to loose his temper and become ornery. As Larry Vandebusch, the Grievant’s co-worker and apparently the first to see the Grievant at work on October 25, credibly stated “When he’s (Grievant) in that kind of frame of mind, I don’t say nothing to him.” Employer exhibit 18, the Grievant’s third step disciplinary action (dated 1/27/07 but should be dated 2/27/07) states in pertinent part:

. . .The reality is you insinuate who the person is in such a way that your fellow employees are clear on who you are *attacking*. . . Your behaviors continue to make the work environment uncomfortable for your fellow employees and violate Great Lakes Calcium’s work rules of disrespect to a co-worker and violating the company’s code of conduct harassment policy.” (My emphasis)

This behavior is indicative of an angry man and bolsters the conclusion that, on occasion, anger management issues surfaced.

Filtz driver Kody Lutz testified that the Grievant loaded his truck with G-stone in such a way as to cause damage to the driver’s side of his truck. Grievant, according to Lutz, pulled the bucket full of G-stone from the truck prematurely. The bucket still had stone in it and when the Grievant pulled it from the truck the stones rained down on the side causing the damage. Lutz driver Allen Genz, testifying as to the way in which the Grievant loaded his truck with G-stone, said:

Q. Okay. What happened after Mr. Beaten relieved Larry?

A. The day - - A good day went south real quick.

. . .

A. And it was - - From the word go it was bad.

Q. Okay. Tell me what was happening.

A. When he goes into the pile the buckets are too full. You can see as he's going up to the truck that the stones are falling off of the bucket.

Q. Okay. Then what?

A. Then they're hitting the side of the trucks. He's just loading not the way he's supposed to be loading trucks.

...

Q. Okay. How many loads approximately did you carry on that - on that day, ballpark?

A. Ballpark would be about 30 loads.

Q. Thirty loads. How many loads did you observe Mr. Beaten loading in the manner that you just described where the rocks were raining down?

A. All of them.

...

Q. Did you make any attempt to talk to Mr. Beaten about the way he was loading?

A. I've (sic) made attempts, but we were just ignored.

Genz further testified as follows:

Q. - - - did you have occasion to observe the damage to the outside of the trucks?

A. Yes, I did.

Q. And how is that? How did you have that occasion to see the damage?

A. I got - - I wash the trucks.

Q. Okay.

A. And I noticed that the new truck was all pitted up already on the box side, on the driver's side.

Q. Okay. In your experience was there more pits on there than one would expect from a single eight-hour shift?

A. Yes, yes.

And Filtz driver John McClure:

Q. During the course of your years with Best and With Filtz, did you have occasion to work with Bryan Beaten?

A. Yes, I have.

Q. In your experience how was Bryan to work with?

A. Depends on what mood he was in.

Q. Okay. When he was in a good mood, how was he to work with?

A. He was fine.

Q. Okay. How about when he was in a bad mood?

A. He was a bear.

Q. What do you mean by he was a bear?

A. Impossible to work for.

In order for this Arbitrator to believe the Grievant's version of events regarding loading the three Filtz trucks, I would have to believe that all of the Filtz witnesses are lying and that they, apparently, are involved in some kind of a conspiracy against the Grievant. I do not believe they conspired against the Grievant. In this matter it is the Grievant's version of the events that I don't buy. I find the Filtz drivers credible and the Grievant incredible despite the Union's argument that it could not conceivably have happened the way they said it did and the argument that because the stone was wet it could not have fallen from the bucket. The inconsistencies in the driver's testimony do not cause me to question the general truthfulness of the testimony as a whole. It is not uncommon to have inconsistencies in multiple eyewitness testimony. This does not, however, mean that all of the eyewitnesses are lying.

