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LABOR ARBITRATION PROCEEDING
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

QUARRYSTONE, INC.,

Employer,

and

GENERAL TEAMSTERS UNION, LOCAL NO. 406

Union.

MERC No. 20-C-0569-GA

Arbitrator Lee Hornberger

A__ Discharge

DECISION AND AWARD

December 30, 2020

Hide Summary ^

Case Summary

LABOR ARBITRATION

SUMMARY

[1] Discharge - Dishonesty - Time cards ►118.6481 ►118.6486 [Show Topic Path]
Quarrystone Inc, had just cause to discharge an equipment operator for dishonesty, as he was unable to establish his whereabouts for 65 minutes, the employer proved that he was on the phone with an ex-employee and his father for at least 19 minutes of this time, and he claimed all of this time as work time, Arbitrator Lee Hornberger ruled. The grievant knew that providing false information on required documentation could result in discharge. The employer properly fired the grievant for first offense dishonesty, as an employer is entitled to honesty from employees, this is not a de minimus offense, and the CBA authorizes discharge for a first offense of dishonesty.

APPEARANCES

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INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between Quarrystone, Inc. (Employer) and the General Teamsters Union, Local No. 406 (Union). The Union contends that the Employer violated the CBA when it discharged Grievant. The Employer maintains that it did not violate the CBA when it discharged Grievant.

Pursuant to the procedures of the Michigan Employment Relations Commission, I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on November 13 and 18, 2020, in Escanaba, Michigan, via Zoom. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses and for the introduction of relevant exhibits. The dispute was deemed submitted on December 23, 2020, the date the last post-hearing submission was received.

The parties stipulated that the grievance and arbitration were timely and properly before me, and that I could determine the issues to be resolved in the instant arbitration after receiving the evidence and arguments presented.

Both advocates did an excellent job in representing their clients. All involved in the arbitration were courteous and professional. The powerful post-hearing submissions were extremely helpful.

ISSUES

At the arbitration hearing, the parties agreed the issues are as follows:

Was Grievant discharged for just cause. If not, what is the remedy?

In its post-hearing brief, the Employer did not specifically frame the issues.

In its post-hearing brief, the Union framed the issues as follows:

Did the Employer establish just cause to discharge Grievant? If the Employer failed to carry its burden of establishing just cause to discharge Grievant, what shall the remedy be?

I frame the issues as follows:

Was Grievant discharged for just cause? If not, what is the remedy?

RELEVANT CONTRACTUAL LANGUAGE
ARTICLE 2
MANAGEMENT RIGHTS

* * * * *

M. To make and enforce reasonable rules for the maintenance of discipline, subject to the express provisions of this Agreement, including the procedures established herein for the resolution of grievances;
N. To suspend, discharge or otherwise discipline employees for cause, as defined by the terms and provisions of this Agreement, and to otherwise take such measures as management may determine to be necessary for the orderly, efficient and economical operation of the Employer.

ARTICLE 9
DISCHARGE OR SUSPENSION

The Employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension, shall give at least one warning notice of complaint against**[*2]** such employee to the employee,**[*2]** in writing, and a copy of same to the Union and job steward affected, except that no warning notice need be given to an employee before he is discharged, if the cause of discharge is dishonesty, drunkenness or illegal narcotics while on duty. The warning notice as herein provided shall not remain in effect for a period of more than six (6) months from date of said warning notice. Discharge must be by proper written notice to the employee and Union affected. Any employee may request an investigation as to his discharge or suspension. Should such investigation prove that an injustice has been done an employee, he shall be reinstated and compensated at his usual rate of pay while he has been out of work. Appeal from discharge must be taken within twenty (20) days by written notice and a decision reached within thirty (30) days from the date of discharge or suspension. If no decision has been rendered within thirty (30) days, the case shall then be taken up as provided for in Article 9 hereof.

ARTICLE 10
ARBITRATION AND GRIEVANCE PROCEDURE

SECTION 1. In the event of any grievance or complaint arising under and during the term of this Agreement, an effort shall be made to adjust same in an amicable manner between the Employer and the Union. In the event that such grievance and complaint cannot be settled in this matter, the question may be submitted by either party for arbitration, as hereinafter provided. There shall be no legal proceeding of any kind before means of settlement provided herein are exhausted.

SECTION 2. Either party may demand arbitration. The party first demanding arbitration shall give two (2) days notice, in writing, to the other party of its desire to arbitrate. An arbitrator shall be selected by the Michigan Employment Relations Commission in accordance with its procedures. The decision of the arbitrator shall be binding on both parties. Failure to submit to arbitration upon request made, as provided in with this Article, shall result in the forfeiture of all rights provided by this Agreement.

The arbitrator shall have the sole and exclusive power and jurisdiction to determine whether a particular grievance, dispute or complaint is arbitral under the terms of this Agreement, including procedural disputes.

FACTUAL OUTLINE
Précis

Where was Grievant and what was he doing between 8:45 a.m. and 9:50 a.m., November 20, 2019? The Employer contends that Grievant was not working during that time period and dishonestly recorded on his time card that he was working and that dishonestly recorded time on his time card justified first offense discharge under CBA Art. 9. The Union contends that Grievant was doing job related activity during this period of time and did not falsify anything.

List of Participants

Grievant — Front end loader at pit.**[*3]** Grievant was an employee of the Employer**[*3]** from July 10, 2017 to November 27, 2019.

Kirk Alexander — Union Business Agent
Jack Ansell — Truck driver.
Thomas Buchanan — Truck driver.
Laura Brown — Bookkeeper.
Josh Godfrey — Ex-employee.
Randy Johnson — Ex-employee mechanic.
Jason Livingston — Vice-president and co-owner of Employer.
Marvin Miller — Truck driver and Union Steward.
Dale Otradovec — Truck driver.
Cory Pangborn — President and co-owner of Employer.

