

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**CITY OF MARSHFIELD UTILITIES COMMISSION**

and

**GENERAL TEAMSTERS UNION LOCAL 662**

Case 173  
No. 68850  
MA-14366

(Suspension Grievance)

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**Appearances:**

**Steven C. Zach**, Attorney at Law, Boardman, Suhr, Curry and Field LLP, 1 S. Pinckney St., Fourth Floor, Madison, WI 53701-0297 appeared on behalf of the City of Marshfield Utilities Commission.

**Jill M. Hartley**, Attorney at Law, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 N. Rivercenter Dr., Suite 202, P.O. Box 12993, Milwaukee, WI 53212, appeared on behalf of the General Teamsters Union Local 662.

**ARBITRATION AWARD**

The City of Marshfield Utilities Commission, herein the Utility, and the General Teamsters Union Local 662, herein the Union, are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested Paul Gordon, Commissioner, to serve as the arbitrator to resolve a grievance concerning a five day disciplinary suspension of bargaining unit member Dan Sova, herein Sova or Grievant. Hearing was held on the matter on July 14, 2009 in Marshfield, Wisconsin. No transcript was prepared. The parties filed written briefs and the record was closed on August 19, 2009.

**ISSUES**

The parties stipulated to the following issues:

Did the employer have just cause to suspend the Grievant, Dan Sova, for five days for his conduct on February 12, 2009?

If not, what is the appropriate remedy?

**RELEVANT CONTRACT LANGUAGE**

**ARTICLE 7 – SUSPENSION, DISCHARGE AND DISCIPLINARY ACTION**

**Section 1**

No employee who has completed his probationary period shall be discharged or suspended without just cause and without one (1) warning notice of the complaint in writing to the employee with a copy to the Union and steward, except no warning notice is required for discharge or suspension due to dishonesty, being under the influence of intoxicating beverages while on duty, recklessness resulting in a chargeable accident while on duty or other flagrant violations. Discharge or suspension shall be in writing with a copy to the Union and employee affected.

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**BACKGROUND AND FACTS**

Grievant has been an employee of the Utility since September 1979. He is an account clerk with an office on the second floor of the two story Utility building in Marshfield. He has one prior discipline of a written warning in March, 2007 for conducting personal business on his employer's time (stopping by his wife's place of business while on a mail run and without prior approval).

The Utilities Commission has adopted an Employee Handbook which contains various policies including:

**501 Safety**

\* \* \*

Each employee is expected to obey safety rules and to exercise caution in all work activities. Employees must immediately report any unsafe condition to the appropriate supervisor. Employees who violate safety standards, who cause hazardous or dangerous situations, or who fail to report or, where appropriate, remedy such situations, may be subject to disciplinary action, up to and including termination of employment.

\* \* \*

**508 Use of Equipment and Vehicles**

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Please notify the proper supervisor if any equipment, machines, tools, or vehicles appear to be damaged, defective, or in need of repair. All damage to vehicles is to be reported on the "vehicle or equipment accident or damage report" form. Prompt reporting of damages, defects, and the need for repairs could prevent deterioration of equipment and possible injury to employees or others. The supervisor can answer any questions about an employee's responsibility for maintenance and care of equipment or vehicles used on the job.

\* \* \*

Grievant received the handbook in August 2007.

By memo of February 13, 2007 to all employees they were informed as follows:

This letter of instruction is being provided as a result of a recent vehicle accident and equipment damage that went unreported. All employees have a duty to report any accident, injury, equipment damage, property damage, or like incidents of which they may become aware. The employee causing or otherwise involved with the incident is not the only employee who has a responsibility to report such occurrences.

Employees are not necessarily disciplined for accidents which result in property damage or personal injury, but they will be disciplined for failure to report such accidents.

The reporting is absolutely necessary to provide an opportunity for review of the situation and to allow for follow-up action to ensure that the situation is not repeated. Leo has been conducting a more detailed investigation than has customarily been completed. He reviews the situation to determine what the Utility or the employee should have done differently to prevent the occurrence. This will allow us to put more effort into preventing future incidents.

Grievant was not involved in anything having to do with the February 2007 memo. He did see this memo when it was first posted.

During Grievant's lunch break on February 12, 2009, he was in the first floor shop area of the Utility building using a Utility grinder to clean rust off one of his personal tools. Employees are permitted to use such Utility equipment for personal uses such as this without needing to get permission. While Grievant was doing this the grinder tool rest, a safety feature, broke off from the rest of the machine with a loud noise throwing some pieces across the floor. Grievant, the only person in the room at the time, was not injured. The loud noise caught the attention of another employee, Ray Burrill, who was outside and also on his lunch break. Burrill is not a supervisor. Burrill came into the shop to see what happened and saw Grievant working at the grinder. Grievant told him the part had broken off. Grievant did not ask Burrill to fix or report the matter to anyone, nor ask him to tag or lock out the grinder. To lock out a piece of equipment is to place a noticeable tag on it so that others do not use it until repaired. Burrill then left the shop. Grievant placed the broken parts of the tool rest on the grinder bench where they were visible to anyone at the grinder before he left the shop. Grievant did not tag or lock out the grinder. He had heard about a tag out/lock out policy, but was not otherwise familiar with how to do that.

