BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF WAUSAU

and

CITY OF WAUSAU DEPARTMENT OF PUBLIC WORKS
LOCAL 1287, AFSCME, AFL-CIO

Case 137
No. 68766
MA-14341

Appearances:

Mr. Dean Dietrich, Attorney at Law, Ruder Ware, 500 First Street, Suite 8000, Post Office Box 8050, Wausau, Wisconsin, 54402-8050, appearing on behalf of City of Wausau.

Mr. John Spiegelhoff, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1105 East 9th Street, Merrill, Wisconsin, 54452, appearing on behalf of City of Wausau Department of Public Works Local 1287, AFSCME, AFL-CIO.

ARBITRATION AWARD

City of Wausau ("City") and City of Wausau Department of Public Works Local 1287, AFSCME, AFL-CIO ("Union") are parties to a collective bargaining agreement dated January 1, 2007, through December 31, 2008 ("Agreement"). The Agreement provides for final and binding arbitration of disputes arising thereunder. On April 1, 2009, the Union filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning disciplinary action taken against the Grievant. In response, the Commission supplied to the parties a panel of arbitrators, from which the undersigned was selected. A hearing was held on July 28, 2009, in Wausau, Wisconsin. At the parties' discretion, there was no transcript of the proceeding made. Post-hearing initial and reply briefs were filed and exchanged by October 14, 2009, whereupon the record in this matter was closed.

Now, having considered the record as a whole, the undersigned makes and issues the following award.

ISSUE

The City and the Union stipulated that the following issue is to be addressed by the arbitrator:

Whether the City violated the Agreement when it terminated the Grievant on February 12, 2009? If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 5 – MANAGEMENT RIGHTS

The City possesses the sole right to operate City government and all management rights repose in it but such rights must be exercised consistently with the other provisions of this contract. These rights include but are not limited to the following:

A. To direct all operations [*sic*] City government.

B. To hire, promote, transfer, assign and retain employees in positions with the City;

C. To suspend, demote, discharge and take other disciplinary action against employees for just cause;

D. To relieve employees from their duties because of lack of work or other legitimate reasons;

E. To maintain efficiency of City Government operation entrusted to it;

F. To take whatever action is necessary to comply with State or Federal law;

G. To introduce new or improved methods or facilities;

H. To change existing methods or facilities;

I. To contract out for goods or services. Whenever possible, the Employer shall provide the Union a reasonable opportunity to discuss contemplated subcontracting that would result in the layoff of bargaining unit personnel prior to a final decision being made on such subcontracting.

J. To determine the methods, means and personnel by which such operations are to be conducted;

K. To take whatever action is necessary to carry out the functions of the City in situations of emergency.

The Union and the employees agree that they will not attempt to abridge these management rights and the City agrees it will not use these management rights to interfere with rights established under this agreement or for the purpose of undermining the Union or discriminating against any of its members.

Any dispute with respect to the reasonableness of the application of said management rights with employees covered by this agreement (see Exhibit 'A' for a complete list of these employees) may be processed through the grievance and arbitration procedures contained herein, however, the pendency of any grievance or arbitration shall not interfere with the right of the City to continue to exercise these management rights.

ARTICLE 35 – RULES OF PERSONAL CONDUCT FOR EMPLOYEES

Rules of City employees established by the City are hereby agreed to by the individual employees and the Union. Any other work rules which the City shall establish shall be subject to the grievance procedure based upon their reasonableness. The work rules set forth in this agreement are as follows:

. . .

N. Discipline or Discharge: The City agrees that no employee in the bargaining unit represented by the Union will be disciplined except for just cause. An employee may appeal any discipline or discharge cases through the grievance procedure.

. . .

BACKGROUND

The Grievant began employment with the City on December 8, 2003. For the duration of his employment, he worked in the City's Department of Public Works ("Department") as an Equipment Operator 1, an entry-level position that performs general labor. Although normal working hours in the Department are from 7:00 a.m. to 3:00 p.m., Monday through Friday, snow removal needs in the winter sometimes require the Department to "float" its employees to a third shift from 11:00 p.m. to 7:00 a.m.

During the winter of 2008-2009, for about six weeks leading up to the first week of February, the Grievant had been performing third-shift snow removal duties on a consistent basis. The Grievant's primary duty on the snow removal shift was to haul snow in what is known as a "tandem" dump truck. The Grievant would drive the truck to where snow was

being removed, have the truck filled with snow, and then transport the load to a location that had been designated by the City for dumping. The Grievant would repeat this pattern through the shift, until the snow removal work was completed.