Hank Shinnaberry — Shop Foreman.

Introduction

The present CBA has a term of March 15, 2019, to March 14, 2023.

The Employer produces concrete and other aggregates for sale to local businesses. The Employer's pit is approximately six or seven miles from its main complex. Grievant was assigned to work at the pit operating a loader about two months before the incident in this case. The pit is a large parcel of land from which the employer takes sand and stone. These are loaded onto Employer vehicles and delivered to customers and to the Employer's cement plant at the main complex.

The main complex has several parts to it. There is the office building for the administrative staff. About 200 yards away is the shop where the vehicles are maintained and stored. Also at the main complex is the plant where the Employer produces cement.

The Employer apparently does not have a time clock. It makes time cards available to the employees who fill them out on their own.

Grievant

Grievant began working for the Employer on July 10, 2017. He operated several types of equipment, including loaders at the cement plant and at the pit. He was assigned to the loader at the pit a couple of months before the November 20, 2019, incident.

October 2018

When Grievant was working at the main complex, Mr. Pangborn became frustrated with Grievant's timeliness. In an October 22, 2018, email Mr. Pangborn expressed his frustration to Union Business Agent Alexander. In that email, Mr. Pangborn stated that he had witnessed Grievant arriving to work late yet reporting on his timecard that he had begun work at the normal shift starting time. According to Mr. Pangborn, over the course of six days Grievant was paid for 69 minutes of time that occurred before Grievant actually arrived at the facility to begin work. He expressed that a little leeway was appropriate but he was unhappy at the liberties he felt that Grievant was taking. He asked the Business Agent for some guidance. There is no evidence in the Record as to whether there was any resolution.

The pit

Mr. Livingston visited the pit almost every morning. There are a couple of different holes at the pit area. The deepest part of one of the holes must be pumped out of water in order to allow for the removal of materials at the bottom. Mr. Livingston goes there to make sure that the pumping system is operating properly.

Mr. Livingston became aware of complaints that Grievant was on his cell phone frequently while operating the loader at the pit. To check out these complaints, on several occasions**[*4]** while he was visiting the pit to ensure that the pumping system was**[*4]** working, he watched Grievant. He did not see Grievant wasting time.

November 20, 2019, before 8:54 a.m.

On the morning of November 20, 2019, the loader at the pit, which is stored outside in an unheated and unsecured area, would not start. Grievant testified that he had some mechanical skills. Grievant spent some time trying to get it going. Grievant testified at the arbitration hearing that he called Mr. Johnson, a former mechanic for the Employer. Grievant had initial telephone conversations with Mr. Johnson from 7:43 a.m. to 8:02 a.m. and from 8:20 a.m. to 8:30 a.m. The 7:43 a.m. phone call was in response to a Facebook messenger text. Grievant had a telephone conversation with a friend from 8:17 a.m. to 8:20 a.m. According to Grievant, he was not able to get the loader started and went to the shop to get jumper cables and other items necessary to get the loader running. When he got to the shop, he saw mechanic Mr. Shinnaberry. Mr. Shinnaberry apparently volunteered to come out to help. They gathered tools, returned to the pit in separate vehicles, and were able to get the loader running.

According to Grievant, after the loader was running and the fluids warmed up, Grievant checked over the machine before starting to engage in production. Grievant determined that additional hydraulic fluid, oil, and grease were needed. Grievant returned

to the shop to pick them up. Mr. Shinnaberry testified that he understood that Grievant would probably be returning to the shop to pick these items up. After Mr. Shinnaberry left the pit, Grievant decided to reach out to one of the drivers, Tom Buchanan, who had delivered supplies from the shop to the pit for him in the past, to ask Mr. Buchanan if he could bring the supplies out to the pit. Grievant testified that, right after he dialed Tom's number at 8:54 a.m. to make this request, he saw Mr. Buchanan's truck coming down the road towards the pit. Before Mr. Buchanan had an opportunity to answer the call, Grievant disconnected because there was now no reason for the call. The call from Grievant to Mr. Buchanan was at 8:54 a.m. and Mr. Buchanan return the call at 8:57 a.m.

November 20, 2019, after 8:54 a.m.

Mr. Ansell testified that Grievant left the pit to go to the shop around 9:00 a.m. Grievant ran into Mr. Ansell when he left to go to the shop. When Mr. Ansell found out that Grievant was returning to the shop to pick up supplies, he asked Grievant if Grievant would go to Mr. Ansell's pickup truck and get his cell phone. Grievant agreed.

Grievant had a telephone conversation with Mr. Johnson from 9:02 a.m. to 9:08 a.m. Grievant testified that he does not recall the subject of this conversation. Grievant had telephone conversations with his father at 9:14 a.m., 9:27 a.m. to 9:29 a.m., 9:30 a.m. to 9:32 a.m., and 9:34 a.m. According to Grievant, these conversations with his father concerned "putting insurance on one of my vehicles."

Grievant testified that he then went to the shop for**[*5]** the second time that day, which, according to the Union's post-hearing brief,**[*5]** takes 10 to 15 minutes depending on the traffic, found three buckets, cleaned them out, filled them with hydraulic fluid and oil, gathered up some grease, and loaded the supplies into his pickup truck. He indicated that he saw Mr. Shinnaberry under a truck while Grievant was there gathering the supplies but did not say anything to him.

According to Grievant, after gathering the supplies, Grievant went to Mr. Ansell's truck to get the cell phone. Grievant could not find the cell phone. He got in his truck and left to return to the pit. He did not get too far from the shop when he realized he had forgotten to pick up the electrical testing meter.

Grievant had a telephone conversation with Mr. Johnson from 9:43 a.m. to 9:49 a.m. Grievant testified that he did not recall the topic of that conversation. Grievant called Mr. Ansell at 9:56 a.m. According to Grievant, this was to tell Mr. Ansell about Ansell's cell phone not being in Mr. Ansell's truck.