Grievant knew he was required by policy to report the damage to a supervisor. He thought Burrill would probably report it to Jerry Tetzlaff, the purchasing agent and a manager who orders and replaces equipment for the Utility. Burrill sometimes works in the office next to Tetzlaff. Tetzlaff is not a supervisor but Grievant thought he would be the appropriate

person to report the damage to as he was responsible for equipment orders and replacements. At about 12:25 p.m. when he left the shop Grievant stopped by Tetzlaff's first floor office, but he was not there at the time. He did not leave a note for Tetzlaff. Grievant then went back to his second floor office as his lunch period was over at 12:30 p.m. Other than his initial conversation with Burrill, Grievant did not report the damage to his supervisor, Lee Babcock, who was out for lunch then. Grievant did not consider his supervisor to be the appropriate person to report the broken grinder too, as he is not the tool manager. Grievant did not report the matter to anyone else. He did not consider it a serious safety matter because a previous grinder in the shop had not had a tool rest on one side of the grinder, but did recognize it as a safety factor.

Burrill returned to the shop as his lunch break was ending at 12:30 p.m. and noticed the grinder pieces at the grinder a short time after Grievant had left the shop. He noticed the grinder was not tagged or locked out. Burrill did not see Tetzlaff or look for him, but proceeded to look on the internet for replacement parts for the grinder. His supervisor, Nick Kumm returned from his lunch break and asked Burrill what he was doing and Burrill told him about Grievant and the broken grinder. They located tags in a storeroom and Kumm directed Burrill to tag the grinder. Burrill did, and wrote on the tag a note not to use it. This all took about 15 or 20 minutes. By then, Tetzlaff had returned from his lunch, and Burrill and Kumm told him in his office what had happened.

Grievant was unaware that Burrill and Kumm had tagged the grinder and spoke with Tetzlaff. Sometime between 12:30 and about 1:00 p.m. Grievant went downstairs a couple of times to Tetzlaff's office to tell him about the grinder but did not see him, leave a note or try leaving a voice mail. He did not see that the grinder had been tagged, and did not see anyone else on the first floor. He did not report the damage to anyone at that time. No other employees saw Grievant then, who returned to the second floor, looked in the break room on that floor, did not see Tetzlaff, and finally returned to his own office.

Kumm then spoke with another supervisor, Greg Geiger, about how to handle the situation where a supervisor had not been initially notified of broken equipment. Geiger suggested Kumm should talk to Grievant's supervisor, which he did at about 1:30 p.m. as he was looking for the report forms to use when equipment is damaged. Babcock took the forms and said he would handle the matter.

Babcock had returned from his lunch break at 1:00 p.m. that afternoon, and at about 2:30 p.m. was discussing the matter with another employee when Grievant came into Babcock's office to discuss another matter. After that discussion Babcock asked Grievant if there was anything he wanted to tell him. Grievant then told him about the broken grinder tool rest and asked if he was in trouble. Babcock told him that he had violated the rule by not immediately reporting the damage to him. Grievant said he'd tried to notify Tetzlaff but could not find him. Grievant was then given the damage report forms to complete, which he did and returned them to Babcock.

Grievant then went to Geiger to ask him to tell anyone inquiring that Geiger had given him permission to use the grinder. Grievant testified at the hearing that he did this to cover his tracks. Grievant had not had a prior conversation with Geiger about this, Geiger had not given permission, and had not been asked prior to this. Geiger told Grievant that he did not need permission and that he would not make the requested statement.

Babcock investigated the matter and then reported to Human Resources and the Utility Manager, Joseph Pacovsky, who reviewed Grievant's employment history. He felt a trust matter was involved in this and the 2007 matter. He compared other incidents of other employee discipline. He then made the disciplinary determination. The next day Babcock met with Grievant and his Union representative, telling Grievant he could not trust him and informed Grievant of the disciplinary decision, giving him a memo from Pacovsky dated February 13, 2009 which stated in pertinent part:

On Thursday, February 12, 2009 you were observed using a piece of utility equipment during your lunch break. Minutes later a loud noise was heard and the equipment was found damaged. The damage was not reported, nor was the equipment marked with a lock-out tag. It wasn't until much later in the day when you were asked about the incident that you admitted to using the equipment without permission, damaging the equipment, and not reporting the damage or marking the equipment as damaged. Your actions resulted in several flagrant violations of Utility work rules. Flagrant work violations are discussed in Article 7, Section 1 of the Union contract.

