Beitner #8

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration Between:

EMPLOYER

-and

UNION, MI COUNCIL 25, LOCAL 1061

GR: Employee 1/3-day Suspension Arbitrator: ELLIOT I. BEITNER

OPINION

An arbitration hearing was held on October 29, 1981 at the Employer City Hall in accordance with the applicable provisions of the collective bargaining agreement in effect between the parties. Demand for Arbitration was processed through the American Arbitration Association, and this arbitrator was selected by the parties in accordance with the procedures of the American Arbitration Association. Sworn testimony was taken at the hearing; exhibits were received in evidence, and the record was closed.

ISSUE:

Was there proper cause for the administration of a three-day disciplinary layoff to the Grievant, EMPLOYEE 1?

Background:

The Grievant, EMPLOYEE 1, has been employed by the Employer for four years and currently works as a Park Maintenance Worker III. At the time of the incident in question he was a Park Maintenance Worker II. No other disciplinary action has been taken against the Grievant prior to or subsequent to the disciplinary layoff that is the subject of this grievance. PERSON 1,

the Park Operations Superintendent, testified that the Grievant's workmanship is excellent and that he is a very good employee. In fact, PERSON 1 selected him for promotion after this grievance arose.

Last year for the first time the Grievant began operating a snow plow and had been performing those duties for only one or two weeks at the time of the events leading up to this grievance. He had received no training from the Employer in the operation of the snow plow although he had requested instruction. A fellow employee showed him how to raise the blades. The Grievant worked the 9:00 p.m. to 5:00 a.m. shift, and on January 30, 1981 he was assigned to plow the snow at the Library A parking lot. One to two inches of fresh snow had fallen.

While the Grievant was performing his snow plowing duties he observed a vehicle behind him pull into the parking lot and park in the middle of that lot. The Grievant believed that a citizen was dropping off books and continued his snow plowing. When he returned to the area, he observed the parked car had not been moved. He had been plowing that lot in a north-south direction, and the car was parked perpendicular to the direction in which he was plowing, facing west. He continued to plow in a north-south direction, plowing up to the car on each side so that the car was plowed in. He stated that when the car was plowed in he estimated there were approximately six to eight inches of snow, up to the rocker panel. He denied touching that vehicle and stated that there was no ice in the area.

A citizen complained the following day that his car had been plowed in resulting in damage to his car. He was advised to contact the Employer attorney's office to process a claim. PERSON 1 telephoned the Grievant that afternoon and, according to the Grievant, woke him up.

According to PERSON 1, when he asked for an explanation of what had happened, the Grievant stated, "I was bored." The Grievant testified that he had just been awakened and wished

to end the phone conversation to go back to sleep. He adds that he now thinks it was the wrong thing to say. He testified that he did not intend to offend anyone and did not believe that he had damaged the car: his snow plow did not touch the car nor, he believed, had the snow.

PERSON 2, a Labor Relations Supervisor, conducted a Section 6 complaint investigation interview with the Grievant and PERSON 1 present. He advised the Grievant that a citizen had complained that when he had pulled into the lot with engine trouble his car had been damaged by plowed snow. According to PERSON 2, he asked why EMPLOYEE 1 plowed in the car, and the Grievant had answered, "Why not, it seemed like a good idea at the time." Later he had said that his plowing in was "an unkind act toward another human being and I am a sinner." Nothing was mentioned at that meeting about a lack of skill in snowplowing as a reason for the occurrence. PERSON 2 stated, in fact, that he kept waiting for some type of explanation that would get the Grievant off the hook, but the Grievant presented no acceptable explanation.

At the February 4, 1981 grievance meeting this issue of lack of skill and training was raised by the Union. The Grievant had received a three-day suspension for violating Employer Rules and Regulations (Joint 2) Section 1, Rule 10, which reads: "Perform assigned duties in a diligent fashion at all times during working hours." On February 4, 1981 the Grievant filed a grievance (Joint 4) stating as follows:

> Mr. Employee 1 received a letter of discipline on Jan. 30, 1981 for violating Employer Rules & Regulations, Sec. I, Rule 10. He was suspended for 3 days without pay for allegedly "not performing assigned duties in a diligent fashion at all times during working hours." Mr. Employee 1 contends that he has never been properly trained in the proper technique of snow removal by his employer. Therefore, the 3-day suspension is without proper cause.
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> Suggested Adjustment: Management must remove the letter from the employee's file and reimburse him for his 3 days lost time.