According to Grievant, Grievant then turned around and went back to the shop for a third time. Mr. Shinnaberry testified that Grievant did not come to the shop between 9:00 a.m. and 9:50 a.m., and that Grievant only picked up the fluids after he returned when Mr. Pangborn and Mr. Shinnaberry were present at the shop. That would have been after 9:52 a.m.

Right after Mr. Pangborn saw Grievant at the shop, Mr. Pangborn contacted Mr. Livingston with that information. Mr. Livingston then contacted Grievant at the pit 20 minutes later at 10:12 a.m.. He told Grievant to return to the main complex to operate a loader at the cement plant. Grievant testified that he finished up at the pit and arrived back at the concrete plant at the main complex before noon. Mr. Livingston testified that he met Grievant when Grievant arrived back at the main complex.

Wednesday, November 20, 2019

On November 19, 2019, **President and co-owner Pangborn** received a phone call from Mr. Livingston. Mr. Livingston asked, "Do you know where [Grievant] is?"

Mr. Shinnaberry would be in the shop almost all the time. Mr. Shinnaberry was the Head Mechanic. Mr. Livingston called Mr. Pangborn from the pit. Mr. Pangborn drove to the shop. Grievant was not there. Then Grievant showed up. Mr. Pangborn then talked with Grievant. Mr. Pangborn then left the building. He had no further involvement that day with Grievant.

According to Mr. Pangborn, Grievant left the pit area at 8:49 a.m. to go to the shop. But Grievant was not at the shop 10 minutes later. No one had been in the shop. There were no answers as to where Grievant was. Grievant did not show up at the pit during that time. The question was what were the whereabouts of Grievant from 8:49 a.m. to 9:50 a.m.? Grievant did not return to the pit during this time period. Another driver was driving Grievant's loader. After a short time period, it was decided to have Grievant come back to the main plant.

Truck Driver Otradovec[*6] testified that on November 20, 2019, he saw Grievant on the phone playing**[*6]** video games and texting. This was "daily." Grievant would be "on top of the hill playing gambling games." Grievant was supposed to be moving overburden. Mr. Otradovec had a November 20, 2019, conversation with Tom Buchanan. Mr. Otradovec

indicated that Grievant was "not in the yard." Mr. Otradovec brought fluid to the pit. Mr. Buchanan asked Otradovec if he knew where Grievant was. Mr. Otradovec started work at 8:30 a.m. Mr. Otradovec did not see Grievant. It was odd that Mr. Otradovec did not see Grievant.

Mechanic Shinnaberry works in the shop. He is familiar with Grievant. On November 20, 2019, Mr. Shinnaberry was at the pit. The loader in the pit would not start. Grievant was supposed to be doing daily maintenance. Grievant called Mr. Shinnaberry ca 7:30 a.m. or 8:00 a.m. Mr. Shinnaberry went and looked at the loader. He was trying to find an air leak in the brake system. He got to the pit ca 8:20 a.m. to 8:40 a.m. A battery cable was loose. Grievant was there. Mr. Shinnaberry did not ask where Grievant had been during the hour. According to Mr. Shinnaberry, Grievant arrived at approximately 10:00 a.m. or 10:15 a.m.

Truck Driver Buchanan knew Grievant. Mr. Buchanan received a phone call from Grievant. Grievant said "going ahead and load myself. .... [g]oing to shop to get hydraulic oil." Mr. Buchanan stayed and loaded trucks for a while. Co-owner Livingston showed up at approximately 9:15 a.m. They had a conversation. Mr. Livingston wanted to know where Grievant was. Mr. Buchanan was there approximately ten minutes. Mr. Buchanan does not recall seeing Grievant on the road. Mr. Buchanan thinks he saw Grievant later that day. He saw Grievant on the phone 'all the time," and it "wasn't [his] place to talk with him [Grievant]."

According to **Co-Owner Livingston**, Grievant's punctuality was "all over the place." One "could not count on him to get anything done." Mr. Livingston moved Grievant to a job in the pit. There were problems with Grievant at the pit. There were multiple complaints of Grievant playing on his phone. Mr. Livingston was trying to give Grievant a chance to make it with the Employer. On November 20, 2020, Grievant was working as the loader-operator in the pit. Mr. Livingston took no action concerning phone complaints. Mr. Livingston tries to go to the pit in the morning. It was 9:15 a.m. when Mr. Livingston got to the pit. Grievant was not there. Mr. Buchanan was there. The question was "where is" Grievant. "Grievant had left to get hydraulic oil." Mr. Buchanan said Grievant called him. Mr. Livingston called Mr. Pangborn to see if Grievant was at the shop to get oil. One could do all of this within half an hour. Mr. Livingston called Mr. Pangborn. Mr. Pangborn went to the shop. Grievant was not at**[*7]** the shop. Grievant eventually showed up at the shop. Mr. Livingston drove to the shop. Mr. Livingston does not recall seeing Grievant or his truck. Mr. Pangborn let Mr. Livingston know that Grievant was at the shop.

November 26, 2019,[*7] meeting

There was a meeting on November 26, 2019, in Mr. Pangborn's office concerning the November 20, 2019, situation. Messrs. Pangborn and Livingston and Union Steward Marvin Miller met with Grievant. They talked with Grievant. According to Mr. Pangborn, Grievant's recollection of his time frame changed. Grievant was not consistent. There was Grievant's first answer. Then there was a slightly different story. There was a discussion about Grievant being late on prior occasions with time on the time card. No time was taken off Grievant's time cards when he was late. Grievant tried to explain his time line. According to Mr. Pangborn, Grievant was dancing around what he did during the hour. Mr. Miller said quit "BSing." Grievant never gave a consistent answer on where he was. Mr. Miller told Grievant to "quit making up stories about his time on the morning of November 20, 2019." According to Mr. Miller, Mr. Pangborn asked Grievant "where were you at?" Grievant said, "down at the shop." Then Grievant changed his story.