As a result, you are being given a 5 day suspension without pay. This suspension will commence effectively immediately through Friday, February 20, 2009. You will be paid for your hours worked on Friday, February 13, 2009, per the Union contract.

Any future violations of work rules may result in discipline, up to and including termination.

Grievant went home then after a half day's work and served the suspension.

The Union grieved the discipline, alleging a violation of Article 7, Section 1 of the collective bargaining agreement. The grievance was denied by the Utility, leading to this arbitration. Further facts appear as are in the discussion.

### **POSITIONS OF THE PARTIES**

#### **The Utility**

In summary, the Utility argues that it has established just cause for the five day suspension because it established conduct by the Grievant in which it had a disciplinary interest, and the discipline imposed reasonably reflects that interest. The Utility does not contend that Grievant needed permission to use the grinder for personal reasons on personal time and such does not form any basis for the discipline given to Grievant.

The Utility argues that Grievant's conduct warranted discipline. Employees were advised to report damaged to property to a supervisor under Rule 501 and Rule 508. These rules were re-emphasized a year before Grievant's actions by a Letter of Instruction on reporting damage. Grievant was aware of the Rules and Letter. His argument appears to be there is ambiguity in who he is suppose to report to, and that because Burrill was aware of the damage and Grievant's attempt to contact Tetzlaff he satisfied the reporting requirement. Grievant's argument is misplaced. Both rules require the report be made to the "appropriate supervisor" or the "proper supervisor". Grievant did not report to any supervisor, as both Burrill and Tetzlaff are not supervisors. He did not notify Burrill or Tetzlaff. There was no discussion between Grievant and Burrill that Burrill would do anything related to the grinder. Grievant never did notify Tetzlaff despite claims he attempt to. When Grievant had an opportunity to notify his supervisor later, he didn't volunteer it, but Babcock initiated the conversation. And Grievant's testimony that he had attempted to contact Tetzlaff is not true. Under cross examination admitted he tried to cover his actions by asking Geiger to lie for him. There were a number of people present between 12:30 and 1:00 p.m. when Grievant testifies he went to see Tetzlaff and no one saw him. Kumm and Burrill, who were in the shop locking out the grinder, didn't see him. Grievant did not seek out other supervisors on the ground floor. He would have been as busy then as he was after 1:00 pm, which is convenient for his story. He would have left a note or tried to call Tetzlaff if he really tried to notify him. He did not voluntarily tell his supervisor. There was no reason not to tell his supervisor earlier if he really tried to see Tetzlaff. His response of am I in trouble is consistent with fear of discipline and failure to report damage. Grievant did not comply with the Rules regarding reporting damage. He was aware of the rules. He had been notified that discipline would be imposed for failing to report property damage. The Utility has established conduct by Grievant in which it had a disciplinary interest.

The Utility argues that Grievant's conduct warranted a five day suspension. It reasonably reflects the disciplinary interest. Grievant's actions were directly counter to a Rule which was important and a special Letter of Instruction advises of discipline for violating that Rule. The labor agreement provision that no employee may be suspended without one warning notice of the complaint requires progressive implementation of discipline. Grievant received a written warning in March 2007 for a violation. It was not grieved then. That discipline warned that future incidents would give rise to discipline up to and including discharge. Pacovsky viewed the 2007 and 2009 violation similarly, both involving integrity and honesty. The 2009 suspension reflects flagrant conduct that justifies suspension notwithstanding prior warning. Broken safety equipment was not tagged out and supervisors not advised. Affirmative steps were taken to avoid discovery by a supervisor and Grievant failed to acknowledge his actions until confronted by his supervisor. The Utility is disturbed that Grievant left a broken piece of equipment for others to use with potential safety ramifications without notifying a supervisor. Pacovsky reviewed other Utility discipline to establish a proper level of discipline. A similar incident of personal business on company time resulted in a two week suspension. Here, though not as egregious, there was a prior warning so some level of suspension was appropriate. This was a safety rule and the integrity of Grievant is call into question as it was earlier. The type of action involved, Grievant's conduct

in attempting to avoid discipline and progressive discipline makes the discipline here appropriate. Arbitrators are hesitant to second guess the degree of discipline, and an arbitrator is not free to substitute his judgment for the Company's simply because he would have made a different decision, citing arbitral authorities. In this cast there are no factors which would justify the substitution of a different level of discipline.

The Utility requests that the grievance be dismissed.

### **The Union**

In summary, the Union argues that the employer bears the burden of proving just cause for Grievant's suspension, and that it failed to meet that burden. Grievant's conduct did not constitute a flagrant violation of Utility work rules. Therefore, he was entitled to a warning before suspension. The contract requires one warning before discharge or suspension except in cases of the enumerated so called cardinal sins or other flagrant violations. Grievant had not previously been warned for failure to report damage to equipment and his alleged offense is not a flagrant violation. The suspension violates the agreement.