When working a snow-removal shift, Department employees are required to report certain data on their time cards. First, they are required to write down how many hours they work on a shift, so they can be compensated accordingly. Second, they are required to record certain work accomplishments, in terms of the kind of material they were working with, the manner in which they were working with the material, and the quantity of material they processed. When operating the tandem, for example, the Grievant would report on his time card that he was working with snow (as opposed to salt or sand), that he was hauling it (as opposed to some other activity such as plowing), and the number of loads of snow he took to the dumping location. The work accomplishment information reported on employee time cards is later incorporated into operational reports which are given to the City's Mayor and Director of Public Works for the purpose of tracking resource use and costs.

The testimony offered at hearing in this matter revealed differences in understanding as to how exact the work accomplishments data reported on time cards should be. Don Skare is the City's streets superintendent who generally manages employees and workloads in the Department. Skare indicated that it is the City's expectation that such statistics are reported with complete accuracy. Skare testified that Department employees are trained when they are hired as to how to keep track of this information and report it on their time cards. The City also produced evidence indicating that the importance of consistently and accurately reporting work accomplishment data is periodically discussed at employee meetings. The subject was included, as follows, on the agenda for an employee 2006 "Winter Kickoff" meeting:

> **PAPER WORK** – View the handout of the properly filled out time card. Fill out the time card for the work that you did with the appropriate work order and the right accomplishment measure. If you used sand during the shift make sure that the amount is recorded as well. ***Record all numbers, plow-wing-sander-truck on your time cards.***
>
> Accomplishment for plowing is = (0) Per Storm (Sheila will enter)
> Accomplishment for sanding is = Cubic Yards of sand used
> Accomplishment for hauling snow = Cubic Yards of snow removed
>
> Record all salt usage or all materials for that matter. Brine, Sand, etc.…

This agenda was not handed out to Department employees at the meeting, but it was posted on a Department bulletin board. The subject also appeared on the agenda for an August, 2008 meeting and again on an agenda for a February, 2009 meeting. The agenda item for the February, 2009 meeting read as follows:

> **Accountability on Time-Sheets:** Use correct PW numbers when filling out time sheets, hours worked, sand or salt used, snow hauled. This isn't new stuff – we've streamlined work orders already but we will continue to adjust or modify work orders, but we still need to be consistent. (Sh-t in Sh-t out) We need these numbers to be correct or no one will trust our figures for anything.

The Grievant attended the meetings at which these matters appeared on the agenda.

Al Mathwich is the lead worker on the third shift and responsible for running the snow removal crew. Mathwich testified that work accomplishment data is not regarded by him or most others on the third shift as something that has to be reported with absolute accuracy. Mathwich's view is that the top priority is to get the snow removal job done, and he simply did not understand that perfect work accomplishment reporting was a significant issue. Mathwich and the Grievant both testified that it is known on the third-shift that there are a couple employees who actually track their work accomplishments through the course of a shift, and the other employees simply estimate their accomplishments at the end of the shift based on what these individuals put down on their time cards. The Grievant acknowledged at hearing that he typically estimates his work accomplishments this way.

For the past two years, the Grievant has served as the vice president and chief steward of the Union. In that capacity, he assists with disciplinary matters involving Union members. He testified that he has never known of a situation in which a bargaining unit employee has been disciplined for reporting an inaccurate work accomplishment on a time card.

In early 2009, Skare noticed that the Grievant had been reporting more than other employees for work accomplishments, while supervisors had been asserting that less work was being accomplished. Around that same time, other Department employees were approaching Skare and stating that some of their co-workers were not doing their jobs. The Grievant, along with one other employee, was the subject of most of the complaints. Based on this information, Skare decided to attach a GPS device to the City truck that was being operated by the Grievant. A GPS device is designed to track and record data indicating the whereabouts of any vehicle to which it has been attached. It does so by identifying, on a minute-to-minute basis, the location of a vehicle, whether the vehicle is moving, and the duration of all stops. Without the Grievant's knowledge, a GPS device was attached to his assigned truck for four consecutive shifts, from February 2, 2009, through February 5, 2009. The Grievant's truck apparently was the only City vehicle for which GPS data was gathered for four straight days during that period of time. Although the City attached a GPS device to the vehicle operated by the other Department employee who was the subject of a high number of employee comments, that device was rotated, along with other GPS units, among other City vehicles as well.