On the November 20, 2019, time card, there were no adjustments for the time in question. Mr. Pangborn viewed this as dishonesty. Mr. Pangborn prepared the discharge notice. Mr. Pangborn believed Grievant not being fair with the Employer and the time card and use of time situation was in violation of CBA Art. 9.

November 27, 2019, discharge letter and Grievance

The November 27, 2019, discharge letter from Mr. Pangborn to Grievant said,

> This letter is to inform you that as of 11/27/19 your employment with [the Employer] is terminated.
>
> After a meeting on 11/26/19 at 3:00 p.m. between yourself, Jason Livingston, Cory Pangborn along with Marvin Miller as a Union Representative witness, we as a company believe there has been time claimed on your timecards that was not actually worked.

Specifically discussed in the meeting is a period of time on Wednesday November 20th between approximately 8:45 a.m. and 9:50 a.m. in which you cannot confirm your whereabouts. Jason Livingston arrived at the pit at approximately 9:15 a.m. where overburden is being removed by several other employees, and you were not on site. After asking a few individuals Jason was able to find out you had called Tom Buchanan at 8:49 a.m. and stated you left the site to retrieve fluids for the loader you were operating. At 9:27 a phone call was placed from Jason Livingston to myself, Cory Pangborn questioning your current location. At that time I left the office and went to the shop where you told Tom Buchanan you were going to get the fluids. At this time of approximately 9:40 I talked with mechanic Hank Shinnaberry**[*8]** who was working on truck 05 in the shop. Hank was asked if he knew where you were or if anyone else was in the shop. Hank said no one else was in the shop area. Hank and I preceded to talk about a couple items at which time you came into the shop at 9:50 a.m. and questioned Hank about a meter to check a battery. At 9:51 I sent a message to Jason Livingston letting him know you arrived at the shop.

This period of an hour in question**[*8]** is traveling from the pit on N.3 lane to the shop at our Escanaba location. This travel period is usually approximately 10 minutes.

During our meeting you claim to have traveled directly to the shop, retrieved fluids for the loader and was completed with filling the loader with fluids back at the pit by 10:12 when Jason called asking you to return to the Escanaba location.

This timeline leaves 60+ minutes travel from N.5 lane gravel pit to shop and 30 minutes to clean 5 gallon buckets and fill with bulk oil, return to N.3 lane pit and fill loader with fluids.

During this 1 hour plus period there is no confirmation from any other employee or additional information substantiating your whereabouts.

This time was claimed on your time sheet as worked hours that cannot be confirmed. Additionally in the meeting of 11/26/19 you have claimed you had been late 2-3 times over the last few months. In review of timecards pulled from 8/1/19 to date all timecards are clocked in at 7:00 a.m. with only one exception on the 28th of August.

We as a company believe the time on the 20th of November along with the other days admitted to have been late that appear to have been claimed is theft from the company and cannot be tolerated or allowed.

Per contract between [the Employer] and [the Union], … article 9 no warning notice need be given for the cause of discharge for employee dishonesty.

For this reason [the Employer] is making your discharge effective immediately.

Union representatives have been contacted and will receive a copy of this discharge letter.

The November 27, 2019, Grievance said:

I received a termination notice dated November 27, 2019 claiming employee dishonesty.

I am requesting an investigation for the discharge and I am requesting to be reinstated and be made whole for all loses.

Including but not limited to article 9 of the [CBA].

There was a request by Grievant for further investigation.

December 12, 2019, meeting

There was a December 12, 2019, meeting with Business Agent Alexander.

Mr. Pangborn talked with Jack Ansell. Mr. Ansell said Grievant called Ansell and asked him to lie for Grievant.

After the December 12, 2019, meeting, Mr. Pangborn sent a letter to Mr. Alexander. That letter said:

> Jason and I have discussed the dispute with [Grievant] and it is our final decision to not employ [Grievant] at this company as of the previously stated date of 11/27/2019. In addition to the interviews and discussion we had at our meeting on 12/12/2019 Jack Ansel,**[*9]** the employee discussed in that meeting about a phone call from [Grievant] stopped in today. Jason and I asked Jack if [Grievant] called him recently and Jack said he did. Jack said he was at the parts store in town when [Grievant] called him and was asked how long he be gone and Jack told him an hour and 15 minutes. [Grievant] asked Jack to say a half an hour and Jack said he wouldn't lie to his bosses.
>
> We did not reach out to Jack. [H]e just happened to stop in today so we figured we would clarify it with him."
>
> If you have any additional questions**[*9]** feel free to reach out to either myself or Jason. Thank you for your time in this matter and let me know when or if we are needed for any additional steps.

March 3, 2020, Arbitration demand

The Union submitted its demand for arbitration on March 3, 2020.

CONTENTIONS OF THE PARTIES

a. **For the Employer**

According to the Employer, this arbitration arises out of CBA, Art. 9. The Employer's November 27, 2019, written discharge of Grievant was for just cause under Art. 9. No warning notice is required under Art. 9 when an employee is discharged for dishonesty. In this case, no warning notice was necessary. Grievant's pattern of dishonesty was recognized in 2018 and documented and acted upon in 2019. The Employer, Mr. Pangborn, its President; Mr. Livingston, its Vice-President; Mr. Alexander, Union Business Agent; and several employees were aware of Grievant's pattern of dishonesty on and before November 20, 2019.

Grievant's dishonesty was documented in the November 27, 2019, Discharge Letter; a letter from Mr. Pangborn to Mr. Alexander after a meeting on December 12, 2019; in an October 22, 2018, Memorandum from Mr. Pangborn to Mr. Alexander documenting 69 minutes charged to the Employer for time not worked over a six-day period; in the phone record of Mr. Ansell, driver; and in the redacted phone log of Grievant from November 20, 2019.