The Union argues there is no merit to the employer's claim that Grievant's alleged violation constitutes a flagrant violation for which immediate suspension is allowed. Article 7 contains the list of cardinal sins for which no prior warning is necessary, including dishonesty, being under the influence of intoxicating beverages, recklessness resulting in a chargeable accident, and a catch-all, other flagrant violations. Grievant's conduct was not within these. Mentioning several items in a list and not mentioning other subjects means that the parties intended to exclude the unmentioned subject, citing arbitral authorities. Thus, even if Grievant is guilty of violating the reporting policy, that is not identified as one warranting immediate suspension. Nor is it similar to dishonesty or being under the influence of intoxicants to place it in the catch-all. Grievant was entitled to a warning and lacking that, the suspension must be removed and he made whole.

The Union also argues that Grievant's March 2007 warning does not satisfy the prior warning requirement of Article 7. The 2007 warning letter was his only discipline in 30 years, which is insufficient to justify the February 2009 suspension. The Utility must demonstrate that Grievant had received a warning for the same offense. The warning letter must be for the same type of offense as the incident at issue. The contract requires prior warning for the complaint for which the employee is later suspended or discharged. The contract does not say any complaint or a complaint. A prior warning does not satisfy the type of language in Article 7 unless it is for the same offense as the subsequent infraction, citing arbitral authorities. Prior to February 12, 2009, Grievant had no warning for failure to report equipment damage. The 2007 warning for an unauthorized stop is irrelevant and was not for failure to report damaged equipment. It can't be used to establish the required warning prior to suspension. The employer cannot unilaterally decide the written warning letter requirement is not necessary, citing arbitral authorities. Without a written warning for the same matter in effect at the time, the most Grievant may receive for his alleged violation is a warning.

The Union further argues that Grievant did not violate the employer's accident/damage reporting policy and his suspension therefore lacked just cause. The five day suspension notice and testimony of the Utility Manager shows the suspension was not only for failure to report damaged equipment, but also for failure to lock out the piece of broken equipment. Credible evidence demonstrates Grievant made several attempts to contact a supervisor and that he never received training in locking or tagging out equipment. There was no just cause for suspension. Neither handbook sections 501 and 508 state how much time an employee has to report damage, and simply makes reference to immediately and prompt. Grievant did attempt immediately to notify Tetzlaff of the damage. He went to Tetzlaff's office about 12:25 p.m. but was unable to find him. He went back to his office after his lunch period, but left twice between 12:30 and 1:00 p.m. to locate Tetzlaff. He then became engrossed in his work and temporarily stopped looking for Tetzlaff, with the intention of making him aware before his shift's end at 4:00 p.m. About 2:30-2:45 p.m., well before the end of the shift, when confronted by his supervisor he informed him of the damage. Grievant did not attempt to hide the damage from Babcock, and readily explained that the grinder tool rest broke. This and his undisputed testimony of several attempts to locate Tetzlaff demonstrate he had every intention of notifying a supervisor of the problem, and was not trying to hide his operating the grinder when it broke. The employer did not present any evidence to dispute Grievant's claim he searched for Tetzlaff in his office and the break room on multiple occasions. There was no evidence Grievant was at his desk all afternoon nor did Tetzlaff testify to dispute the claim he was not in his office between 12:20 and 1:00 p.m. when Grievant said he looked for him. Grievant tried to comply with the policy but was unable to do so by 2:30 p.m. His attempt to locate Tetzlaff negates just cause for suspension for failing to notify a supervisor of the damage.

The Union maintains that whether Tetzlaff is actually a supervisor is without consequence. He had been a supervisor and Grievant thought he still was. And he is in charge of ordering equipment, so Grievant's decision to notify him was reasonable. The employee handbook is vague on the identity of whom to report to. One section says the appropriate supervisor; the other says the proper supervisor. The Utility admitted there was no specific direction given as to who the appropriate or proper supervisor was. It suggests it was clear Grievant should notify his own supervisor of the damage. This is not supported by the plain reading of the handbook language. Had the policy intended the employee's direct supervisor it would have said that. It doesn't say that. It refers to appropriate and proper supervisor, indicating the supervisor to report to may not be the employee's direct supervisor. The handbook language can be interpreted differently. Grievant believed Tetzlaff was the appropriate supervisor because he was responsible for equipment, unlike his own supervisor. The Utility cannot fault Grievant for making a reasonable judgment under the circumstances. He made several attempts to notify a person he thought was the appropriate supervisor. Simply because as of two hours after the incident he had not yet spoken with Tetzlaff does not mean he would not have done so before the end of his shift. The facts do not justify a five day suspension.