The City has been using GPS devices on its vehicles since about 2001. Union representatives knew in 2001 that the City was using GPS, but initially were under the impression that the devices only were being used only on "patch" trucks, which are used to fill potholes in streets, for the purpose of defending the City against claims citizens sometimes

make regarding damage to cars caused by potholes. Skare testified that not long after the City started using GPS, however, it began attaching the devices, for a variety of purposes, to its other vehicles as well, including pickup trucks, sign trucks, plow trucks, and tandem and tri-axle dump trucks. Skare acknowledges that the Union may not have known right away that the City had expanded usage of GPS devices to these other vehicles, but he testified that it was apparent that bargaining unit members had developed an understanding that GPS devices were being used, because the subject occasionally came up in questions from employees at staff meetings. Joe Blair, the president of the Union, asserted at hearing that the Union did not know that GPS devices were being attached to vehicles other than patch trucks, but acknowledged that the news was not surprising to the Union – he stated that it was known that a time was coming when the City would begin to use such technology. According to Blair, the surprise was in learning, when the incident concerning the Grievant arose in 2009, that the information garnered by the City from the GPS devices could be used for disciplinary purposes. Blair testified that he had a conversation with Skare in 2001, in which Skare represented that the GPS devices were a tool to protect the City from liability and specifically assured Blair that GPS data would not be used to discipline Department employees. Blair asserted at hearing that, if Skare had told him otherwise, Blair would have informed other members of the bargaining unit that they could face discipline based on the information gathered from the GPS units and the Union would have demanded to bargain the impact of the use of GPS units for such purposes. Skare, on the other hand, denied at hearing having stated to Blair that GPS data would not be used for disciplinary purposes. Skare testified that he told Blair during the 2001 conversation that any misconduct uncovered through GPS monitoring would be addressed by the City.

On the afternoon of February 10, 2009, the Grievant was summoned to a meeting with certain Department managers, including Skare. Blair also attended the meeting, as the Grievant's union representative. At that meeting, the City confronted the Grievant with information regarding the Grievant's work activities that had been gathered over the four days of GPS monitoring during the prior week. Based on the GPS data, the City had concluded that the Grievant had committed certain work rule violations. The Grievant was suspended at the conclusion of the investigatory meeting. On February 12, 2009, the City sent correspondence to the Grievant signed by the Director of Public Works and Utilities, which set forth three bases for termination of the Grievant's employment:

> Effectively [*sic*] immediately, I hereby terminate your employment with the Department of Public Works. I conclude after further investigation, that your conduct warrants discharge. Your conduct includes sleeping during work hours (theft), falsifying records and other ongoing violations contained in your employee record.

The first basis for the Grievant's discharge, "sleeping during work hours (theft)", relates to the Grievant's activities on the night of February 3, when he exceeded his break time. The Agreement provides for a ten minute break during every four hours of a shift. Third shift snow removal employees usually combine their two ten-minute breaks into one twenty

minute break, which they typically take around 3:00 in the morning. It is undisputed that it is permissible for employees to nap while on break. Due to the late-night nature of snow-removal work and the safety concerns that accompany operating heavy equipment, the City recognizes that it can be necessary to sleep during breaks. The evidence also shows that it is common knowledge among third-shift employees that they are allowed to take quick naps even during non-break times, if doing so is necessary for safety reasons and does not become habitual. Mathwich testified that, as lead worker, he tells employees, "If you're tired to the point where you may fall asleep when driving heavy equipment, pull over, take a short nap, and continue your duties". To be able to sleep during a break time, it is sometimes necessary and not uncommon for City employees to seek out a remote location to rest. The City does not have a policy that prohibits employees from leaving the worksite during break-times. Employees are permitted to go to the store to get coffee, go back to the Department shop, or even find a quiet place to rest. The only rule is that employees cannot travel all the way across town – if they are working on the east side of the City they are not permitted to travel to the west side during a break. The GPS data gathered by the City on February 3 showed that, at his break-time, the Grievant drove his City truck to a remote parking lot. The Grievant remained parked in that lot from 3:03 a.m. to 4:03 a.m., exceeding his twenty-minute break by forty minutes.

The parties disagree as to how forthcoming the Grievant was when confronted during the meeting of February 10 regarding the extended break. Notes taken by a City management representative during the meeting describe the exchange as follows:

> [Skare] shows [the Grievant] and [Blair] the GPS report and asks [the Grievant] to explain. [The Grievant] says he can't remember, doesn't know. [Skare] then explains the area he is talking about. [Skare] asks [the Grievant] if he knows were [*sic*] Anderson + Johnson old office is. [The Grievant] says he doesn't know were [*sic*] that is. [Skare] then draws a map of the area + [the Grievant] looks at [Skare] with a confused look and shakes his head no and says he doesn't know were [*sic*] that is. [Skare] then tells him that's were [*sic*] [the Grievant's] truck was on the GPS. [The Grievant] then says maybe he had taken a break there. [Skare] then asks him about the amount of time that was spent there an [the Grievant] replies "I don't know, I must have fallen asleep and didn't wake up." "I always take break there."