Grievant claimed he called Mr. Buchanan at 8:54 a.m. Mr. Buchanan called back at 8:57 a.m. as Grievant was leaving the pit. If it took 15 to 20 minutes for Grievant to get to the shop, as he claimed, it was 9:15-9:20 a.m. when he arrived. If, as other witnesses indicated, it takes ten minutes to collect fluids, he would return from the shop to the pit before 9:30 a.m. He said it took 20 to 30 minutes between 9:15 a.m. and 9:45 a.m. to get the fluids in the shop. During that same period, he spoke three times with his father, once to Escanaba Public Safety, and with Mr. Johnson. He was on the phone for 12 minutes. Grievant said he turned around at Bark River Knife and returned to the plant. That facility is approximately one to two minutes away from the plant by truck. He got back to the plant at 9:50 a.m.

Grievant said he was gone from 9:40 a.m. when he left the shop until 9:50 a.m. when he returned to the shop and saw Messrs. Pangborn and Shinnaberry. He spoke with Mr. Johnson for six minutes between 9:43 a.m. and 9:49 a.m. If it took**[*10]** one to two minutes to go to Bark River Knife and return, most of the ten minutes that Grievant was gone, he was talking again with Mr. Johnson for the fifth time that morning since 7:43 a.m. Grievant asked Mr. Shinnaberry about the battery tester at that point. It is likely that Grievant arrived at the shop to obtain the fluids at 9:50 a.m. Thereafter at 9:56 a.m., he called Mr. Ansell. If, in fact, he was in the shop washing buckets and obtaining grease for 30 minutes, Mr. Shinnaberry would**[*10]** have seen him, spoken with him, or at least heard him. It is probable that Grievant would have spoken to Mr. Shinnaberry about the fluids, Truck 05, buckets, loader, battery tester, and any number of other things. Grievant claimed he did not even say "hi." Grievant denies asking Mr. Ansell to lie for him about being gone only a half-hour instead of an hour and 15 minutes. There was no benefit to Mr. Ansell in lying for Grievant. Grievant, however, had motive and reason to encourage Mr. Ansell to lie

about how long Grievant was gone from the pit. On November 20, 2019, Grievant was concerned that his behavior jeopardized his job.

The Grievance and relief sought by the Union must be dismissed and denied. The award must be entered on behalf of the Employer.

b. **For the Union**

The Union argues that the Employer failed to (1) establish that Grievant was not working in the interest of the Employer during the time alleged by the Employer, and (2) establish that Grievant was dishonest, as that term is used in the CBA and as applied by the Employer in the past. As to just cause to discharge Grievant for tardiness, the Employer has introduced evidence that only weakly establishes that there were any new incidents of tardiness and has totally failed to establish when such incidents occurred.

The Employer's prior action with regard to the issue of tardiness established the standard to be applied in this case. As set forth in an October 22, 2018, email from co-owner Pangborn to Business Agent Alexander, over a period of a week, Grievant was late on five or six days for a total of 69 minutes and received only a verbal and a written warning under a system of progressive discipline. Since those verbal and written warnings were over six months old at the time of this discipline, they could not be used for further progressive discipline.

As to the claim of dishonesty, we are talking about maybe a few minutes, and maybe no minutes, of clearly established wasted time at the most. It is not clear the Employer has proven any time charged to the Employer for work not performed. Even if it had, the discipline to be issued, as in the prior instance in 2018, would be a written warning at most.

The action alleged by the Employer does not arise to the level of dishonesty. The CBA specifies that no prior notice need be given for dishonesty. The allegation is that Grievant was nowhere to be found for a period of one hour and 15 minutes.**[*11]** That is factually inaccurate. If, however, Grievant were found to be on a brief frolic and detour, that would amount to wasting time and not dishonesty. The Employer has set no standard as to when wasting time becomes stealing time.

The CBA requires very bad conduct to constitute dishonesty. This is established by the nature of the other two forms of misconduct that allow for immediate discharge without a written notice on record within six months are inappropriate**[*11]** conduct of the most egregious form - drunkenness or illegal narcotics while on duty. These two egregious forms of misconduct put flesh and bones on the term "dishonesty." Not every form of wasting time constitutes dishonesty. The Employer previously viewed a total of 69 minutes of failure to accurately record time worked not as dishonesty but as appropriate for progressive discipline in 2018.

The Employer cannot even establish any wasted time. The proofs concerning this claim of wasted time were far from conclusive. The sole witness by which the Employer tried to establish the wasted time on November 20, 2019, was clearly mistaken about Grievant's whereabouts later that same day. The Employer's proofs are all hinged on whether or not the mechanic was mistaken when he testified that Grievant was only in the garage twice on the morning in question - first when Grievant went to the garage to get items to start the loader (there is no dispute over this trip) and second when he came back to the garage to obtain fluids and a voltmeter. On the other hand, Grievant testified that he picked up the fluids (the second trip), then started to return to the pit when he remembered that he needed the electrical tester and came back to the shop to pick that item up (the third trip). If the Employer fails to clearly establish that there were only two trips instead of three, it has failed to carry its burden of proof that the Grievant was stealing time.

DISCUSSION AND DECISION

Introduction

The CBA provides that an employee cannot be disciplined without just cause. It is well established in labor arbitration that where, as in the present case, an employer's right to discipline an employee is limited by the requirement that such action be for just cause, the employer has the burden of proving that the discipline was for just cause. "Just cause" is a term of art in CBAs. "Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he was disciplined. Other elements include a requirement that an employee know or could reasonably be expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline; the existence of a reasonable relationship between an employee's misconduct**[*12]** and the punishment imposed; and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

For the following reasons, I conclude that the Employer did not violate the CBA when it discharged Grievant.

Discipline

Grievant was discharged for alleged dishonesty in violation of CBA, Art. 9.