The Union next argues that the photographs offered by the Company do not prove that the Grievant caused the damage to the trucks because all show similar damage and, because Lutz had less loads than the other two drivers, his truck should have less damage than the other two, so the evidence proves that the damage was likely caused by a series of assignments over time, rather than by Grievant only. The testimony of William Filtz, the owner, driver, dispatcher and mechanic

of W.J. Filtz Trucking, is entirely credible. On the day in question he was contacted numerous times by his drivers complaining about the treatment they were receiving from the Grievant, including the fact that the trucks were being damaged “. . .”because of Bryan being in a hurry and in an agitated state of coming in the trucks quickly and spilling stone on the side of the trucks and then not returning his bucket to a level or return position to exit the truck, thus spilling the stone on the sides of the trucks.” He inspected the trucks the following day and confirmed the fact that an excessive amount of damage had been done to the trucks at the Great Lakes facility the day before. His inspection is particularly persuasive because he inspects his trucks each day and takes great pride in how his trucks are seen by the public and by his customers and for driver retention due to providing them with a good piece of equipment. It is very important to him that his customers see a clean, good looking truck because “It lets them know that we care about our equipment and thus we care about their business and their product that we are moving for them.” For the undersigned to conclude that William Filtz is lying about the damage to his trucks I would have to conclude that he is in on this conspiracy against the Grievant. I don’t draw such a conclusion.

The Union alleges that the allegation that the Grievant overloaded the ag lime with the trucks driven by McClure and Lutz by 13,000 and 7-9,000 pounds respectively is absurd and physically impossible. The Union presents a mathematical explanation as to why this is true. Boiled down to its lowest common denominator, it concludes that even a 7000 pound overload would be triangular in shape and, since a triangular shaped pile must be twice as high as a rectangular shaped pile with the same base area, the 7000 pound load would be about 2.43 feet above the top of the box at its highest point. Since McClure testified that his 7000 to 9000 pound overload was only one foot over the top of the box, such an overload is impossible. Lutz says that his 13,000 pound overload was 2 to 3 feet high which is also an impossibility. Besides, Beaten testified that the payloader cannot load much higher than a foot above the top of the Filtz truck. The undersigned does not know whether a 7000 to 9000 pound triangularly shaped overload of ag lime would extend 2.43 feet above the top of the box. It may very well do so. I also don’t know if a 13,000 pound overload would be two to three feet high. What I am persuaded of is that the Grievant intentionally overloaded the trucks with ag lime because of his day-long feud with these drivers. I believe that he knew very well that by overloading them they would have to take the extra time to unload the overload, and that they would have to manually shovel the triangularly shaped load in the bed to spread the ag lime evenly in the bed in order to put the tarps over the load to keep it from blowing out of the truck bed. This is exactly what the drivers had to do. The evidence clearly supports the conclusion that, because McClure and the Grievant had words at the end of the day resulting in the Grievant having to return to the ag lime pile to load the two remaining trucks after he had cleaned up in preparation to leave for the day, he was put out and primed for revenge.

The Union says that the Company failed to prove that the acts of the Grievant were intentional, and because it charged the Grievant with intentionally overloading or damaging the Filtz trucks it cannot support the charges against him. I have already indicated that I am persuaded that the overloading of the ag lime was intentional. As for the loading of the G-stone, I am convinced that that was intentional also. It was clear to the drivers that Grievant was in one of his

moods and it was clear to them that his loading procedure on this day was different from his loading procedure on days when he was in a good mood. McClure and Luts both testified, credibly, that they attempted to stop the Grievant from loading the stone in a way that damaged the trucks but the Grievant ignored them and continued loading in that manner. The Grievant's testimony that the drivers said nothing to him is not credible.

The Union says that the Grievant cannot be disciplined for his manner of dealing with Filtz drivers. The use of profanity in the shop is consistently recognized by arbitrators as unworthy of discipline if it is not used as a threat or insult, and in this case the Union argues the profanity was not directed at the Filtz drivers. The Union argues that the interaction between McClure and the Grievant just prior to the loading of the ag lime at or near 10:00 p.m. was just shop talk. In response to the driver's request for ag lime the Grievant said he didn't give a shit what McClure wanted, but that if McClure wanted a load of ag lime he would give it to him. This is the Grievant's testimony, not McClure's. McClure testified:

Q. Okay. Tell me about that. You saw him go into the break room. Why didn't you just follow him into the break room?

A. Because the door was locked.

Q. So Mr. Beaten locked the door?

A. Yeah.

Q. Okay. And so what did you do then?

A. Well, I looked inside to see if he was in there. I didn't see him. So I walked around to the other side of the building – other side of the plant looking for a door to get in, got into a door, found my way to the break room, and he was sitting there.

