BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL UNION 565, THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION (AFL-CIO)

and

BOUMATIC

Case 1
No. 71783
A-6531

(Sami Berisha Grievance)

Appearances:

David Goodspeed, Business Representative, Local 565, Sheet Metal Workers' Local 565, 1602 South Park Street, Madison, Wisconsin, appearing on behalf of the Union.

Troy Thompson, Attorney, Axley Brynelson, P.O. Box 1767, 2 East Mifflin Street, Suite 200, Madison, Wisconsin 53703, appearing on behalf of the Company.

ARBITRATION AWARD

Sheet Metal Workers' International Association, Local 565, hereinafter referred to as the Union, and BouMatic, hereinafter referred to as the Company or Employer, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide the Sami Berisha discharge grievance. A hearing was held on December 7, 2012 in Madison, Wisconsin, at which time the parties presented testimony, exhibits and other evidence that was relevant to the grievance. The hearing was not transcribed. The parties filed briefs and reply briefs, whereupon the record was closed on February 7, 2013. Having considered the evidence, the arguments of the parties, the applicable provisions of the agreement and the record as a whole, the undersigned issues the following Award.

ISSUES

The parties stipulated to the following issues:

1. Whether the Employer terminated the grievant's employment with just cause?

2. If the Employer did not terminate the grievant's employment with just cause, then what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2011-2013 collective bargaining agreement contains the following pertinent provisions:

Article IV – Hours and Overtime

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Section 4.08, Subsection 44

Call-In Pay. An employee notified to work after having left the Company premises shall receive no less than two (2) hours' work or two (2) hours' pay at the applicable rate. This provision shall also apply to Saturday, Sunday, or holiday overtime.

. . .

Article XVI – Discipline and Termination

Section 16.01, Subsection 323(j)

These rules in no way limit the Company's right to otherwise discipline or discharge an employee for just cause.

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Section 16.02 Subsections 324 – 329

324. Disciplinary Action for Minor Offenses: For the purposes of this Section, typical examples of minor offenses are excessive absenteeism or tardiness, unexcused absenteeism, or tardiness, quitting work early, being away from assigned work area without permission, horseplay in which no injury results and lining up early at time clocks. Disciplinary

action imposed on an employee by the Company for commission of a minor offense shall be handled in the following manner:

325. First offense: Recorded verbal warning.

326. Second offense: Formal letter of warning to the employee and a copy to the Union.

327. Third offense: Three (3) day disciplinary layoff, without pay; a letter to the employee and a copy to the Union giving the reason(s) for the action taken. A Union Committee person, if available, will be present in this meeting.

328. Fourth offense: Termination of employment; a letter to the employee and a copy to the Union giving reason(s) for the action taken. A Union Committeeperson, if available, will be present in this meeting.

329. The parties to this Agreement recognize that multiple minor offenses, if committed simultaneously or in close proximity to another minor offense(s), may create a situation in which a penalty may be applied by the Company without the requirement of following the sequential steps provided above.

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Article XX – Management Rights – Plant Rules

Section 20.01, Subsection 343

It is agreed that the management of the Company and its business and the direction of its working forces is vested exclusively in the Company and this includes, but is not limited to, the following. . . [to] suspend, discipline, or discharge employees for just cause;. . .and to establish and enforce reasonable plant rules.

. . .

Subsection 346

The Company's exercise of the foregoing functions shall be limited only by the express provisions of this contract and the Company has all the rights which it had at common law except those expressly bargained away in this agreement and except as limited by statute.

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PERTINENT COMPANY PLANT RULES

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To that end, the company sets forth its established Plant Rules, which, together with observing all other standards of conduct, employee are required to obey.

An employee who fails to maintain proper standards of conduct at all times and who violates any of the following shall subject him/herself to disciplinary action up to and including discharge.

. . .

IV. Personal Conduct

42. Employees must be "hand screened in" and at their designated place of work, ready to work, at their scheduled starting time.

43. At the conclusion of their lunch period or break period, employees are to promptly report back to their assigned workstation and resume working.

. . .

46. Except for lunch periods, break periods, visits to washrooms, and visits to the closest drinking fountain, or when assigned duties that require an employee being away from his/her workstation, an employee shall not leave his/her workstation without permission from his/her supervisor.

47. Employees are expected to be at their station working up to the time the buzzer sounds. However, the last 5 minutes of an employee's shift may be used, if necessary, to put away tools, clean up the work area, prepare the work station for transition the employees on the next shift, or to take care of production related paper work and time keeping records.

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52. An employee shall not falsify any reports or records including production, personnel, timekeeping, absence, sickness, injury or insurance claims.

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PERTINENT COMPANY POLICY

ABSENTEE POLICY

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NOTE: Plant Rule #42 states: Employees must be "hand scanned in" and at their designed (sic) places of work, ready to work, at their scheduled starting time." Two instances of no punch or forgotten punch in a rolling calendar year will be considered acceptable. More than two will result in ½ occurrence if less than 2 hours or 1 full occurrence if 2 hours or more.

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BACKGROUND

The Company is engaged in the business of design, manufacture, and supply of milking systems and dairy farm equipment. The Union is the exclusive collective bargaining representative for some of the Company's employees at the Company's Madison manufacturing facility.

The record shows that the Company requires all bargaining unit employees to accurately record their actual hours worked on a daily basis using the Company's electronic timekeeping system. Employees do this by punching-in and punching-out on an electronic timekeeping system. (Technically, employees don't punch or clock in and out anymore – rather they scan in and out – but the old terms punch and clock are still used). The record further shows that there is never an occasion when it is appropriate or allowable for an employee to record more hours than the employee actually worked.