The Union further argues that the suspension notice identified Grievant's failure to lock and tag the equipment as a second ground for discipline. But the Utility did not have an



established lock out/tag policy at the time of the incident, and Grievant had never been trained in such procedure. In February 2009 there was no such policy; now there is. There were no accompanying locks with the tags on a shelf in the storage area. Burrill, who works in the shop, did not know where the tags were. Kumm didn't know if the power to the grinder was off or whether it was identified as out with the tag. Pacovsky confirmed that Grievant would not have had any training on locking out or tagging equipment, and confirmed that Grievant's failure to lock out the equipment was one of the reasons for the five day suspension. Arbitrators hold that to find just cause the employee must have been aware that the conduct was in violation of a rule or policy, citing arbitral authorities. Grievant had no knowledge of a lock out/tag put policy or requirement in February 2009, so his suspension for violation of a rule of which he had no knowledge therefore lacked just cause. He made several attempts to notify the person he believed was the appropriate supervisor and simply had not been able to make contact with him by 2:30 p.m. This is not grounds for a five day suspension.

The Union argues that the employer cannot rely upon issues not originally identified in the disciplinary notice to justify Grievant's suspension. Grievant admitted his conversation with Geiger about permission was in effect an attempt to provide himself cover if accused of using the equipment without permission. This is irrelevant to the determination of just cause. The Utility did not identify that as grounds for suspension at the time the suspension was issued, nor at any time after it was issued. It can't use it now to bolster its case, citing arbitral authorities. Grievant was never informed that his conversation with Geiger contributed to his suspension. The suspension letter makes no reference to the conversation and it was not raised in the discipline meeting. Arbitral precedent prohibits changing the grounds for discipline after the decision is conveyed to the employee, citing arbitral authorities.

The Union further maintains that a five and a half day suspension was too harsh a penalty under the circumstances. The arbitrator has discretion over the appropriateness of the penalty as an integral part of the just cause decision, citing arbitral authorities. A five day suspension here is not justified where Grievant made several attempts to contact the individual he thought it was appropriate to notify, and simply had not been able to locate him within two hours. The most he is guilty of is not having the same idea of the appropriate supervisor as the Utility management. Under the circumstance his actions are simply not serious enough to justify a five day suspension. There is a responsibility in the arbitration process to determine whether the punishment fits the crime, citing arbitral authority.

The Union requests the discipline be removed from Grievant's records and that he be made whole.

### DISCUSSION

This is a discipline case. Article 7, Section 1 of the parties' collective bargaining agreement states:

No employee who has completed his probationary period shall be discharged or suspended without just cause and without one (1) warning notice of the

except no warning notice is required for discharge or suspension due to dishonesty, being under the influence of intoxicating beverages while on duty, recklessness resulting in a chargeable accident while on duty or other flagrant violations. Discharge or suspension shall be in writing with a copy to the Union and employee affected.

The parties agree that the issue in the case is just cause. The Union argues that Grievant's conduct did not violate any work rule or instructions, it was not flagrant and therefore requires a warning, there was no prior warning that is relevant to this case, and that a five day suspension is out of proportion to any violation that might have occurred. The Utility contends two rules and the Letter of Instruction were violated, flagrantly, and if a prior warning was needed that happened in the 2007 discipline and in the letter of instruction.

The agreement does not define just cause, but both parties argue basically the same two part test for just cause. Generally, just cause involves proof of wrongdoing and, assuming guilt of wrongdoing is established and that the arbitrator is empowered to modify penalties, whether the punishment assessed by management should be upheld or modified. See, Elkouri & Elkouri, *How Arbitration Works*, 6th Ed., p. 948. In essence, two elements define just cause. The first is that the employer must establish conduct by the Grievant in which it had a disciplinary interest. The second is that the employer must establish that the discipline imposed reasonably reflects it's disciplinary interest. See, e.g., MILWAUKEE COUNTY, MA-13866 (Gordon, Nov. 2008). That is the definition of just cause that will be used here subject to the provisions in Article 7 of the parties' agreement.

The first inquiry into just cause is whether the employer has established conduct in which it has a disciplinary interest. In this case there are two rules, or policies, that the Utility has promulgated concerning the reporting of damaged property and the Utility also issued as Letter of Instruction on the same topic. There is no question that Grievant received the rules and saw the Letter in Instruction. The Utility has an interest in the safety of employees and the general public which may be impacted by unsafe or damaged equipment, as well as knowing the condition of its property. The Union does not argue otherwise. The crucial parts of the rules/policies and Letter read as follows:

**501 Safety**

“. . . Employees must immediately report any unsafe condition to the appropriate supervisor....”

**508 Use of Equipment and Vehicles**

“. . . Please notify the proper supervisor if any equipment, machines, tools, or vehicles appear to be damaged, defective, or in need of repair. All damage to vehicles is to be reported on the “vehicle or equipment accident or damage report” form. Prompt reporting of damages, defects, and the need for repairs could prevent deterioration of equipment and possible injury to employees or

**Letter of Instruction: Accident Reporting**

“. . . All employees have a duty to report any accident, injury, equipment damage, property damage, or like incidents of which they may become aware. . . .”