The Employer denied the grievance on the same day (Joint 5) reading as follows:

This grievance is denied.

> The grievance alleges a violation of Article IV. Management Rights, claiming his three (3) day disciplinary suspension was without proper cause. At this time, Mr. Employee 1 contends that he was never properly trained in the proper technique of snow removal.
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> It is noted that the grievant does not deny that he deliberately plowed in a car at the Library A parking lot, causing damage to the vehicle. During the investigatory interview conducted on January 16, 1981, Mr. Employee 1 was afforded an opportunity to explain why he plowed in the car. Mr. Employee 1 offered the reasons that: he was bored, that it was an unkind act .toward another human being, that he was a sinner. At no time did Mr. Employee 1 even suggest that he plowed in the car because he was incompetent in the technique of snow removal or suggest that his actions were accidental.
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> The defense now offered is incredulous and clearly a self-serving afterthought.

Grievant EMPLOYEE 1 acknowledged that he had plowed in the car, but stated that he plowed the only way he knew how. He explained his "statement that it didn't seem like a bad idea as meaning that he didn't think that it was wrong or improper to continue plowing in a north-south direction even though this resulted in the plowing in of another vehicle. He acknowledged that he did it intentionally. He asserted that he was performing his job diligently and carefully and did not push snow or ice into the car. He testified that nobody had ever showed him how to plow around a car. He acknowledged that one could have plowed in an east-west direction to try to avoid the car, but he was not practiced in operating the jeep in that direction. Saying "I am a sinner" was based he said on his fundamentalist religion and was meant to convey the idea that anytime he offends another person it is because he has original sin and is a sinner. He did not make the statement to acknowledge that he had done something that was per se a sin, but rather something that had offended a fellow citizen.

Contract Provisions:

ARTICLE IV - MANAGEMENT RIGHTS

Section 1. Except as otherwise specifically provided in this Agreement, the Management of the Employer and the direction of the work force, including but not limited to the right to hire, the right to discipline or discharge for proper cause, the right to decide job qualifications for hiring, the right to lay off for lack of work or funds, the right to abolish positions, the right to make rules and regulations governing conduct and safety, the right to determine schedules of work, the right to subcontract work (when it is not feasible or economical for the Employer employees to perform such work), together with the right to determine the methods, processes, and manner of performing work, are vested exclusively in Management. Management, in exercising these functions, will not discriminate against any employee because of his or her membership in the Union.

ARTICLE IX- GRIEVANCE PROCEDURE

Section 3. Grievances will be processed in the following manner and within the stated time limits.

Step 2.B. Arbitration

a. In accordance with the procedures of the American Arbitration Association, the Union may submit a Demand for Arbitration within sixty (60) calendar days after receipt of the Management's response in Step 1.a., not including the day of receipt of response. During the sixty (60) day period, two (2) representatives and one (1) non-employee representative of the Union shall meet with two (2) representatives of the Employer Labor Relations Office at a mutually agreeable time for the purpose of: exchanging respective evidence exhibits to be submitted to Arbitration, identification of witnesses, and stipulations of fact. Only that evidence so exchanged may be submitted to Arbitration. Nothing contained in this paragraph shall be interpreted as a bar to the settlement of the dispute by the parties.

b. An arbitrator shall be selected from a panel of five (5) names submitted by the American Arbitration Association. The arbitration shall be conducted in accordance with the rules of the American Arbitration Association. The power of the arbitrator shall be limited to the interpretation and application of the express terms of this Agreement and he/she shall have no power to alter, add to, subtract from or otherwise modify the terms of this Agreement as written. His/ her decision on grievances within his/her jurisdiction shall be final and binding on the employee or employees involved, the Union, and Management.

In disciplinary cases involving stealing by employees and/or possession or use of illegal drugs or narcotics during work hours or while on Employer property, the parties agree

that such violation shall be considered proper cause for summary discharge. In such cases the arbitrator shall be limited to a determination of facts only, and shall have no authority to modify the penalty imposed. Such violation shall not be construed as exclusive proper cause for discharge.