The Grievant asserted that he was not trying to be uncooperative during the meeting, but that when Skare described and then drew a map of the lot where his truck had been parked on February 3, he simply did not immediately recognize the location. Testimony at hearing established that the "Anderson and Johnson" business referenced by Skare during this conversation was already no longer in operation when the Grievant began working for the City. The Grievant also testified that he did not immediately report that he had slept during the meeting of February 10, because he was worried about getting in trouble. Skare described Grievant's responses at the meeting as evasive. Skare asserted that it took approximately forty-five minutes to get the Grievant to admit that he had overslept on his break. Skare testified that the Grievant's uncooperativeness at the February 10 meeting is part of what the City considered in making the decision to terminate his employment.

The second basis set forth in the Grievant's discharge letter provides that he was terminated from City employment for "falsifying records". For each of the four days during which the Grievant's truck was being monitored by GPS, he reported on his time card that he had worked full eight-hour shifts. The City's notes from the February 10 meeting indicate that the City discussed with the Grievant GPS data that indicated that the Grievant's truck was idle at seemingly random, somewhat extended periods of time during these shifts, with no apparent explanation. The GPS device attached to the Grievant's tandem reported the following: on February 2, the Grievant's truck was at the DPW facility from 12:25 to 1:16 a.m. and from 3:10 to 4:00 a.m.; on February 3, the Grievant's truck was stopped from 1:04 to 1:40 a.m.; on February 4, the Grievant's truck was stopped from 1:28 to 1:58 a.m.; on February 5, the Grievant's truck was stopped from 2:08 to 2:25 a.m., from 2:53 to 3:30 a.m., from 3:35 to 4:09 a.m., and from 4:15 to 4:40 a.m. The Grievant and Blair asserted during the course of discussion at the February 10 meeting that there are legitimate reasons for a truck such as the one operated by the Grievant to have breaks in activity during a shift. Sometimes, for example, there is a need to assist another employee and there are equipment break-downs that can halt activity.

The allegation that the Grievant had falsified records also included the City's determination, based on the GPS data, that the Grievant had inaccurately reported his work accomplishment data on his time card. On February 2, the Grievant logged that he had hauled fifteen loads of snow; the GPS unit indicated that he had hauled eight loads. On February 3, the Grievant reported that he had hauled thirteen loads of snow; at the point when the GPS unit went dead on that shift at 5:15 a.m., it showed that the Grievant had hauled eleven loads. On February 4 the Grievant reported that he had hauled sixteen loads of snow; when the GPS unit stopped recording at 3:10 a.m., it indicated that he had hauled five loads. On February 5, the Grievant reported that he hauled twelve loads; the GPS data indicates that he hauled ten loads. The City asserts that the GPS data gathered around this time concerning loads other employees were hauling matched what they were reporting on their time cards

Finally, in its termination letter of February 12, the City cites as a basis for the Grievant's discharge "other ongoing violations". The Grievant had a disciplinary history with the City. Prior to his discharge, the Grievant's most recent discipline had occurred on January 8, 2009, when he received a two-day suspension for having had a non-employee passenger riding around with him on a regular basis in his City truck during snow removal operations. The remainder of the Grievant's disciplinary history with the City, as well as the content of his annual performance evaluations, is discussed further below.

The Union's grievance with regard to the Grievant's discharge led to the present proceeding. The parties have stipulated that this matter is properly before the arbitrator.

DISCUSSION

To support its assertion that the Grievant slept on the job and falsified records, the City relies on the data it gathered from the GPS device attached to the Grievant's truck. At the

outset, it is necessary to address the extent to which the GPS evidence presented by the City will be taken into consideration. The Union argues that such evidence should not be considered for two basic reasons. First, it asserts that the Union lacked sufficient notice that the City was using GPS technology – that it did not know the extent to which the City was conducting GPS monitoring, that it was not known that a GPS device had been attached to the truck the Grievant was driving, and that it understood that data gathered from a GPS device would not be used for disciplinary purposes. Second, the Union contends that the City has failed to establish that its GPS devices are reliable.

I have concluded that it is appropriate to take into consideration some of the GPS data submitted by the City in this case. It is clear from the record that the Union was not completely in the dark as to the City's use of GPS technology. Blair acknowledged having learned, through a conversation with Skare in 2001, that the City owned and was using GPS devices. Although the Union contends that it understood that the devices were only being used on the City's patch trucks, Blair testified that the Union knew the technology was on its way in and, therefore, was not particularly surprised when he learned that GPS devices were being attached to other trucks as well. Further, Skare provided credible testimony indicating that the City's use of the GPS devices had been the subject of employee questions on occasion, including at staff meetings, and the employees therefore must have had an awareness that such devices were being used.