There is no question that on February 12, 2009 Grievant was using a Utility grinder during his lunch break when a tool holder part of the grinder broke off from the rest of the machine. Grievant admits, and the record supports, that the tool rest is a safety feature of the grinder. Although accidental, this is damage to Utility equipment within rules 501 and 508 and the Letter of Instruction. The Utility has a disciplinary interest in Grievant complying with the rules and Letter in these circumstances.

There is an issue raised by the Union as to whether Grievant violated those rules and the Letter. The Union contends that Grievant was trying to notify the person he thought was the appropriate or proper supervisor. He thought that would be the purchasing agent, Tetzlaff who, in the past, had been a supervisor. Grievant stopped to tell him at 12:25, but Tetzlaff was not back from lunch yet. The Union argues that only two hours had passed since the grinder was damaged and the time Grievant told his supervisor, Babcock, about it when asked. The rules don't set a specific time within which to notify. Further, the Union argues that Grievant intended to tell the appropriate or proper supervisor before the end of his shift at 4:00 p.m. and did try twice more between 12:30 and 1:00 p.m. to find Tetzlaff.

The undersigned is persuaded that the Grievant did not comply with the two rules and the Letter of Instruction and that he had more than ample time to do so. He may have thought that Burrill would tell Tetzlaff, which is fact is what happened. But that does not relieve Grievant from the obligation to follow the rules himself and notify the proper or appropriate supervisor. It is clear that before he was asked a question by his supervisor at about 2:45 p.m. he had not brought the matter to the attention of any supervisor or manager. It is difficult to understand how his own supervisor would not be an appropriate supervisor to bring this matter to even if Babcock was not responsible for equipment. Tetzlaff, while not a supervisor in the strict sense of the rules, does have authority in equipment matters. The undersigned does credit Grievant's testimony that he stopped at Tetzlaff's office at 12:25 to report this and Tetzlaff was not there. Both Burrill and Kumm testified that it was after they discussed the matter and Burrill tagged the grinder, a period of about 20 minutes, that Tetzlaff returned from his lunch. This leaves a narrow time period in which Grievant could have returned twice between 12:30 and 1:00 p.m. to look for Tetzlaff. Burrill was on the internet in his office, looking for the tag in a storage area with Kumm, and tagging the grinder during that time. Kumm was also in Burrill's office for a time, looking for the tags in the storage area and later talking to Geiger about the report forms and failure to report during that time. It is possible that Grievant could have been on the first floor looking for Tetzlaff in his office and in the second floor break room during that time without being seen by Burrill or Kumm. But it is also clear that Grievant, not able to find Tetzlaff before 1:00 p.m., did not leave a note or voice mail for him and did not try to contact anyone else. His own supervisor was back at 1:00 p.m. Geiger and Kumm were both there at or before 1:00 p.m. While it is true that the

specific time limit on when to report, Rule 501 says “immediately”. Rule 508 goes on to note that: “Prompt reporting of damages, defects, and the need for repairs could prevent deterioration of equipment and possible injury to employees or others.” Grievant did not report this immediately. Immediately would be to do something right away, not two hours later. This is not a term that has any special meaning other than a plain meaning. According to Webster’s Third International Dictionary, immediately is defined as:

2: without interval of time: without delay: STRAIGHTWAY.

Grievant first mentioned it to his supervisor more than two hours after it happened, and then only after something of a “prompt”. Two hours is not immediate, even if Grievant did intend to report it a supervisor or to Tetzlaff by the end of the day. The rules do not say anything to the effect that an employee has until the end of their shift to report the damage. And it similarly is not prompt as used in rule 508. Here Burrill, Kumm, Tetzlaff, Geiger and Babcock all knew about the incident within about 35 minutes of the event. Grievant did not follow rule 501 and did not follow rule 508. Similarly, he did not comply with the duty to report as set out in the Letter of Instruction.

It is also clear that Grievant did not report the damage on a damage report form as required in rule 508. He did not ask anyone for the form or where it could be found, regardless of to whom the report must be made. Again, other supervisors were in the building and he did not ask them about the form. Kumm was aware the form needed to be used, even if he did not know where one was at first. Geiger, when asked, was able to direct him to the form. Grievant could have asked Geiger, Kumm or Babcock for the form (and reported the matter verbally at the same time). He simply did not even attempt to do this, and violated the rule.

The letter of discipline cited the failure to report the damage a basis for the discipline. But it also cites in the same sentence the failure to mark the equipment as damaged. This indicates that the failure to mark the damaged equipment was also a basis for the discipline. However, there was no formal policy or directive to employees prior to this incident that required them to mark or tag damaged equipment. This was sometimes done, and there were tags that were available and used by Burrill after he and Kumm looked for and found them. The requirement of a tag or marking, however, was formalized later. Rule 501 and rule 508 do not mention marking or tagging damaged equipment. Neither does the Letter of Instruction. With few if any exceptions, it is a fundamental concept of just cause that employee have some prior notice of the type of conduct that is required of them or forbidden before they can be disciplined for not taking certain actions. That is the case here with not marking the equipment and then having that serve as part of the basis for discipline when a marking or tagging policy was not in effect at the time of the damage. Grievant cannot be found to have violated that rule or policy as a basis for being disciplined.