The Company avers that it has a "zero tolerance" policy for dishonesty and/or theft which is reflected in Plant Rule 52. When employees have been caught engaging in a single instance of what the Company considers to be dishonesty and/or theft, they have been summarily fired without any progressive discipline. In the last decade or so, that's happened at least seven times. In all seven of the following instances, the bargaining unit employee was fired. In one instance, the employee accepted a pre-punched time card. In another instance, the employee took aluminum scrap from a scrap bin. In another instance, the employee slept on the job. (The Employer considered that "theft of time"). In another instance, the employee had an inaccurate time card. (The Employer considered that "stealing time"). In another instance, the employee took a Company bumper sticker and put it on his car's bumper. The value of the sticker was less than $1.00. In another instance, the employee took copper tubing. In another instance, the employee took a package of napkins. The value of the napkins was less than $10. While the Union grieved some of these discharges, it was not successful in getting any of them overturned. Insofar as the record shows, the Company has been uniform in applying Plant Rule 52 and firing anyone who engages in even a single instance of dishonesty and/or theft.

The Company has two maintenance electricians on the first shift and two on the second shift. Based upon the nature of their work, maintenance electricians hold a special position of trust in that they work without a lot of direct supervision. They regularly have to come in to work outside their normal work schedule to address maintenance issues, including checking the pipes and boilers on weekends in cold weather.

When the maintenance electricians do come into work on the weekends to check the pipes and boilers, they are generally there for just a half hour. Although they are there for just a half hour, employees are expected to follow the same timekeeping procedures on weekends as they follow Monday through Friday. Thus, maintenance electricians are expected to clock in, check the boilers, and then clock out. This process records their actual hours worked. These employees though are not paid for just their actual hours worked. Instead, pursuant to a call-in pay provision in the collective bargaining agreement, they are paid two hours pay. This call-in pay is not self-implementing, meaning somebody has to do something to ensure that the employee gets the call-in pay. What happens is that the maintenance supervisor reviews the time cards, and if an employee is entitled to call-in pay, he makes an entry that says the employee is entitled to two hours of call-in pay (even though the employee actually worked less than two hours). When this happens, the employee's pay is adjusted upward. There are no instances in the record where the converse occurred and an employee's pay was adjusted downward.

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The record indicates that in 2004, the Company inadvertently overpaid bargaining unit employee Tim Dobratz $300. While it is unclear from the record how or why this overpayment occurred, it is clear that Dobratz did not cause it or have anything to do with the overpayment. He was unaware of the overpayment until he was called into a meeting and asked about it. Afterwards, Dobratz reimbursed the Company for the overpayment. Dobratz was not disciplined for the overpayment.

FACTS

Sami Berisha, the grievant herein, was employed by the Company as a full-time maintenance electrician until his discharge on September 6, 2012. This case involves his discharge.

Berisha is originally from Kosovo, and his native language is Albanian. He immigrated from Kosovo to America in 1999. By his own admission, his speaking of the English language is "not very good." Additionally, he cannot read English. He settled in Madison and was hired by the Company in 1999. This is the only job he's held since he came to America.

Prior to the incident involved herein, Berisha had never been disciplined for any reason. Thus, he had a clean disciplinary record. As an experienced employee, Berisha knew the Company's rules and regulations. He also knew that the Company fires employees for

dishonesty and theft. He also knew how to record his actual hours worked. Prior to the incident involved here, he's never had a problem with recording his actual hours worked on the Company's timekeeping system.

On Saturday, August 25, 2012 (all days hereinafter refer to 2012), a masonry contractor was scheduled to perform some work on the Company's premises. The Company was closed that day, so someone needed to unlock the Company's locked parking lot gate to let the contractor in to perform the work. Maintenance Supervisor Ron Gadow originally asked Maintenance Group Leader Charles Cushman to do the work, and Cushman said that he would. Later, though, Cushman discovered that he had another commitment that he wanted to attend, so on August 24, with Gadow's permission, Cushman asked Berisha if he would perform that Saturday overtime work. Berisha said that he would. While Berisha had come in to the Company's facility numerous times before on winter weekends to check on the pipes and boilers, he had never come in before to let a contractor in and out of the Company's facility. Cushman then gave Berisha the following instructions. He told Berisha that when the contractor called him on his cell phone, he was to come in to work, unlock the locked parking lot gate and let the contractor into the Company's facility. Then, he could leave the Company's facility and go home while the contractor did the work he was hired to do. When the contractor finished his work, he'd call Berisha, whereupon Berisha was to return to the Company's facility and let the contractor out of the parking lot and lock the parking lot gate. Then, Berisha could leave. Cushman reiterated that the parking lot needed to be locked while the contractor was working inside because the Company has in recent times been targeted by thieves looking to steal scrap metal. Cushman did not give Berisha any instructions about how to punch in and out on August 25.

On Saturday, August 25, Berisha let the contractor in and out of the Company's parking lot as he told Cushman he would. Here's what he did. About 8:00 a.m., he opened the locked gate for the contractor and let the contractor in to do his work. It took Berisha about ten minutes to perform this task. Then, Berisha left the Company's premises. When the contractor was finished doing his work, he called Berisha, whereupon Berisha returned to the Company's facility. After he arrived, he let the contractor out of the Company's locked parking lot. Once again, it took Berisha about ten minutes to perform this task.

The Company expected Berisha to clock in and out twice that day (for a total of four punches). Berisha did not do that. Instead, he just clocked in and out once (for a total of two punches). Specifically, he clocked in at 7:59 a.m. when he arrived to let the contractor in. Then, he clocked out that day at 4:00 p.m. after he let the contractor out.

While Berisha was clocked in for eight hours that day, there's no question that he did not work the entire eight hour period that he was clocked in. Instead, his work was limited to the ten minutes that it took each time to let the contractor in and out of the facility.