The real dispute here is whether the Union had notice that data gathered from the GPS devices could be used for disciplinary purposes. The Union asserts that the conversation between Blair and Skare in 2001 should be understood as a guarantee by the City to the Union that GPS data would not be used for disciplinary purposes. As noted, there is significant discrepancy between Blair and Skare as to the substance of that conversation. Blair testified that Skare reassured him that GPS data would not be used for disciplinary purposes. Skare asserts, on the contrary, that he told Blair that any misconduct detected through GPS would be addressed by the City. Both witnesses were credible, which makes it difficult to resolve this conflict in their testimony. In the end, however, it is difficult to give much credence to the Union's larger claim that it had developed an understanding, based on a comment allegedly made by Skare in 2001, that the City had a policy providing that GPS data would not be used for disciplinary purposes. GPS devices, even if originally used for some non-disciplinary purpose, invariably gather data regarding employee activity. Knowing, as it did, that the City owned GPS devices and was using them on employee-operated vehicles, it would have been significant for the Union to have established that the City did not intend to use the data gathered from such devices for disciplinary purposes. Yet the Union was unable to point even to a single follow-up conversation that occurred, between 2001 and 2009, in which it attempted to formalize or even reiterate or confirm the commitment it now claims it relied on. This is particularly surprising given the fact that the subject of GPS monitoring apparently came up periodically during this period of time in staff meeting discussions. Considering these factors, I am not constrained by the Union's assertion that it understood that the City would not use GPS monitoring for disciplinary purposes.

Even in the absence of such a policy, there is a wide spectrum of opinion regarding whether employee surveillance accomplished through a GPS device requires a special kind of notice to employees before it can be used as a basis for discipline. Some have described GPS as merely a more efficient means of visual monitoring, while others believe it is much more intrusive because, unlike visual monitoring, it is computer assisted and has the ability to store information in a database for long-term retrieval without requiring human supervisory control. *See*, *e.g.,* "The Impact of Emerging Technologies in the Workplace: 'Who's Watching the Man (Who's Watching Me)?'", 25 Hofstra Lab. & Emp. L.J. 355 (William A Herbert and Amelia K Tuminaro). In BEVERAGE MARKETING, INC., 120 LA 1388 (Fagan, 2005), a case cited here by the Union, the arbitrator opines that the point at which GPS devices are installed would be a good time for a company to provide notice to its employees that they could be subject to such surveillance, but the fact that Beverage Marketing had not done so did not seem to be dispositive in the arbitrator's ultimate decision to reduce the discipline at issue in that case. Given several specific factors that are present in the case before me, I have concluded that the GPS monitoring conducted by the City in relation to the Grievant was a fair, albeit technologically advanced, method of supervisory observation, despite the fact that the City did not notify the Union that is was using such a device on the Grievant's truck or that the data could result in disciplinary action.

First, there is no aspect of this case that suggests that the Grievant had a reasonable expectation of privacy such that notice would have been warranted. As a general matter, an employer's policies will shape an employee's reasonable expectations in this area. CITY OF ONTARIO, CALIFORNIA, ET AL. V. QUON ET AL, NO. 08-1332, 2010 WL 2400087 (June 17, 2010). There was no provision in the Agreement or any other policy that guaranteed advance notice of or barred monitoring by the City with a GPS device or any similar technology. Further, the Grievant was driving a City-owned truck, in which he could not have had a legitimate expectation of privacy. It was a utility vehicle that he was not allowed to drive home during non-working hours or use for any other personal purpose. Indeed, the month before the GPS evidence was gathered, the Grievant had been suspended for two days for having a friend drive around with him in his truck. That discipline should have sent a clear message to the Grievant that there was no legitimate expectation of privacy in such a vehicle.

I also am persuaded that the GPS monitoring was fair because the City did not store the data it gathered in relation to the Grievant for a long period of time. The City revealed the GPS data on which it was relying in the meeting of February 10, within one week of the period when the information was recorded. Thus, although the City did not notify the Grievant that a GPS device had been attached to his truck, the secrecy of that approach was balanced out by the fact that the City revealed the data to the Grievant soon enough that he had a meaningful opportunity to recall the particular events that had been recorded and respond to the resulting allegations.

Obviously my finding in this regard is at odds with the Union's contention that the City stockpiled its evidence against the Grievant. I do not believe that compiling GPS data from

February 2 through February 5 and then presenting the Grievant with that data at a meeting on February 10 constitutes stockpiling. The City has persuasively argued that it wanted to monitor the Grievant's actions over a period of several days, to ensure that any information it uncovered was not anomalous. The fact that the Grievant apparently committed several acts of misconduct in that relatively short period of time does not automatically indicate that the City was sitting back and letting offenses pile up.