Grievant violated Rule 501, Rule 508 and the Letter of Instruction when he did not immediately and promptly report the damage to an appropriate or proper supervisor. The first

prong of the just cause analysis has been demonstrated by the Utility. However, the parties'

Page 13  
MA-14366

agreement places a condition in just cause in Article 7 Section 1. It requires, for a discharge or suspension, one warning notice of the complaint in writing unless the discharge or suspension is for one of several categories of infractions or is a flagrant violation. In order for this violations to serve as a basis for this discharge, Grievant's violations must have been either flagrant, or he must have received at least one warning of the complaint in writing.

It is clear that Grievant did not receive a written warning of this complaint –failure to immediately and promptly report damage to equipment to an appropriate or proper supervisor–before he was disciplined for it. The Utility argues that the warning requirement is to require progressive implementation of discipline and Grievant had been disciplined previously. The discipline Grievant received in 2007 for stopping by his wife's place of business while on a mail run and without prior approval had nothing to do with equipment or damage, or not reporting damage. The Utility reliance on a general progressive discipline basis to support the 2007 warning as a warning here is simple far too broad a basis to connect the two violations. Progressive discipline could be, and is, applied to a myriad of rule violations or other infractions. That does not warn about any other specific rules or infractions. The clause in Article 7, Section 1 speaks to “notice of the complaint”. Here the complaint is not reporting the damage. It is not making an unauthorized stop on company time. The 2007 written warning contains the statement: “Any further incidences of this nature will result in discipline up to and including discharge”. The nature of the unauthorized stop is not like the nature of not immediately reporting damage to the grinder. It does not serve as an effective warning to not violate rule 501, rule 508, or the later issued Letter of Instruction, or that the type of conduct in the 2007 matter could be considered a violation of those rules or the Letter.

Similarly, the Letter of Instruction cannot serve as a warning here because there is no complaint in that letter against Grievant. Grievant was not involved in the accident and equipment damage which prompted the Letter of Instruction. The Letter of Instruction mentions the potential of discipline for failure to report such accidents. It was not issued to Grievant specifically, but to all employees generally. It was a directive to report damage, not a warning that a violation had occurred on Grievant's part. If such a letter could serve as a warning notice of the complaint to an employee then the mere issuance of one such notice for all rules and policies to all employees would suffice, and that would in turn render the one (1) warning notice of the complaint meaningless as a practical matter.

Grievant did not receive a warning notice of the complaint before he was suspended. There remains the matter of whether such notice is excused in this case because the violations were flagrant. The Union argues that the placement of the phrase “other flagrant violations” in the same sentence as dishonesty, being under the influence of intoxicating beverages while on duty, and recklessness resulting in a chargeable accident while on duty means the flagrant violation must be equivalent to those other types of conduct. It argues the principle that to mention several items in a list and not mention other subjects means that the parties intended to exclude the unmentioned subject. This is the maxim of *expressio unis est alterius*. It could be read that way, and require some outrageous conduct or conduct of a similar nature to those listed serve as the flagrant violation. The Utility argues that the violation was flagrant as it

a clear violation of the reporting requirement. It could be read that way, too. The record is void of any bargaining or past practice to aide in determining which way the clause should be read. As the Utility argues, Grievant left the damaged equipment untagged for others to use with potential safety ramifications. The Utility points out that Grievant even took steps to avoid discovery by a supervisor and failed to acknowledge his action until confronted by a supervisor. The Union retorts that Grievant did try to report the matter to Tetzlaff several times as another reason why this was not a flagrant violation.

The undersigned is persuaded that the failure to report damage violations in this case are not flagrant in either sense of the word. To accidentally break the tool rest from the grinder and not immediately report it is a safety factor, but not of the magnitude as dishonesty, being under the influence of intoxicants while on duty, or recklessness resulting in a chargeable accident. He was not impaired by intoxication and did not violate any laws. Grievant obviously did not falsify any records or reports about the grinder damage. He did not try to hide the fact that the grinder was broken or even that he broke it (as opposed to having permission to use it). Burrill heard the noise, saw the broken parts, and Grievant told him what happened. Clearly this is a situation where everyone could reasonably be expected to know that it was Grievant who broke the grinder tool rest. And even though Grievant did not put a tag or note on the grinder or shut off the power to it, he did pick up the broken pieces and place them in front of the grinder where anyone would see that the part was broken. Burrill did notice the broken parts there when he returned to the shop after his lunch break. This does mitigate the safety factor. It might be a far different situation if no one knew that Grievant had broken the grinder and he left the parts so as to not be readily noticeable. But that this not what happened here.