Although Berisha knew he was clocked in for eight hours that day, he didn't think he was going to get paid for eight hours. Instead, he thought that Gadow would manually change

or adjust the hours on his time card downward to reflect that he got call-in pay for letting the contractor in and out of the facility. Specifically, Berisha thought he would get two hours of call-in pay for the morning and two hours of call-in pay for the afternoon for a total of four hours of call-in pay for that day.

That didn't happen though. Instead, the Company paid Berisha for the entire eight hour period that he was clocked in.

Berisha was assigned the same task of letting a contractor in and out of the Company's facility the following Saturday, September 1. This time, the assignment came from Gadow (rather than Cushman). Gadow essentially gave Berisha the same set of instructions that Cushman had given him previously. Gadow did not give Berisha any instructions about how to punch in and out on September 1.

On Saturday, September 1, Berisha let a contractor in and out of the Company's parking lot (just as he did the previous week). Here's what he did. About 8:00 a.m., he opened the locked gate for the contractor and let the contractor in to do his work. It took Berisha about ten minutes to perform this task. Then, Berisha left the Company's premises. When the contractor was finished doing his work, he called Berisha, whereupon Berisha returned to the Company's facility. After he arrived, he let the contractor out of the Company's locked parking lot. Once again, it took Berisha about ten minutes to perform this task.

The Company expected Berisha to clock in and out twice that day (for a total of four punches). Berisha did not do that. Instead, he just clocked in and out once (for a total of two punches). Specifically, he clocked in at 7:59 a.m. when he arrived to let the contractor in. Then, he clocked out that day at 12:45 p.m. after he let the contractor out.

While Berisha was clocked in for 4.75 hours that day, there's no question that he did not work the entire 4.75 hour period that he was clocked in. Instead, his work was limited to the ten minutes that it took each time to let the contractor in and out of the facility.

Although Berisha knew he was clocked in for 4.75 hours that day, he didn't think he was going to get paid for 4.75 hours. Instead, he thought that Gadow would manually change or adjust the hours on his time card downward to reflect that he got call-in pay for letting the contractor in and out of the facility. Specifically, Berisha thought he would get two hours of call-in pay for the early morning and two hours of call-in pay for the later morning for a total of four hours of call-in pay for that day.

That didn't happen though. Instead, the Company paid Berisha for the entire 4.75 hour period that he was clocked in.

. . .

Sometime on September 1, Ron Gadow stopped by the facility unannounced and noticed that the parking lot gate was unlocked. That surprised him, because the gate was supposed to be locked. He also discovered that Berisha was punched in, but was not at work. He decided to investigate further.

Over the next few days, Gadow reviewed the video surveillance camera footage from August 25 and September 1 when Berisha let the contractors in and out of the parking lot. The video footage from August 25 showed that Berisha came into the facility about 8:00 a.m. that day and let the contractor in, and left about ten minutes later. Then, at about 4:00 p.m., Berisha came back and let the contractor out of the parking lot. The video footage from September 1 essentially showed the same thing, namely that Berisha came into the facility about 8:00 a.m. that day and let the contractor in, and left ten minutes later. Then, at about 12:45 p.m., Berisha came back and let the contractor out of the parking lot. Gadow then checked Berisha's time cards for August 25 and September 1. As noted above, Berisha's time card for August 25 showed that he was clocked in from about 8:00 a.m. to 4:00 p.m. Berisha's time card for September 1 showed that he was clocked in from about 8:00 a.m. to 12:45 p.m. After comparing the video footage to the times referenced on the time cards, Gadow could tell that Berisha was not at work for the times referenced on his time cards. Thus, Berisha's time cards for August 25 and September 1 did not accurately record his actual hours worked on those two dates.

Gadow then reported his findings to BouMatic Executive Vice President of Global Human Resources Amy Parkhurst. She then reviewed the video recordings and Berisha's time cards. After doing so, she concluded that Berisha's time cards for August 25 and September 1 were inaccurate in that they recorded more time on them than Berisha was actually present. What was not apparent to Parkhurst was whether there was a plausible explanation for this.

Parkhurst then scheduled an investigatory interview for the morning of September 6. Prior to the meeting, per her usual practice, Parkhurst prepared two separate letters to give to the employee. One was a discharge letter and the other was a suspension letter. Parkhurst testified that prior to the meeting, she was prepared to give Berisha either of the two letters, depending on the explanation he offered for his conduct at the upcoming meeting.

About an hour before the meeting was set to start, Parkhurst notified Union Business Agent Tim Sullivan in a phone call that she planned to discharge Berisha at the upcoming meeting. Prior to that, Gadow advised Union steward Charles Cushman of the same thing (i.e. that Berisha was going to be discharged at the upcoming meeting).

The meeting convened as scheduled and was attended by Parkhurst, Company Human Resource representative Chris Ascher, Gadow, Berisha and Union Committeeman Steve Ascher.

Some of what happened at the meeting is disputed. According to the three Company witnesses who were at the meeting, Parkhurst asked Berisha for an explanation of his actions

on August 25 and September 1. According to Berisha, that didn't happen, and he was not asked for his side of the story. Union Committeeman Steve Ascher, who was at the meeting and testified at the hearing, was not asked about what transpired at the meeting. Berisha testified that he initially did not understand what he was being accused of because he did not know he had been overpaid for his work on August 25 and September 1. After he understood that he had been overpaid for his work on August 25 and September 1 because of his time cards for those days, and that he was being accused of theft for that overpayment, his only response was to say that Gadow didn't tell him that he (Berisha) had to punch out before he left the plant. Berisha repeated this statement two or three times. Parkhurst concluded that Berisha did not offer a plausible or credible explanation for what had happened and, as a result, his conduct was intentional (and not accidental). At the end of the meeting, Parkhurst told Berisha he was terminated and handed him the following discharge letter:

> September 6, 2012
>
> Dear Sami,
>
> Your position is being terminated effective September 6, 2012. Your position is terminated for theft.
>
> Kind Regards,
>
> Amy Parkhurst /s/
> Amy Parkhurst

With that action, the meeting ended. It had lasted about 15 minutes. Berisha was then escorted to the maintenance department area by Gadow and Chris Ascher. After Berisha retrieved his personal belongings, they escorted him out of the facility.