I am also not persuaded that the City was targeting the Grievant unfairly with GPS monitoring, as the Union suggests. The evidence does show that, while the City was placing GPS units on other City vehicles, the Grievant's was the only vehicle that was being monitored on a consistent basis for that period of several days. Based on this evidence, the Union asserts that the City had its "eye" on the Grievant and was intent on monitoring him long enough to make a case against him. The Union's position here suggests that an employer must monitor every employee with a GPS device before it can legitimately rely on any GPS evidence, and I am simply not persuaded that such a stringent requirement is appropriate. Further, although it seems clear in this case that the City was specifically monitoring the Grievant's conduct, the record does not support the contention that he was being targeted unfairly. Skare testified that he had noticed that the Grievant was recording more for work accomplishments than any other employee. Yet the City had received complaints from other employees about the Grievant not doing his job. Though the City also received similar complaints regarding another employee and the record shows that that employee apparently was not monitored as consistently as the Grievant, it is fair to note that the Grievant also had just been disciplined one month before for driving a friend around in his City truck. To the extent that the City was subjecting the Grievant to a higher level of scrutiny, it seemingly had objective reasons for doing so. Further, the evidence does not support the Union's suggestion that the City laid in wait until the Grievant committed some misconduct. The City did not have to wait for anything, as the misconduct for which the Grievant was disciplined began, as discussed below, on the first day of GPS monitoring.

Finally, I reject the Union's contention that the City's GPS units should be deemed unreliable. The Union suggests that the City did not take adequate steps to verify the reliability of the units it purchased, because it based its decision merely on some literature Skare read and some conversations Skare had with others, such as representatives of the City Police and County Sheriff's Departments, who had experience with the units. I am not willing to establish a certain amount of due diligence that had to be performed by the City before it could purchase a GPS device that would be deemed reliable in the context of an arbitration hearing. Nor am I willing to conclude that GPS evidence must be supported by expert testimony to be admissible. There was no apparent problem with the GPS data the City gathered. Although, as the Union points out, the GPS units occasionally went dead for one reason or another, such occurrences seem to be accurately depicted in the data and therefore are not a cause for concern. The Union suggests that the data was not reliable because the icon of the Grievant's truck, when viewed on a computer at hearing, was "skipping" around on the screen. There was a certain amount of jerking in the movement of the icon, but it appeared nevertheless to move along a discernable route. The fact that its motion was not perfectly fluid does not persuade me that the evidence should be discounted.

Turning to the merits of the termination, a number of factors have persuaded me that the City has met its burden to show that it had just cause to terminate the Grievant's employment. First, I am persuaded that the Grievant knowingly falsely reported his work accomplishments. The Grievant reported that he transported fifteen loads of snow on his shift that started on the night of February 2. In fact, he transported eight. It is absolutely clear from the evidence that it is not uncommon for the majority of the third-shift crew to estimate their work accomplishments. Given that evidence, I would not be offended by some discrepancy between an employee's reported number of loads and actual number of loads. It is not particularly bothersome to me under these circumstances, for example, that the Grievant reported having hauled twelve loads on February 5, when he in fact hauled ten. The fact that the Grievant's reported loads on February 2, however, are nearly twice the number of his actual loads, undermines any claim that the Grievant was merely estimating as others do. Rather, it appears that he was exaggerating to make it look like he did a full day's work when he must have known that he did not. Further, although the GPS unit went dead and therefore did not provide reliable data for the night of February 3, it is undisputed that the Grievant misreported his work accomplishments on that shift as well. He testified at hearing that even though he was on break for an hour rather than twenty minutes, yet he simply indicated that he had hauled the number of loads that he thought would be consistent with an average shift, because he was afraid that he would otherwise get in trouble for having slept on the job. Even considering the relaxed attitude taken by the third-shift crew toward recording work accomplishments, the record shows that the City had repeatedly stressed the importance of such requirements at employee staff meetings, and the Grievant had to have some idea that the instances in which he was falsely reporting such data could subject him to discipline.

The Union takes issue with the fact that the City did not question the Grievant during the February 10 meeting regarding the allegedly misreported work accomplishments. According to the Union, if the City had raised this subject at the meeting it would have learned that third-shifters routinely estimate their load counts. Again, given my conclusion that the Grievant was not merely estimating his work accomplishment numbers, I am not persuaded that the failure on the City's part to raise that subject at the meeting makes any difference.