EMPLOYER
EMPLOYER RULES AND REGULATIONS

The purpose of these Rules and Regulations is not to restrict the rights of anyone, but to define them and to protect the rights of all and to insure cooperation.
All employees shall abide by the following requirements. Failure to do so shall result in disciplinary action.

10. Perform assigned duties in a diligent fashion at all times during working hours.

Employer's Position:

It is the Employer's position that the Grievant intentionally plowed in the car of the citizen in the parking lot. His action was improper and resulted in damage to that automobile. Employees had never been authorized, according to the Employer, to plow in vehicles. The Grievant could, in fact, have plowed around the car. His actions were inconsistent with his responsibilities as an Employer employee and constitute a violation of Work Rule No. 10.

Union's Position:

It is the Union's position that the Grievant did not violate Work Rule No. 10 because he performed his assigned duties in a diligent fashion at all times during working hours. While it may have been a mistake in judgment for him to plow in the vehicle, it was not a violation of the work rule. Furthermore, the employee had never been instructed in the full operation of the snow plow or how to plow around a vehicle. He had also never been informed that it was improper to plow in a car that was parked in a parking lot. In fact, employees had discussed plowing in cars in the past, and these acts were the subject of humorous locker room conversations. While supervisors may not have specifically authorized such activity, these discussions were held,

according to PERSON 3, a public maintenance worker, and Union steward, in the present of supervisors, and the supervisors did not say or do anything. The Grievant is acknowledged by management to have excellent workmanship and has, in fact, been promoted since these events occurred. He should not be stigmatized by having this disciplinary layoff on his personnel record.

Decision:

It is axiomatic in a discharge or discipline case that the burden of proof rests with the employer to show that the disciplined employee committed the act with which he is charged and that the discipline was for proper cause. The standard of that proof in arbitration is generally that of the civil law: a preponderance of the evidence. Justice Harlan, in Samuel Winship, 25 LED 2d 368 (1970), after addressing the reasons for the different standards used in criminal and civil cases, says of the preponderance of the evidence standard:

> A preponderance of the evidence standard therefore seems peculiarly appropriate for, as explained most sensibly, it simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence." (F. James, Civil Procedure, 250-251 (1965), (pp. 379-380, Footnotes deleted)

In this case, then, the Employer must show that the Grievant violated Work Rule No. 10 and that the Employer had proper cause for the discipline that was invoked. The management rights section of the contract delineates the various rights of the Employer. Among the rights listed are "the right to discipline or discharge for proper cause" and "the right to make rules and regulations governing conduct and safety." The Employer Rules and Regulations (Joint 2) were promulgated by the Employer pursuant to that contractual authority. These rules and regulations are on their face reasonable; and, specifically, Work Rule No. 10 is reasonable. That rule reads:

"Perform assigned duties in a diligent fashion at all times during working hours." While this work rule is, as stated, reasonable on its face, it includes no definition of the term "diligent." The Random House Dictionary of the English Language defines "diligent" as follows:

> (1) constant in effort to accomplish something; intentive and persistent in doing anything: a diligent student; (2) done or pursued with persevering attention; painstaking.

It lists as synonyms: (1) Industrious, assiduous, sedulous, occupied. (2) Persevering, indefatigable, untiring, tireless, unremitting. The plain meaning then of the rule is to require employees to work attentively and carefully and to put in a full day's work for a full day's pay. Work Rule No. 10 has been expanded by the parties, it is true, to include acts of negligence, i.e. carelessness. Arbitrator Barry C. Brown discusses this expanded interpretation in his decision of March 23, 1978 (Joint 7).

That case concerned the ten-day disciplinary layoff of Richard Timmerman for his alleged negligent operation of a Employer vehicle. Arbitrator Brown noted that the term "diligence" does not necessarily include the absence of negligence, but noted that the parties had applied Rule 10 since April 1, 1977 in a fashion that encompasses negligence under that rule. Arbitrator Brown put it this way:

> While it follows that an employee who works diligently will not be acting negligently, there are different shades of meaning between non-diligence and negligence. Most rules governing work performance include a separate provision which specifically informs employees that negligently caused damage to the employer's property is subject to disciplinary action. There is no such specific rule in the detailed publication of Rules and Regulations issued by the Employer on April 19, 1976... In this case, the employer in April, 1977 chose to cover this sort of misconduct in the future by giving a broader meaning and application to Rule 10 and the term "diligent."
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> ... when the employer did redefine diligence in Rule 10, it applied these new terms to an employee on April 1, 1977. In the meetings with the Union concerning the resultant grievance in that case, the employer explained its new policy and how it had reached its decision concerning the length of the layoff. While the union expressed disapproval of management's approach, they did not carry the grievance any further. (p. 12-13, Brown opinion)