Q. Why didn't you see him when you looked in?

A. I didn't. He wasn't there.

Q. . . .What happened then?

A. Told him I needed a load of ag lime and basically he said he didn't give a shit about it, what I needed. Then I said, you know, hey, it's been a long day for both of us. I need these loads. My boss wants these two trucks loaded. So I said a (I) need a load of sand, a bucket of sand, in the box first.

Q. Okay.

A. I thought I was going to get a bucket of sand in there. That didn't happen either.

Q. So after you told him that, did he - - did he leave the break room and get in the payloader?

A. He left the break room, got in the payloader, and kind of went Nascar on it, went real fast. You know, it's like, hey, it ain't my fault. I've got to get these loads.

It probably comes as no surprise that the undersigned finds the testimony of McClure to be more credible than that of the Grievant. In light of all of the evidence I am convinced that the exchange between the Grievant and the driver was inappropriate and supports the charge made by the Company in that respect i.e. "Inappropriate interaction with customer, making customer feel like he is an inconvenience." As I have mentioned above, the Grievant intentionally, thus deliberately, overloaded the Filtz trucks with ag lime.

As for the argument that the Company cannot rely on evidence relating to the Grievant's failure to get a load ticket before loading the ag lime because that allegation expands the charges against the Grievant, this is not correct. One of the reasons for the Grievant's discharge is:

a) Refusing to accept driver scale-in load tickets.

Once again, the Grievant's testimony is essentially one hundred and eighty degrees from the testimony of the Filtz drivers. As I have mentioned, I do not believe the Grievant is credible. I believe that the evidence is clear on the fact that the drivers attempted to give Grievant their load tickets and that he refused to take them. This is contrary to established company policy. As to the argument that the Grievant cannot be disciplined without notice of a work rule providing that he get a load ticket before loading each of the customer's trucks, I find that he had sufficient notice of the policy and that he complied with it on virtually every occasion save this one. Notice need not be written in order to constitute sufficient notice of a rule. Where a policy or practice is consistently followed it need not be promulgated or published in order to be upheld. BEVERAGE CONCEPTS, 114 LA 340 (Cannavo, 1999), TEMPERATURE CONTROL, 59 LA 1226 (Cowan, 1972) and others. Of course, in the absence of a written rule, the employer bears the burden of proving that the employee knew, or should have known, of the policy. Here, the evidence is more than sufficient to make that showing. The credible testimony of Vandenbusch follows:

Q. . . .Is there any circumstance under which you as a payload operator are allowed to load a truck without a ticket?

A. About the only way is if somebody's in the office and I can call the office and say that the guy doesn't have a ticket. Then they could tell me to load it. Otherwise don't.

...

THE WITNESS: It's the company policy and they told everyboby that you don't take a - - load a truck without a ticket. That's been on. They've been drilling it into your head for - - at least for the last five, six years.

If this is true, and I find Vandebusch's testimony to be credible, the Grievant knew, or should have known, of the policy. He testified that he had only loaded a truck "I would say a couple" of times in the past year. Over the past five years he's not sure. "More than ten, less than 50. I can't say for sure." The record supports the notion that he got a load ticket before loading a truck on virtually every occasion, save a precious few, since he began working as a payload operator, further supporting the conclusion that he knew of the policy.

The drivers confirm the procedure:

Lutz:

Q. . . . So you drive up to the ag lime pile and then what happens?

A. You wait for a loader man to show up, give him a hand ticket that's got - - The ticket looks like this. (Referring to the ticket in question)

Q. Okay.

A. And he proceeds to load you.

Genz:

Q. Okay. Now, under the policy that you heard Bubba describe were you supposed to do something with that ticket?

A. Yes. I was supposed to hand it to the loader operator.

...

Q. What happened next?

A. Then I tried giving them my load ticket.

Q. You tried giving who?

A. Bryan.

Q. Bryan.

A. And he just ignored you.

Q. Okay. What did you do to try to give him the load ticket?

A. You are standing outside. The company policy is you are not supposed to load without a load ticket.

Q. Right.

A. So I was standing outside of the truck. So you don't load something without a ticket.

McClure:

A. Telling him (referring to Genz) basically how to do it (handle the tickets) because it was his first time there.

...

Q. Okay. Now, towards the end of the day you heard Allan (Genz) testify that he tried to give Bryan the ticket and Bryan wouldn't take it. Do you recall a conversation with Allan about tickets after that?