The Union filed a grievance challenging Berisha's discharge that same day. The grievance was appealed to arbitration.

POSITIONS OF THE PARTIES

Union

The Union's position is that the Company did not have just cause to discharge Berisha for his actions on August 25 and September 1, 2012. It acknowledges that Berisha remained clocked-in on those two dates when he was not at the plant. However, it's the Union's view that he did not commit theft (as alleged by the Company) by doing that. Instead, there was simply a misunderstanding over his punch activity on those days that was a good faith mistake on his part. As for the discipline which the Employer imposed (i.e. discharge), the Union argues that it was simply unfair "given the absence of Employer proof of wrongdoing, the

absence of an interview with the grievant before a decision to discharge was made, disparate treatment, Employer extenuation, and the mitigation of unblemished years of service." It therefore asks that the discharge be overturned. It elaborates as follows.

The Union begins by commenting on what it believes is undisputed, and what is disputed. In its view, the basic facts are undisputed. In this regard, it acknowledges that Berisha punched in and out once on the two days in question, rather than twice as the Company wanted. What the Union believes is disputed is the "meaning of and circumstances surrounding the facts." According to the Union, what the Employer did here was "mischaracterize" what Berisha did to raise it to the level of theft. As the Union sees it, Berisha's time card punch activity should not be considered theft. The Union contends that the Employer didn't offer clear and convincing evidence that Berisha either engaged in theft or intended to commit theft (via his time card punch activity). The Union avers that while "the Employer is free to speculate that Mr. Berisha intentionally omitted time clock punches and intentionally committed theft. . . it does not have evidence in support of that speculation." It's the Union's view that Berisha's time clock punch activity on both Saturdays was predicated on his experience that his supervisor (Gadow) had adjusted his clock time in other Saturday overtime scenarios to conform to the two hour pay requirement for call-in pay. According to the Union, Berisha thought that's what would happen here as well, and he would get paid for two call-ins for a total of four hours on each Saturday. The Union maintains that Berisha's testimony on this point should make it clear that Berisha did not know he was overpaid for his work on August 25 and September 1 until he was confronted about it at the September 6 meeting. The Union also contends that Berisha was not trying to commit theft or steal from the Company when he stayed clocked in and omitted an in-out punch on both days. Thus, the Union avers that the intent to commit theft is absent. Building on that premise, the Union contends that Berisha made a good faith mistake when he omitted the in and out punch in the middle of each day. According to the Union, Berisha's omitted punches were just that: omitted punches. The Union opines that omitted punches "do not by themselves evidence intention of theft." The Union points out that the Company has a written policy to deal with omitted punches. As the Union sees it, the Employer "has, at worst, clear and convincing evidence of failures to punch." The Union submits that Berisha's omitted punches "might" be considered "occurrences" under the Employer's "Absentee Policy."

Next, the Union argues that even if Berisha did commit workplace misconduct by remaining clocked in on the days in question, there was still not just cause to discharge him. In its briefs, the Union raises the following contentions: 1) that the penalty which the Employer imposed was not commensurate to the offense; 2) that Berisha was not afforded due process; and 3) that Berisha was not provided equal treatment. It addresses those contentions in the order just listed.

With regard to the first matter (i.e. the level of discipline which was imposed), the Union emphasizes at the outset that prior to this incident, Berisha had a clean disciplinary record and a "high number of years of service." As the Union sees it, the Company failed to take the mitigating factors of Berisha's disciplinary and employment history into consideration

when it decided to discharge him. Second, the Union argues that summary discharge was not appropriate because on the two days in question, Berisha followed his work instructions "precisely as they were given." Building on that, the Union opines that "it is highly inappropriate that the Employer rewarded his availability and diligence with a summary discharge penalty." Third, the Union contends that another reason why the penalty should be reduced is because of these extenuating circumstances. First, the Union points to the statement which HR Administrator Ascher made to an unemployment compensation investigator about a conversation Gadow had with Berisha on the Monday after August 25. According to the Union, this statement demonstrates "Employer knowledge of the hours Mr. Berisha actually worked on August 25." Building on that, the Union submits that "knowledge implies an Employer obligation to adjust Mr. Berisha's time clock history before overpayment took place." Second, the Union avers that regardless of Berisha's actual time card punches, Gadow was responsible for making "adjustments" to Berisha's time cards in order for Berisha to get call-in pay. It notes in this regard that when Berisha worked at the plant on weekends doing pipe checks, afterwards Gadow had to "adjust" Berisha's time cards in order for Berisha to get call-in pay. Here, though, "for whatever reason", Gadow didn't meet his supervisory obligations and modify Berisha's time clock punches for August 25 and September 1. According to the Union, that contributed to the misunderstanding on Berisha's August 25 and September 1 punch record. That, in turn, created a pretext for overpayment.