The Employer contends that Grievant was guilty of dishonesty and the Grievance should be denied. The Union contends that Grievant was not dishonest and the Grievance should be granted.

The CBA provides that:

> The**[*12]** Employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension, shall give at least one warning notice of complaint against such employee to the employee, in writing, and a copy of same to the Union and job steward affected, **except that no warning notice need be given to an employee before he is discharged, if the cause of discharge is dishonesty, drunkenness or illegal narcotics while on duty**. The warning notice as herein provided shall not remain in effect for a period of more than six (6) months from date of said warning notice. Discharge must be by proper written notice to the employee and Union affected. Any employee may request an investigation as to his discharge or suspension. ... . Emphasis added.

Burden of proof

The Employer has the burden of proof in a discipline case. Elkouri & Elkouri, *How Arbitration Works* (8th ed.), pp. 15-26 to 15-32; Abrams, *Inside Arbitration* (2013), pp. 206-209; *Cornerstone Chemical Co.*, **136 LA 7, 18** (Jennings, 2015).

The Union argues that I should apply the clear and convincing standard. The Employer has the burden of moving forward and, at a minimum, establishing a *prima facie* case. The quantum of proof may vary according to the charges involved. In general, arbitrators apply the preponderance of evidence standard in determining whether the employer has established the necessary just cause. Some arbitrators require a higher degree of proof where the alleged conduct is of a type recognized by criminal law or carries a similar stigma that affects the reputation of the accused and results in the discharge of the grievant. Elkouri & Elkouri, p. 15-26, n 124, citing *Professional Med Team*, **111 LA 457** (Daniel, 1998) (clear and convincing evidence for discharge cases in general), and *United Parcel Service*, **121 LA 207** (Wolff, 2005) (employer must prove by clear and convincing evidence that it had just cause to discharge employee for dishonesty). The Union requests that I require the Employer to carry the burden of demonstrating by clear and convincing evidence the reasons that would justify its termination decision, as opposed to some lesser form of discipline for Grievant's performance issues. As indicated by Professor Abrams, "the employer must convince the arbitrator what occurred." Abrams, p. 208.

Witness credibility

One of my duties is to decide how credible each witness was. It is up to me to decide if a witness's testimony was believable, and how much weight I think it deserves.

I start my credibility analysis with the**[*13]** viewpoint that all witnesses are equal and deserving of equal deference concerning their recollections. At the onset, neither Employer nor Union witnesses should be given higher deference. "[S]upervisors should not necessarily be given greater credibility ... . [It has been suggested that] neither the discharged employee, the steward, nor the supervisor who made the [discipline] decision [is] inherently more credible ... ." Elkouri & Elkouri, p. 8-97.

Here are some things I consider in evaluating witness testimony. (A) Was the witness able to clearly see or**[*13]** hear the events in question? Sometimes even an honest witness may not have been able to see or hear what was happening and may have an incorrect recollection. (B) How good the witness's memory seemed to be. Did the witness seem able to accurately remember what happened? (C) Was there anything else that may have interfered with the witness's ability to perceive or remember the events? (D) How did the witness act while testifying? Did the witness appear honest? Or did the witness appear to be mistaken? (E) Did the witness have any relationship with any party, or anything to gain or lose from the case that might influence the witness's testimony? Did the witness have any bias, prejudice, or reason for testifying that might cause the witness to testify

incorrectly or to slant the testimony in favor of one side or the other? (F) Did the witness testify inconsistently while on the witness stand, or did the witness say or do something or fail to say or do something at any other time that is inconsistent with what the witness said while testifying? If I believe the witness was inconsistent, I ask myself if this makes the witness's testimony less believable. Sometimes it may; other times it may not. I consider whether the inconsistency was about something important, or about some unimportant detail. I ask myself if it seemed like an innocent mistake or if it seemed deliberate. (G) How believable was the witness's testimony in light of the other evidence? Was the witness's testimony supported or contradicted by other evidence that I found believable? If I believe a witness's testimony was contradicted by other evidence, I realize people sometimes forget things, and even two honest people who witness the same event may not describe it exactly the same way.

These are some of the things I consider in deciding how believable each witness was. I consider other things that I think shed light on the witness's believability. I use my common sense and my everyday experience in dealing with other people. Then I decide what testimony I believe and how much weight I think it deserves. See generally WD Mi Civ JI 2.07. Abrams, pp. 189-192; Elkouri & Elkouri, pp. 8-93 to 8-98.

I have considered all the circumstances of all the witnesses when assessing which testimony is the most credible. I have considered the totality of the circumstances.

"[T]he employee has the burden of proving the validity of**[*14]** the defense or excuse that the employee asserts in justification for his ... conduct." *Id.* at 15-25 fn 118.

Grievant knew of the honesty policy

The honesty requirement is in the CBA. It is inherently binding on Grievant.

Grievant knew or could reasonably be expected to know that providing false**[*14]** information on required documentation could result in discharge. Nolan, *Labor and Employment Arbitration* (1998), p. 319. Grievant was on notice of the need to not be dishonest or face discharge.

The Union contends that the Employer giving Grievant a written reprimand in October 2018 for arriving late to work on six days by several minutes each day obviated the right to discharge for first offense time card dishonesty provided for in Art. 9. That contention is not applicable for a number of reasons. First, the October 2018 arriving late to work by a few minutes incidents were in October 2018. The CBA under which the November 2019 discharge occurred has a term of March 15, 2019, to March 14, 2023. There is no evidence in the Record of what the CBA discharge language was in October 2018. Given the fact that the discharge at issue occurred under the present 2019-2023 CBA, and the present CBA has six-month purge language, a written reprimand under the prior CBA does not affect the November 2019 discharge. Second, there is a difference between showing up for work several minutes late as compared to becoming non-findable during an hour while at work on the clock and not being able to explain during at least two investigatory meetings one's whereabouts. Third, Grievant was engaged in non-work activity during the time he claimed on his time sheet.