...

A. Well, he came up to me and asked me what to do. I told him. I said just give me the ticket and I will see if I can get it to Bryan.

...

Q. Did you try to give the tickets to Bryan?

A. Tried to, yeah.

Q. What did you do exactly to try to give him the tickets?

A. Stood outside the - - stood outside the truck, went like this with the ticket. He has lights on the loader, I mean.

Q. So you waived your arm with the tickets in your hand?

A. Yeah.

Q. How close to the payload were you when you waved your arm?

A. About 5 feet.

Q. You were very close to the payloader?

A. Yeah.

Q. Did Mr. Beaten acknowledge you?

A. Nope.

Q. Did he stop and take the tickets?

A. No.

It is safe to say that if the drivers knew of the policy, so did the Grievant. It is also safe to conclude that, given the Grievant's refusal to take the tickets, and the manner in which he loaded the ag lime, he was still in his "mood."

The gate episode was his final act of bad behavior toward the Filtz drivers for the day. As he left, with the drivers still inside the gate and working on the badly loaded ag lime the Grievant had provided for them, he exited the gate and wrapped the chain around it so as to make it look like he had locked it. He placed the lock in such a position that the drivers, upon looking at the gate from their position, would think it was locked, when, in actuality, he had not locked the clasp. The Grievant's explanation for doing this is completely incredible. He says he was afraid of being disciplined if he failed to lock the gate, confirming his knowledge of that responsibility, and afraid of being disciplined if he left the drivers on the property and locked them inside, thus confirming his knowledge that locking the drivers inside the gate was also prohibited. The evidence clearly shows that his anger at having to load the trucks at or near the end of his day was still seething and he was intent on giving the drivers one last shot. The fact that there was another way the drivers could get out (through property next door owned by someone other than Great Lakes) is irrelevant. His objective was to make them *think* they were locked in, and it worked. Fortunately, one of the drivers was aware of the other gate and so the drivers used that exit point. If nothing else, the fact that they had to take their trucks to the other gate as opposed to driving straight out of the Great Lakes facility was an inconvenience for them. His acts were intentional, they were unreasonable, and he knew they were wrong, but his anger motivated him to do it anyway.

The Company included the Grievant's failure to complete his Daily Log as a part of the overall package of reasons for discharge. I find this to be a technical violation of the rules and, in and of itself, would not have supported the discharge. But viewed in combination with all of the other violations on that day, it fits the pattern of Grievant's actions that day and adds some weight to the Company's decision.

I find that the Company has proven each allegation of the Grievant's misconduct by a clear and convincing preponderance of the evidence, thus satisfying the first element of just cause. As for the second element, was the punishment commensurate with the offense, Arbitrator Jones has set forth the relevant facts and circumstances normally considered. They "are the notions of progressive discipline, due process protections, and disparate treatment." (Id.) The undersigned agrees. Progressive discipline has been proven. The validity of the Company's progressive discipline policy has not been challenged in this case. The Grievant does argue that "There is no evidence that in deciding to discharge Beaten, Great Lakes took into account the fact that Beaten went 20 months without any discipline between the time when he received the notice of suspension on February 20, 2007, and the time of the occurrence of the events that led to his discharge on October 25, 2008." It is true that an employee who remains free of discipline for a long period of time may argue her record as a mitigating factor when considering her discharge. This is most often the case when the parties have not established a time period within which the grievant may be disciplined and where the employee has longevity and an otherwise clean record. That is not the case here. In this matter the parties have established that time period in their progressive discipline policy. It is 24 months, not 20, and there is no question that the Grievant knew that he was at Step 3 of the progressive discipline policy and that any discipline occurring within 24 months from February 20, 2007, would result in his discharge. The Grievant does not argue a lack of due process. This leaves the issue of disparate treatment. The undersigned finds no evidence in the record suggesting disparate treatment. The Company has established that the punishment was appropriate under all of the relevant facts and circumstances. Thus the second element of just cause has been proven to a clear and convincing preponderance of the evidence.

In light of the above, it is my

AWARD

1. There is just cause for the discharge of the Grievant
2. This grievance is dismissed in its entirety.

Dated at Wausau, Wisconsin, this 29th day of April, 2009.

Steve Morrison /s/

Steve Morrison, Arbitrator

SM/gjc
7420