With regard to the second matter (i.e. due process), the Union contends that the Employer failed to observe its due process obligations. Here's why. It asserts at the outset that the Employer decided prior to the September 6 meeting to discharge Berisha. To support that proposition, it notes that both Sullivan and Cushman testified that they were informed of Berisha's discharge before the September 6 meeting even occurred. As the Union sees it, that's problematic, and shows that no matter what Berisha said at the upcoming meeting about the facts, the Employer had already made the decision to discharge him prior to speaking with him. According to the Union, that not only violated its due process obligations to the grievant, but also defied logical rules for gathering evidence before rendering judgment. Next, the Union makes several arguments about what happened at the September 6 meeting to show that the Employer failed to conduct a fair investigation and give Berisha industrial due process. First, it characterizes Parkhurst's testimony about what transpired at the September 6 meeting as "sketchy". Second, it notes that Parkhurst brought two letters to the meeting: one was a discharge letter and the other was for something less than discharge. The Union notes that the content of the second letter was never produced. The Union sees that as significant. Third, the Union contends that the meeting opened with Parkhurst handing Berisha his discharge letter. It characterizes that as problematic. Aside from its timing, the Union also argues that the reference in that letter to theft "presupposes evidence that would have to be revealed in the interview in order for the discharge letter to be valid." The Union submits that Parkhurst "could not have known what would be revealed in the meeting, yet she tailored the letter to one narrow range of outcome: discharge." Finally, the Union cites Berisha's testimony for the proposition that he was not interviewed or given the opportunity to state his case at that meeting. The Union also characterizes that as problematic.

With regard to the third matter (i.e. equal treatment), the Union argues that the Company did not provide equal treatment to Berisha. Here's why. First, the Union relies on what happened in the Dobratz case. The Union characterizes that case as another "overpayment" case, and notes that the Employer imposed no discipline on Dobratz in that case. The Union asserts that the Dobratz case has many similarities with Berisha's, but the outcomes were far different. Second, with regard to the eight prior discharge cases which the Employer relies on (i.e. what the Union calls the "Employer cited comparables"), the Union contends that the Employer assumed similarity in the offense when, in fact, there was no similarity. Here's why. The Union characterizes five of them as straightforward theft cases, two as deliberate falsification cases, and one for sleeping on the job. In this case though, Berisha's clock punch omission was not done to falsify or commit theft. As the Union sees it, Berisha did not steal anything, nor did he lie to secure pay to which he was not entitled.

The Union therefore asks that the discharge be overturned and the grievant reinstated and made whole. It also asks the arbitrator to retain jurisdiction over the remedy.

Company

The Company's position is that just cause existed for Berisha's discharge. In its view, Berisha committed workplace misconduct when he remained clocked-in on August 25 and September 1, 2012 when he was not at the plant. According to the Company, that constituted time card misrepresentation. Building on that, the Company maintains that time card misrepresentation constitutes theft and/or dishonesty. The Employer maintains that the discipline which it imposes for that type of misconduct (i.e. theft and dishonesty) is discharge. It elaborates as follows.

The Company starts by making the following preliminary comments that deal with the topic of time card misrepresentation. First, it notes that every witness who testified acknowledged that employees are supposed to accurately record their actual hours worked, and it's never been appropriate or acceptable for an employee to record on a time card more than the employee's actual hours worked. The Company avers that's what Berisha did though. Second, it characterizes time card misrepresentation as particularly offensive because it cheats the employer, betrays the employer's trust, and results in an unearned windfall for the employee.

Having given that introduction, the Company next reviews these basic facts. It notes that on the two days in question, Berisha was supposed to let a contractor in and out of the Company's facility on a Saturday. When he did that, he was supposed to clock in and out twice. He didn't do that. Instead, he just clocked in and out once. By doing that, he stayed clocked in for a total of eight hours on August 25 and 4.75 hours on September 1. That overstated his actual hours worked. Specifically, it overstated his actual time worked by more than seven hours on August 25 and four hours on September 1. That, in turn, resulted in the Company paying Berisha for wages that he did not earn and to which he was not entitled.

The Company argues that the foregoing facts manifest Berisha's "specific intent" to falsify his time records. It elaborates as follows. First, it notes that Berisha was aware that employees are to accurately record their actual hours worked. Second, it notes that Berisha never asked his supervisor if he could depart from the Company's requirement that employees accurately record their actual work hours with respect to his work hours on August 25 and September 1. Third, it notes that Berisha never expressed any confusion to a supervisor regarding how he was to record his hours on August 25 and September 1. Fourth, it notes that prior to September 6, Berisha never told his supervisor that he overstated his work hours on August 25 and September 1. Fifth, it notes that Berisha "accepted" the overpayments that he received from August 25 and September 1. Sixth, it notes that Berisha never returned the overpayments of unearned wages to the Company. Seventh, it asserts that but for Gadow's unscheduled stop at the plant and observation that Berisha was punched-in but not at work, the Company "likely would not have discovered Berisha's conduct." Finally, the Company avers that at the September 6 meeting, Berisha's sole excuse for his conduct was to "blame his supervisor for not catching and correcting his overstatement on his time cards of hours worked and/or for not telling him that he had to punch out before leaving the plant."

The Company argues that in light of the above-referenced facts, the Union's contention that Berisha's conduct was the result of a "good faith mistake" lacks merit. The Company submits that if the arbitrator accepts the Union's proposition (that Berisha's conduct was the result of a "good faith mistake") that "would prevent an employer from proceeding with discharge in the absence of an admission by the employee of a specific intent to steal." According to the Employer, that is not, and never has been, the standard of proof acceptable to matters involving employee theft and dishonesty. The Company also contends that the Union's claim further "rings hollow" because at the September 6 meeting, Berisha never asserted that he mistakenly forgot to punch out on either date. Finally, the Company submits that when Berisha claimed at the September 6 meeting that it was Gadow's fault, he was – in essence – admitting that his misconduct in falsifying his time card was intentional.

Next, the Company addresses the penalty that it imposed for that misconduct. In this portion of its briefs, it addresses the following Union contentions: 1) that the penalty it imposed was not commensurate to the offense; 2) that Berisha was not afforded due process; and 3) that Berisha was not provided equal treatment. It addresses those contentions in the order just listed.