It also appears to me as though the Grievant had a habit of taking unauthorized breaks during his shift and not reflecting the loss of hours on his time card. As a preliminary matter, it is necessary to address the Union's contention that this alleged conduct was not a basis for the Grievant's discharge and therefore should not be considered in the just cause analysis. The Union asserts that there were three bases for the Grievant's discharge: sleeping on the job, falsely reporting his work accomplishments, and other ongoing violations. It argues that the City's discussion in its post-hearing submissions regarding any unauthorized break by the Grievant, beyond the one of February 3 during which he was found to have been sleeping, is an effort on the City's part to bolster its case against the Grievant post-discharge. The record, however, does not support this contention. The City's notes from the February 10 investigatory meeting show that there was discussion at that meeting regarding the repeated breaks in activity reflected by the GPS data for those days in February. Further the termination letter issued to the Grievant on February 12 states generally that the conduct for which the Grievant was being

discharged included "falsifying records". It does not, as the Union asserts, provide specifically that the Grievant was being discharged only for falsely reporting work accomplishments. The "records" the Grievant was keeping were his time cards, on which he was reporting both work accomplishments and hours worked. It is apparent that the City compared all of the information on the Grievant's time cards with the GPS data, drew conclusions as to what the Grievant was up to during his shifts, and used this as a basis for his discharge. Finally, because the Grievant had a full opportunity to address the allegations regarding his allegedly unauthorized breaks at the investigatory meeting and at hearing, there can be no claim that the Grievant was prejudiced by the City having raised this issue in its post-hearing arguments.

As to the substance of this charge, it is difficult to avoid the conclusion that the Grievant was taking unauthorized breaks. On eight occasions over the four days during which the Grievant was being monitored, the GPS indicates that his truck was not moving for periods of, at a minimum, fourteen and, at a maximum, fifty-one minutes. These breaks in activity occurred in addition to the Grievant's recorded break time or at a time when a break would not typically be taken. The Union's argument is that no one actually saw what the Grievant was doing and there are many legitimate reasons why a truck could be stopped for an extended period during snow removal activities. Sometimes there are equipment breakdowns, and other times there is a need to assist another employee. The problem with the Union's argument is that it never goes beyond generalizations. Over the period of four days, the Grievant's truck was stopped for no apparent reason for a total of approximately four hours, and the Grievant was not able to provide any evidence relating to a single actual justification. The Union argues that the City only asked the Grievant for such details at hearing, nearly five months after the incidents occurred and too late to recall an exact explanation. In fact, however, the Grievant also was asked about the stops within one week of when they occurred, at the February 10 meeting. That meeting presented the Grievant with a reasonable opportunity to recall any relevant events, but the Grievant and Blair provided mostly general, seemingly hypothetical explanations. The exception was that the Grievant apparently indicated to Skare that there was a specific equipment breakdown on one of the nights that kept him at the shop, but a Department mechanic could not recall when asked by Skare that any such breakdown had occurred or that there was any need for a shop repair. In the end, the number of stops and the complete lack of explanation regarding this activity is sufficient circumstantial evidence to allow one to conclude that the Grievant periodically spent time not working when he should have been.

As to the charge that the Grievant slept on the job, there is no dispute that the Grievant was guilty of such conduct. The question regarding the sleeping incident is whether the Grievant was "nesting" or inadvertently fell asleep on the job. It is well-established and acknowledged by the parties that arbitral law recognizes a difference. At first glance, the evidence does not automatically suggest that the Grievant was nesting. The City has a policy that permits employees on third-shift snow removal duty to sleep during break-times. Indeed, Al Mathwich, the lead-worker, told employees that they are permitted to sleep even outside of break-times, when it is absolutely necessary to do so for safety reasons. Further, with some limitations not applicable here, City employees are allowed to take breaks in locations of their

own choosing. If he intended to rest, it is not surprising that the Grievant would seek a somewhat isolated location to do so. Indeed, the Grievant indicated that he often took breaks in the parking lot where he was located on February 3. The sleeping incident only becomes suspect – and the Grievant becomes more culpable – when viewed against the backdrop of the Grievant's apparent repeated efforts to get away with doing less than a full-day's work. In light of that conduct, it was reasonable for the City to have drawn the conclusion that the Grievant pulled over and went to sleep with little regard for when he was going to wake up again.

Obviously, the Grievant was the only one in the parking lot on the night of February 3. His characterization of the sleeping incident as an inadvertent event, however, is not reliable, because the Grievant's credibility is harmed by his apparent inclination to commit wrongdoing and then deny having done so. When questioned about the extended break at the February 10 meeting, the Grievant seemed to do his best not to acknowledge what had occurred. It is understandable that he might have been a little confused in the beginning of the meeting as to the incident being discussed – he may legitimately not have known where the "Anderson and Johnson" office building was. It is also understandable that one feels a natural inclination to deny wrongdoing, at first. Still, it took the Grievant so long to come around to acknowledging his conduct at the meeting that it was clear that he was making every effort to avoid doing so. At hearing, the Grievant testified that he woke up from having overslept and exclaimed to himself, "Holy shit! It's late! I need to go!" He also indicated that this had been the only time he had ever overslept on a break and he was afraid of getting in trouble. Given the reportedly unprecedented, traumatic nature of the event, it is difficult to believe that the Grievant's recollection was not keener at the meeting that occurred the following week. Even when the Grievant finally acknowledged the incident, he barely accepted responsibility, stating, "I don't know, I must have fallen asleep and didn't wake up".