Although it was a violation not to have immediately and promptly reported the damage to an appropriate or proper supervisor, the lagrant. Flagrant is defined in Webster's Third International Dictionary as:

3: extremely, flauntingly, or purposefully conspicuous usu, because of uncommon evil, unworthiness, unpleasantness, or truculence: glaringly evident: NOTORIOUS.

It is defined in The American Heritage Dictionary, Second College Edition as:

1. Extremely or deliberately conspicuous; shocking: *a flagrant miscarriage of justice*. **Synonyms:** *flagrant, glaring, gross, rank*. These adjectives refer to what is outstandingly bad, evil, erroneous, incapable, or the like. *Flagrant* and *glaring* both stress the conspicuousness of what gives cause for concern or offense. *Glaring* is somewhat more emphatic in suggesting what cannot escape notice, but *flagrant* often makes the stronger implication of wrongdoing as a moral offense rather than as an act of miscalculation or ineptitude. *Gross* suggests a magnitude of offense or failing that cannot be overlooked or condoned. *Rank*, like *flagrant*, sometimes implies an affront to decency. Often *rank* is used attributively as an intensifying term with the force of absolute or utter: *rank folly*.

The record demonstrates that Grievant told Burrill right away what happened and he then placed the broken parts where they would be noticed. He also tried, though not very hard, to notify Tetzlaff, and did not deny or fail to admit what happened when questioned by Babcock. Although a violation of the rules and Letter of Instruction, this conduct does not strike the undersigned as extreme, flaunting, or purposefully conspicuous. And there is no evidence of any uncommon evil, unworthiness, unpleasantness or truculence on Grievant's part. It is not glaringly evident that Grievant was violating the rules when he had actually told Burrill what happened, assumed Burrill would tell Tetzlaff, and feeble attempted to find Tetzlaff. Even though Tetzlaff is not a supervisor so as to be clearly one to whom a report could be made, he is someone in a position of some authority over equipment. As a practical matter there is no reason that anyone would not sooner or later know there was a broken grinder and Grievant had done it. This is not notorious conduct. It is not deliberately conspicuous for the same reasons. Burrill did not know that Tetzlaff was not notified until Tetzlaff actually returned from lunch. Grievant could not have notified him by then. Babcock knew about the incident by about 1:00 p.m. and that it had not been reported by Grievant. Yet Babcock waited over an hour and a half to address the matter with Grievant. Rather than this being some type of moral offense, the failure to immediately and promptly report the damage is more an act of miscalculation or ineptitude. It is not flagrant.

The Utility acknowledges that Grievant was not disciplined for his attempt to have Geiger say he had given him permission to use the grinder when in fact Geiger had not. That is something that developed after Babcock had talked to Grievant about the damage. It does not go to reporting the damage itself. While the situation does undermine Grievant's credibility, and that can have an impact on accessing whether he really tried to notify Tetzlaff, the undersigned is persuaded that did try to report it to Tetzlaff primarily because Grievant had told Burrill how the machine broke, and there is no practical way that it would not be generally known that it happened that way. There would be no reason for him not to tell Tetzlaff, who would in all reasonable likelihood, and in fact did, find out about it from Burrill anyway.

Because Grievant's violations were not flagrant and because he had not received a prior warning notice of the complaint, Article 7 Section 1 of the collective bargaining agreement provides that he may not be suspended. Accordingly, the second prong of just cause limits the discipline that the Utility can impose to reflect its disciplinary interest. The two rules/policies about immediate and prompt reporting of damaged equipment, verbally or with the required form, were violated and the Letter of Instruction was not followed. Here, the Utility did take into account that this was a second discipline in two years. The record also demonstrates that Grievant has an otherwise unblemished employment history with the Utility of 30 years. Progressive discipline considerations, which the Utility's argument professes to admire, limited by the specific contract language here, would limit discipline to a written warning. Given Grievant had received a prior written warning, albeit for a different type of violation, a second written warning is not excessive in this case and does reasonably reflect the disciplinary interest, which does have some safety implications.

The Utility has established conduct in which it had a disciplinary interest and just cause to impose discipline. The discipline available to reflect that interest is limited to something less than a suspension. While there is just cause for discipline, there is not just cause for the suspension. There is just cause for a written warning. Accordingly, based on the evidence and arguments in this case I make the following

**AWARD**

1. The grievance is denied in part and sustained in part.
2. The discipline shall be reduced to a written warning.
3. The suspension will be removed from Grievant's personnel records and he shall be made whole for the wages and benefits lost while on the suspension.

Dated at Madison, Wisconsin this 11<sup>th</sup> day of November, 2009.

Paul Gordon /s/

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Paul Gordon, Arbitrator