With regard to the first matter (i.e. the level of discipline which was imposed), the Company argues that discharge was warranted under all the relevant facts and circumstances. Here's why. First, the Company notes that it takes violations of Rule 52 (which deal with theft and dishonesty) very seriously. So seriously, in fact, that it has a zero tolerance theft policy. It notes in this regard that in at least a half dozen instances, it has discharged employees for a single act of theft without any progressive discipline. Second, it asserts that Berisha had advance notice of the plant rules, and specifically Rule 52. Additionally, he knew that employees are not supposed to steal from the Company. Third, the Company maintains that its rules are reasonable work rules. It further submits that it is reasonable for an employer to

require its employees to record their actual hours worked. Building on both of the foregoing, the Company argues it is also reasonable "for an employer to apply a zero tolerance theft policy to individuals who overstate their actual hours worked." Fourth, the Employer emphasizes that this is not a case of an employee's accidental failure to punch out. Neither Berisha nor the Union made such a claim at the September 6 meeting or at the hearing. Instead, what Berisha did was intentional. As the Company sees it, Berisha intentionally violated the punch-in rule on two consecutive Saturdays "when it was unlikely that anyone would notice." Finally, the Company disputes that Union's assertion that Gadow was culpable and contributed to Berisha's conduct. It also contends there are no mitigating circumstances which should excuse Berisha's conduct.

With regard to the second matter (i.e. due process), the Employer disputes the Union's contention that Berisha was not afforded due process. It contends that he was afforded due process. Here's why. While Berisha testified at the hearing that he was not interviewed or given the opportunity to state his case at the September 6 hearing, the Employer points out that all three Employer witnesses who were at that meeting testified to the contrary (namely, that Parkhurst did give Berisha an opportunity to tell his side of the story). The Company also asserts that Berisha's testimony (that he was not given a chance to tell his side of the story) conflicts with the testimony of Union Business Agent Sullivan. According to the Employer, Sullivan's testimony "reflect[ed] that BouMatic gave the Grievant a fair opportunity to provide his side of the story prior to terminating his employment." The Company also disputes the Union's assertion that the September 6 meeting opened with Parkhurst handing Berisha his discharge letter. The Company avers it did not happen that way. Instead, Parkhurst first gave Berisha a chance to tell his side of the story, and then she considered his statements before she ultimately decided to fire him. Finally, the Employer argues in the alternative that even if the Union's version of events is accepted, any due process violation was non-prejudicial to Berisha.

With regard to the third matter (i.e. disparate treatment), the Employer argues that the Union's disparate treatment argument should fail because the Union did not prove that contention. To support that premise, the Employer notes that even the Union's own witnesses admitted that the Company applies Rule 52 across the board in a zero tolerance fashion. It also cites the seven prior instances where the Employer felt a bargaining unit employee did something that constituted theft or was dishonest, and the Employer summarily fired the employee without first imposing any progressive discipline. As for the Dobratz matter which the Union relies on (to prove disparate treatment), the Company distinguishes that case from this one on the facts. It notes that in the Dobratz case, Dobratz did not overstate his hours while Berisha did. Since the cases are dissimilar in that factual respect, the Company maintains the Dobratz case is of little probative value here.

The Employer therefore asks that the grievance be denied and the discharge upheld.

DISCUSSION

The parties' labor agreement contains what is commonly known as a "just cause" provision. It provides that the Company will not discipline or discharge an employee without just cause. What happened here is that the grievant was discharged by the Company. The parties stipulated that the issue to be decided here is whether there was just cause to terminate the grievant's employment. I answer that question in the negative, meaning that I find the Employer did not have just cause to terminate the grievant's employment. My rationale follows.

The threshold question is what standard or criteria is going to be used to determine just cause. The phrase "just cause" is not defined in the collective bargaining agreement, nor is there contract language therein which identifies what the Employer must show to justify the discipline imposed. Given that contractual silence, those decisions have been left to the arbitrator. Arbitrators differ on their manner of analyzing just cause. While there are many formulations of "just cause", one commonly accepted approach consists of addressing these two elements: first, did the employer prove the employee's misconduct, and second, assuming the showing of wrongdoing is made, did the employer establish that the discipline which it imposed was justified under all the relevant facts and circumstances. That's the approach I'm going to apply here.

As just noted, the first part of the just cause analysis being used here requires a determination of whether the employer proved the employee's misconduct.

Before I address that point though, I'm first going to make some preliminary comments which are intended to put the alleged misconduct in an overall context.

I begin with the following comments about the nature of discipline cases in general. When employees are disciplined, one common reason is job performance problems. That was not the situation here. Insofar as the record shows, the grievant had no history of job performance problems. Another reason that employees receive discipline is because they have an extensive disciplinary history with an employer. That is not the case here either. The grievant had a clean work record (meaning no prior discipline) until the events involved here unfolded. Thus, this case does not involve a job performance problem, nor does it involve a situation where the employee had an extensive disciplinary history. Rather, this case just involves the grievant's conduct at work on two successive Saturdays. While I'll address the topic in more detail below, it suffices to say here that it involves his time card punch activity on those days. According to the Company, what the grievant did (relative to his time card punch activity) constituted theft. The Union disputes that assertion.

Next, I'm going to make the following comments about theft cases in general. First, I begin with the premise that an employer is entitled to expect honesty on the part of its employees, and employees have a basic responsibility not to steal from their employer. Theft is of such a nature that the mere occurrence of it gives rise to a general presumption that an

employer's business is adversely affected. Second, there are a number of offenses that are considered immediately and substantially destructive of the employment relationship. These offenses are often referred to as the "cardinal" violations. Theft is often at the top of that list. The typical discipline for committing a so-called cardinal violation is immediate discharge. Additionally, the overwhelming weight of arbitral authority establishes the general proposition that discharge is appropriate for theft without regard to the value of the item taken or the length of the employee's service.