CBA, Art. 9 was a reasonable work requirement

Management has the right to establish reasonable work place rules not inconsistent with the CBA. Elkouri & Elkouri, *How Arbitration Works* (8th ed.), pp. 13-144 to 13-145. Assuming there is a proven violation and the other requirements of just cause, the Employer's honesty policy is reasonable. See generally, Abrams, pp. 206 and 261. The first offense discharge for dishonesty is in the CBA. It is not a unilaterally established work rule.

There was a fair and objective investigation

There was an appropriate investigation.

"Industrial due process ... requires management to conduct a reasonable inquiry or investigation before assessing punishment." Elkouri & Elkouri, p. 15-49. It is a fundamental principle of employment law that the issue of due process and following correct procedures can impact on the issue of just cause and the amount of discipline, if any, that should be approved or imposed. *Id.* at 15-47 to 15-50. *Federated Dep't Stores v. Food & Commercial Workers Local 1442*, **901 F.2d 1494** (9th Cir. 1990) (arbitrator appropriately determined due process to be component of good cause for discharge); *Teamsters Local 878 v. Coca-Cola Bottling Co.*, **613 F.2d 716, 718** (8th Cir.), cert. denied, **446 U.S. 988** (1980) (appropriate for arbitrator to interpret just cause as including requirement of procedural fairness).

Abrams, p. 211, states:

> ... [T]he concept of "due process" is inherent in the just cause provision.
>
> ... [A]rbitrators prefer seeing evidence that management ... offered**[*15]** the accused employee the opportunity to contribute before the investigation hardened into a decision. A discharge followed by an investigation obviously puts the cart before the horse. An employer need not keep an employee at work, but there is no obvious**[*15]** reason why it cannot suspend the employee pending investigation.

Arbitrators "often overturn otherwise valid discharges where the employer has denied the employee those [due process] protections." Nolan, *Labor and Employment Arbitration* (1999), pp. 205 to 206.

Arbitrator Goldstein indicated at *State of Illinois*, **136 LA 122, 129-130** (2015), that:

> [A]n employer's obligation to a predisciplinary investigation is determined by context. ... [T]he level of discipline involved is an important consideration ... in determining whether the underlying investigation by the employer was fair and reasonable.

Grievant was given a meaningful opportunity to tell his side of the story before discipline was imposed. There was an adequate check against the possibility of an incorrect decision.

CBA Art. 9 was applied evenly and without discrimination

There is no evidence that other employees have been accused of either dishonesty or falsifying a time card.

There was a time card dishonesty CBA, Art. 9 violation

Neither Employer nor Union witnesses should be given higher deference. "[S]upervisors should not necessarily be given greater credibility ... . [It has been suggested that] neither the discharged employee, the steward, nor the supervisor who made the [discipline] decision [is] inherently more credible ... ." Elkouri & Elkouri, p. 8-97.

I have considered all the circumstances of all the witnesses when assessing testimony. I have considered the totality of the circumstances. Abrams, pp. 189-192; Elkouri & Elkouri, pp. 8-93 to 8-98. See generally WD Mi Civ JI 2.07.

Furthermore:

> The arbitrator's decision in discharge and discipline cases must reflect the parties' values and interests, not the arbitrator's personal conception of how the workplace should be run." Abrams, p. 202.

An arbitrator may require a high degree of proof in one discharge case and at the same time recognize that a lesser degree may be required in others. Elkouri & Elkouri, pp. 15-28 to 15-29.

The period of time at issue in this case is 8:45 a.m. to 9:50 a.m., November 20, 2019. On that morning Grievant spent the following time on the phone with non-employee Johnson who had been previously employed with the Employer as a mechanic.

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7:43 a.m.      19 minutes [this was Grievant responding to a Facebook
Messenger text from Johnson.]

8:20 a.m.      10 minutes

9:02 a.m.      1 minute

9:02 a.m.      6 minutes

9:43 a.m.      6 minutes
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During the 8:45 a.m. to 9:50 a.m. period in question, Grievant spent 13 minutes on the telephone with Mr. Johnson and 6 minutes on the phone with his father. This totals at least 19 minutes on the telephone during the period in question. Before the period in question, Grievant spent 29 minutes on the telephone with Mr. Johnson.

The Employer contends that Grievant spoke with Mr. Johnson**[*16]** about non-work related matters. The Union contends that Grievant spent some time trying to get the loader going, including calling Mr. Johnson for help.

Grievant testified that he did not recall the topics of his 9:02 a.m. and 9:43 telephone conversations with Mr. Johnson.**[*16]** Mr. Johnson did not testify. Grievant testified that his 9:14 a.m., 9:27 a.m., and 9:34 telephone conversations with his father concerned putting insurance on one of Grievant's vehicles.

Effect of falsification of records

It has been stated that:

> The arbitrator's decision in discharge and discipline cases must reflect the parties' values and interests, not the arbitrator's personal conception of how the workplace should be run." Abrams, p. 202.

"As part of the basic employment bargain every worker makes, an employee must provide his employer with a reasonable amount and quality of work in exchange for the compensation and benefits he receives." *Carmeuse Lime & Stone*, *135 LA 1668, 1670* (Abrams, 2016).

Furthermore,

> An employer is entitled to honesty from its employees. If it can't believe its own workers, the employer can't trust them with the job responsibilities and equipment necessary to do their work. An employer's inability to trust its workers puts its overall mission at risk. *Oregon Liquor Control Commission*, *137 LA 1809, 1815* (Pedersen, 2017).