Moreover, at hearing the Grievant came across as a person who, consistent with the City's portrayal, fosters the belief that he can get away with wrongdoing. The Grievant provided testimony regarding the two-day suspension he had received in January of 2009 for having a friend ride around in his dump truck. The Grievant testified that he did not know the City had a policy against such behavior. Yet when the Grievant was asked why, if he did not know there was such a policy, he would then have his passenger duck down below the truck windows when passing another City employee, he responded simply, "I don't know". While the Grievant's testimony may have been technically correct – it is possible that he did not recall that Department employees had been told repeatedly that passengers were not allowed to ride in City vehicles – it is clear that the Grievant had some idea all along that he was breaking the rules. His unwillingness at the hearing to be forthcoming with regard to this issue further harmed his credibility.

The Union asserts that the Grievant's discharge was inappropriate given what it characterizes as a relatively short disciplinary history of two written warnings and a two-day suspension. The City argues that the Grievant's personnel file contains documentation of eleven disciplinary incidents. The pertinent question with regard the Grievant's disciplinary history is whether it was sufficient to forewarn the Grievant that his conduct in February of

2009 could result in the discharge of his employment from the City. I think it was. While the parties can debate endlessly as to whether the Grievant's various disciplinary events were sufficiently formal or documented to put the Grievant on notice, I believe there is no question that he had sufficient notice after January 8, 2009. On that date, the Grievant received the two-day suspension for having had the non-employee passenger accompanying him in his City truck during snow removal operations. The Union does not dispute that this event constituted a formal discipline. The letter of discipline provided to the Grievant stated the following:

> You have been the subject of prior discipline including counselings and reprimands for workplace infractions and inappropriate behavior. This workplace infraction is an extension of past conduct and will not be tolerated by the City of Wausau. . . . Any continued inappropriate behavior or violation of work rules will result in further disciplinary action to include termination.

This notice came on the heels of several instances in which the Grievant had committed a rule violation and received documentation indicating that continued behavior of the kind addressed therein could result in discipline or discharge. While the Grievant arguably could have interpreted each of those previous warnings to put him on notice only regarding conduct of the same kind, the notice provided on January 8 went further. That statement noted, accurately, that the Grievant had committed multiple rule violations and that he had been disciplined repeatedly. It also specifically warned him that "any" inappropriate behavior or work rule violation could result in discipline or discharge. This disciplinary history gave the Grievant adequate notice that conduct such as sleeping on the job and falsifying his time card could get him fired.

It must be acknowledged, as the Union points out, that in the course of his employment with the City the Grievant consistently received positive evaluations. He was rated as having met or exceeded job performance expectations. The Grievant's last evaluation occurred in March of 2008, eleven months before his discharge, and he received a general assessment of "fully competent". Certainly these evaluations have represented an extra challenge to the City's ability to show that it had just cause to discharge the Grievant. They are a reflection of the fact that the Grievant was quite capable at his job, when he was working. They should not have diminished his impression, however, that a continued failure to work and follow the rules could result in serious discipline.

Finally, the Union argues that the disciplinary action taken by the City against the Grievant is inconsistent with that taken against other Department employees in the past. It asserts that the City has engaged in a course of conduct wherein it has resorted to "progressive" discipline through multiple suspensions and it did not show the same tolerance toward the Grievant. The Grievant, however, simply cannot be compared in a persuasive way to these other employees. Arguably the closest analogy to the Grievant was Marty Steffen, another Department employee disciplined for sleeping on the job. Steffen was given only a two day suspension for that incident. The record shows, however, that Steffen had worked for the City for eighteen years when his sleeping incident occurred, and he apparently had received

only a counseling memorandum prior to that incident. The Grievant had been employed by the City for five years and three months, was discharged for much more than simply falling asleep on the job, and did not have a clean or even minor disciplinary history prior to that event. Indeed, the Grievant had a substantially shorter tenure with the City than most of the other employees cited by the Union, and his disciplinary history exemplified an insubordinate tendency that these other employees did not display.

AWARD

The grievance is DENIED.

Dated at Madison, Wisconsin, this 25th day of June, 2010.

Danielle L. Carne /s/
Danielle L. Carne, Arbitrator

DLC/gjc
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