Having made those preliminary comments about theft cases in general, I'm now going to review the parties' collective bargaining agreement to see if it specifies something different than the general rule just noted. It does not. A review of the article in the collective bargaining agreement that deals with discipline and termination (Article XVI) reveals that the parties established some very specific penalties for some very specific infractions. Specifically, they agreed that employees who commit certain "minor offenses" (which they identified by name) will be disciplined in the typical progressive disciplinary sequence. However, the contract provision says nothing about offenses other than "minor offenses". That means it is silent about the so-called cardinal offenses or offenses other than "minor offenses". The obvious inference which can be drawn from this contractual silence is that the Employer does not have to follow the typical progressive disciplinary sequence for so-called cardinal offenses or offenses other than "minor offenses". Instead, it can summarily discharge an employee who commits such an offense.

The final point which I'm going to address – before I turn to the grievant's conduct – concerns what the Company has done previously in theft cases. What it has done previously in such cases can be simply put: it has taken a very hard line. The following shows this. In more than a half dozen cases in the last decade or so, when a bargaining unit employee was caught engaging in a single instance of what the Company considered theft, the employee was summarily fired without any progressive discipline. While some of those cases can be characterized as traditional theft cases, others were far from traditional. Take, for example, the situation where the employee was fired for sleeping on the job. While I would not characterize that as a theft case, the Employer did (calling it a theft of time). That was the Company's call to make. The overall point is that when considered collectively, the prior discharge cases stand for the following propositions. First, historically speaking, the Employer has taken an expansive view of what constitutes theft. Second, historically speaking, the Employer has taken a hard line on what it considers theft, and has always fired the employee for that conduct. The record does not show a single instance where an employee was charged with theft, and the discipline imposed was anything other than discharge.

Having given that overall context, I'm now going to review the grievant's conduct. In doing that, the facts will be interspersed with some relevant background information.

The record shows that Berisha had previously come into the plant on weekends to check the pipes and boilers. When he did that work he would clock in, do his work and then clock out. He made just one trip to the plant per day to do that work. The work that Berisha did on

August 25 and September 1 (when he let contractors in and out of the Company's premises) was different in this respect. For that work, he had to make two different trips to the plant per day. He'd never done that before. Once he arrived at the plant, his work took about ten minutes to perform. When he arrived, he clocked in. Then, he left the Company's premises while the contractor did the work he was hired to do. Berisha did not clock out when he left the plant. When the contractor was finished, he called Berisha who then returned to the plant to let the contractor out. Berisha then clocked out. Thus, Berisha clocked in and out once per day on August 25 and September 1 for a total of two punches each day. By doing what he did, Berisha remained clocked in for 8 hours on the first Saturday (August 25) and 4.75 hours on the second Saturday (September 1). There's no question that he did not work the entire period that he was clocked in. Instead, as already noted, his work was limited to the ten minutes that it took him each time to let the contractor in and out of the facility.

The Company wanted Berisha to clock in and out twice each day (for a total of four punches). Specifically, it wanted Berisha to clock in after he arrived to let the contractor in, and then clock out after he performed that task. Then, the Company wanted Berisha to clock in again after he arrived to let the contractor out, and then to clock out after the contractor left. As noted above, Berisha did not do that. Instead, he just punched in and out once.

There's no question that by staying punched in as he did, Berisha overstated his actual hours worked. Specifically, it overstated his actual time worked by more than 7.5 hours on August 25 and 4 hours on September 1. Said another way, his time card on those two days did not accurately reflect his actual hours worked. That was problematic, of course, because the Company ended up paying Berisha for the entire time he was clocked in (meaning it paid him for wages he did not earn and to which he was not entitled).

The Company contends that by remaining clocked in when he was not at the plant, that amounted to time card misrepresentation. Building on that, the Company maintains that time card misrepresentation constitutes theft.

There's no dispute that time card misrepresentation can, in certain circumstances, constitute theft. The basic question to be answered in this case is whether it constituted theft under the facts present here. The Company argues that it did, while the Union disputes that contention.

Based on the rationale which follows, I find that when Berisha punched in and out once on the days in question – rather than twice as the Company wanted – he did not intentionally falsify his time records and commit theft. Here's why. The record shows that when Berisha had previously worked Saturday overtime, his supervisor (Gadow) would afterwards adjust his time card so that he (Berisha) was paid for two hours per the two hour pay requirement for call-in pay. In other words, even though Berisha did not work two hours when he checked the pipes on a Saturday, that's what he was ultimately paid after Gadow adjusted his time card (no matter what the time card reflected). Berisha testified that he thought that's what would happen here as well when he stayed clocked in while he was not at the plant on the days in

question, and that he would just get paid two call-ins for a total of four hours on each Saturday. He further testified that he did not think he would get paid for the entire time period that he was clocked in (i.e. 8 hours on August 25 and 4.75 hours on September 1). While I'll address the matter of "intent" later in the discussion, what's noteworthy about this testimony is that it's the only evidence of "intent" in the record. Given his prior experience with Saturday overtime scenarios whereby Gadow adjusted his time card afterwards so that he would get two hours of call-in pay – no matter what the time card actually reflected – Berisha's expectation that the same thing would happen again on August 25 and September 1 seems plausible enough. While I'm well aware that Gadow had always adjusted Berisha's time card upward before to conform to the two-hour call-in pay requirement, and never downward, the fact that Gadow had never adjusted a time card downward before does not mean that it couldn't happen or be done. In point of fact, it could have happened and been done in this particular circumstance. That's because Gadow knew that Berisha was only at the plant each day for about ten minutes each time to let the contractor in and out of the parking lot. As such, Gadow knew that Berisha was only entitled to two hours call-in pay for each occurrence, for a total of four hours of call-in pay on each day. In that sense then, the hours on Berisha's time cards did not control how much he was to be paid for that day. Rather, what controlled was the call-in pay provision which provided for two hours of pay for each call-in. Had Gadow modified Berisha's time cards for August 25 and September 1 as he had done previously for Saturday overtime work, that would have prevented Berisha from being overpaid for those days.