Arbitrator Brown determined, since the new application had not been grieved by the Union, that both parties intended Work Rule No. 10 to include the concept of non-negligence. In the case decided by Arbitrator Brown, he found a violation of Work Rule 10 but mitigated the ten-day disciplinary penalty to a reprimand because the formula of applying penalties based on the amount of property damage incurred was not appropriate.

Arbitrator Brown's decision, which acknowledged the expansion of Rule 10 to include the concept of negligence, is not authority, however, for expanding the rule to include intentional acts. The testimony is clear in this case that the Grievant intentionally plowed in a vehicle in the parking lot. There is no allegation by either the Employer or the Union that his acts were based on carelessness and negligence. His conduct does not come within the purview of Rule No. 10. There is no question that the Grievant performed the job of snow plowing in a diligent fashion and completed it. What is actually in question is the propriety of his, plowing in a car.

It is determined that the Employer has not proven by a preponderance of the evidence that the Grievant violated Work Rule No. 10. It may well be that the Employer is not restricted in the exercise of its disciplinary powers to the rules enumerated in its Employer Rules and Regulations. It does have the contractual right to discipline for proper cause. In this particular case, however, it seems apparent that what was involved was a lack of communication between the Grievant and management.

PERSON 2 testified that he was looking for an acceptable explanation so that he could let the Grievant off the hook, but the Grievant's unfortunate choice of terminology frustrated that attempt. When the Grievant said he was a sinner, PERSON 2 understood that to mean the Grievant accepted responsibility and guilt for plowing in the car. In fact, at the hearing when I questioned the Grievant about the meaning of his words, the Grievant explained that he was not

acknowledging that he had violated a work rule or done anything wrong, but rather that he had offended a fellow human being by stranding his car; therefore, according to his religious belief, he was a sinner. He had never explained this to PERSON 2 in this way.

The Grievant did acknowledge that he had used poor judgment. It is clear, however, that he had received no training in the operation of the plow and more importantly no training as to what to do when a vehicle is blocking the path of plowing. There was testimony that employees had even joked about plowing in cars, as well as testimony from Union witness PERSON 3 that employees have the option of calling a tow truck or plowing in a car. The lack of communication was apparent on the part of both parties: the Grievant not explaining his own beliefs more clearly and, earlier, the Employer not communicating to EMPLOYEE 1 the appropriate procedure in dealing with vehicles blocking snowplowing operations.

Undoubtedly, expectations might be different if the Grievant's plowing had occurred in a snow emergency when there was not time to follow a customary practice or courtesy. In this case while it may seem clear in retrospect that the Grievant should have plowed around the automobile, it was not the sort of thing that employees would necessarily know without being told. The Grievant testified that he did not touch the car with the snow plow and believed that the snow did not touch the car. He had no intention of damaging the car and questions, in fact, whether it was damaged. While the Grievant's acts were intentional then, they were not so in the sense that he intended to cause harm to the parked vehicle. Rather, his acts were intentional in plowing the lot in a north-south fashion which procedure required plowing in the vehicle.

It should be noted that the Grievant has performed excellent work, and he is at least in every other respect a diligent worker.In fact, notwithstanding his pending grievance, he was promoted by the Employer. He also expressed concern that he had offended a citizen. Certainly

his attitude suggests an awareness that the purpose of Employer government is to serve the public, being courteous and responsive to the public's needs.

It is determined that the Grievant did not violate Work Rule No. 10 because it has not been shown that he failed to perform his duties in a diligent fashion. It is further determined that his actions did not warrant discipline because he was not advised nor was he aware of the fact that it was improper to plow in a vehicle. The Employer ordinarily advises employees specifically what is required of them when faced with a parked vehicle in an area being snow plowed. Under these facts, however, the Employer has failed to meet its burden to prove a violation of a work rule, and there was no showing of proper cause for discipline. Therefore, it is determined that the grievance is granted and the disciplinary suspension is to be set aside.

ELLIOT I. BEITNER

DATED: December 2, 1981