Next, it would be one thing if the Company had established that Berisha knew he was overpaid for his work on the two days in question. However, the Company didn't prove that point. Berisha's testimony satisfied me that he did not know he was overpaid for his work on August 25 and September 1 until he was confronted about it at the September 6 meeting. After he understood that he had, in fact, been overpaid for his work on those days because of his time cards, and that he was being accused of theft for that overpayment, his only response was to say that Gadow didn't tell him that he (Berisha) had to punch out before he left the plant. Initially, I found Berisha's statement to be somewhat puzzling because both Gadow and Cushman gave Berisha work instructions about how he was to perform the work in question. In doing so, neither of them said anything to him about how he was to punch in and out that day, or that he was to punch out when he left the plant. At the September 6 meeting though, in his statement Berisha did not point the proverbial finger of blame at Cushman, just Gadow. That makes sense when one considers that it was just Gadow, and not Cushman, who was empowered to adjust his time card. Thus, I interpret Berisha's sole statement at the September 6 meeting to mean that he was blaming his supervisor (Gadow) for not adjusting his time card following the two days in question. When Berisha's statement at the September 6 meeting is considered in the context previously noted (i.e. that Gadow had always adjusted Berisha's time card after he worked on a Saturday so that Berisha was paid call-in pay regardless of what his time card actually reflected), it makes more sense than it does if that context is not considered.

Next, the Company points out that at the September 6 meeting, Berisha never asserted that he mistakenly forgot to punch out on either date. That's true; he didn't. As a result, this is not a case where Berisha asserts that he simply forgot to clock in and out a second time as

the Employer wanted. In that sense then, Berisha's actions relative to his time card were intentional. What I mean by the word "intentional" in the previous sentence is that when Berisha remained clocked in when he was not at the plant, that action on his part was not accidental or a mistake. Rather, it was an intentional act on his part.

However, just because Berisha's punches on his time card were intentional, and not a mistake, that does not prove that he intended to steal time from the Company. I find that Berisha's conduct relative to his time card punch activity on the two days in question was a misunderstanding on his part. While he incorrectly thought it was acceptable for him to stay clocked in while he was not at the plant, he now knows it is not acceptable workplace conduct. I'm persuaded that at the time the time card punch activity occurred though, it was a good faith mistake on Berisha's part.

In so finding, I'm not saying – as the Company posits in their brief – that such a finding means that the standard of proof needed in a theft case is an admission by the employee of a specific intent to steal. I don't think I've ever said that in a prior theft case, and in fact, I've sustained the discharge of many employees in theft cases based on circumstantial evidence alone without an admission by the employee of a specific intent to steal. Thus, an employer does not need to have an admission of theft by the employee in order for the discharge to be upheld. In this case, if I was persuaded that this was a run-of-the-mill time card misrepresentation case where the employee intended to defraud the Company out of money, then I'd have no trouble finding that to be theft. Here, though, I'm simply not persuaded that when Berisha stayed clocked in on the two days in question and omitted an out-in punch on both days, that he was intentionally trying to cheat or steal time from the Company or commit theft (as the discharge letter said). Instead, I find that Berisha made a good faith mistake when he omitted the out and in punches in the middle of each day. Once again, my rationale for reaching that conclusion is that Berisha's prior experience with Saturday overtime work was that his supervisor would later adjust his time card to conform to the two-hour call-in pay requirement, and Berisha thought that that's what would happen here as well. While Berisha's assumption turned out to be incorrect because Gadow did not adjust his time cards as he had done previously, Berisha's assumption was predicated on his past experience. That assumption, which I find plausible under the circumstances, leads me to conclude that Berisha's omitted punches were just that (i.e. omitted punches) and nothing more. The Company's contention that Berisha's omitted punches constituted theft was not proven. While Berisha's actions relative to his time card punch activity on the two days in question can be characterized in a variety of ways, the Company overreacted when it characterized it as theft. Accordingly, the Employer did not prove the first element of just cause.

Since the Employer did not prove that Berisha committed the misconduct of theft, it is unnecessary to address the second element of just cause (i.e. whether the employer established that the discipline it imposed was justified under all the relevant facts and circumstances). Consequently, no comment is made about the parties' arguments with respect to 1) whether the penalty of discharge was commensurate to the offense; 2) whether Berisha was afforded due process; and 3) whether Berisha was provided equal treatment.

Based on the foregoing, I find that the Employer did not have just cause to discharge Berisha. Accordingly, his discharge is overturned. The Company is directed to reinstate him and make him whole for all lost wages and benefits, less any interim earnings. In computing backpay, the Company can, of course, offset the amount of money overpaid to Berisha for his work on August 25 and September 1, 2012.

In light of the above, it is my

AWARD

1. That there was not just cause to terminate the grievant's employment.

2. That since the Employer did not have just cause to terminate the grievant's employment, his discharge is overturned. The Company is directed to immediately reinstate Berisha to his former position with no loss of seniority and to make him whole for all lost wages and benefits, less any interim earnings.

3. The undersigned will retain jurisdiction for at least 60 days from the date of this award solely for the purpose of resolving any dispute with respect to the remedy herein.

Dated at Madison, Wisconsin, this 28th day of February, 2013.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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