Arbitrators have held that falsification of employer records, including dishonest entries on activity records, can be just cause for discharge. *Atlanta Linen Service*, *85 LA 827, 829* (Slatham, 1985) (falsification of employer records being just cause for discharge is "certainly understandable as the [employer] must insist and rely upon the integrity of records...[F]alsification implies that some action was reportedly taken which, in fact, was not in reality taken"); *Robert Bosch Corp.*, *117 LA 1406* (Lalka, 2002) (employer had just cause to discharge an employee who falsified a production log). *Georgia Power Corp.*, **125 LA 97, 99** (Abrams, 2008) (finding that employer had just cause for discharging a 25-year employee with no previous discipline who falsified a work record). See *Zimmer Surgical, Inc.*, *137 LA 1734, 1744* (Ross, 2017).

In the case before me, the discharge for first offense dishonesty is embedded in the CBA. Given the specific wording of Art. 9, first offense discharge for dishonesty is part of the definition of just cause. This case does not involve discrimination, inconsistent enforcement, protected activity retaliation, or a *de minimis* violation

Penalty

It has been indicated that the remedy to be fashioned will be fact-specific. An arbitrator can consider mitigating circumstances. Arbitrators may reduce the penalty if, given the facts of the case, it is clearly out of line with generally accepted industrial standards of discipline. Elkouri & Elkouri, pp. 18-46 to 18-49; and Elkouri & Elkouri, How Arbitration Works (8th ed.) (2018 Cum. Supp.), pp. 18-6 to 18-7. See generally *ConAgra Foods, Inc.*, **137 LA 169, 178-180** (Ross, 2017). "**Absent a specific provision establishing that violation of a provision [of the CBA] results in [a certain level of discipline]**, the arbitrator has broad leeway to determine whether the discipline imposed fits the charge of misconduct." Farrell, "Due Process/Just Cause Issues," *References for Labor Arbitrators* (American Arbitration Association, 2005),**[*17]** p. 32. Emphasis added.

"Court decisions recognize broad arbitral discretion to review the reasonableness of the penalty imposed by the employer in relation to the employee's wrongful conduct." Elkouri & Elkouri, p. 15-32. *Paperworkers v. Misco, Inc.*, **484 U.S. 29** (1987).

It has been said that, when an employee**[*17]** "has violated a rule or engaged in conduct meriting disciplinary action, it is the function of management to decide the proper penalty." *Park Geriatric Village*, *81 LA 306, 311* (Lewis, 1983). The fact that the employer may have imposed a somewhat different or more severe penalty than the arbitrator might have fixed "had he had the decision to make originally is not justification for [the] arbitrator to change the penalty." *SA Slenk and Co.*, *26 LA 395, 396* (Stouffer, 1956). An arbitrator "should not substitute his personal judgment for that of management because he does not agree with management in its disciplinary decision." *Parkview-Gem Inc.*, *59 LA 429, 431-432* (Dugan, 1972). *Emerson Electrical Co.*, *89 LA 512, 515* (Traynor, 1987) (once "the evidence

demonstrates just cause exists for discipline, an arbitrator is not warranted in overruling its decision to discharge unless the evidence shows management acted in an arbitrary, capricious, discriminatory or inequitable manner"). Elkouri & Elkouri, pp. 15-32 to 15-35. Abrams, p. 212. *Rabanco Ltd*, **137 LA 328, 337-338** (Latsch, 2017).

It has been said that arbitrators should not alter the employer's choice of penalty unless the employer's actions have been arbitrary or in violation of a statute or the CBA. This principle is summarized in *Davison Chemical Co.*, *31 LA 920, 924* (McGuiress, 1959), as follows:

> Where proper cause for a disciplinary action exists, a penalty imposed in good faith by management should not be disturbed by the arbitrator. It is not for the arbitrator to substitute his judgment for that of one having proper authority to discharge, where there has been no abuse of discretion or no conduct forbidden by statute or the labor agreement.

Arbitrator Whitley P. McCoy summarized management's discretion to determine the appropriate level of discipline.

> Where an employee has violated a rule or engaged in conduct meriting disciplinary action, it is primarily the function of management to decide upon the proper penalty. If management acts in good faith upon a fair investigation and fixes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it. The mere fact that management has imposed a somewhat different penalty or a somewhat more severe penalty than the arbitrator would have, if he had had the decision to make originally, is no justification for changing it. The minds of equally reasonable men differ. A consideration which would weigh heavily with one man will seem of less importance to another. A circumstance which highly aggravates an offense in one man's eyes may be only light aggravation to another. If an arbitrator could substitute his judgment and discretion for the judgment and discretion honestly exercised by management, then the functions of management would have been abdicated, and unions would take every case to arbitration. The result would be as intolerable to employees as to management. *Vertex Aerospace, LLC*, **120 LA 767, 768** (Kilroy, 2004) (quoting *Stockham Pipe Fitting Co.*, **1 LA 160** (McCoy, 1945)).

The degree of discipline imposed under this specific CBA language was reasonably related to**[*18]** Grievant's offense. The authorization of first offence discharge for dishonesty in the CBA extremely limits, if not completely eliminates, my ability to provide for a different discipline level assuming a proven violation.

It has been indicated that:

> The**[*18]** arbitrator's decision in discharge and discipline cases must reflect the parties' values and interests, not the arbitrator's personal conception of how the workplace should be run." Abrams, p. 202.

Union's arguments

The Union makes serious arguments. I have seriously considered all of them.

The Union argues that the Employer's 2018 action concerning tardiness established the standard to be applied in this case; in October 2018, over a period of a week, Grievant was late on five or six days for a total of 69 minutes and received only a verbal and a written warning; since those verbal and written warnings were over six months old at the time of this discipline, they could not be used for further progressive discipline. This argument does not control. The 2018 situation did not occur under the present CBA. If the parties had wanted to require progressive discipline for dishonesty, they could have said so in the present CBA. This they did not do. One email in 2018 to which there was apparently no response does not create a practice that would change the unambiguous language of CBA, Art. 9.

The Union argues that concerning the dishonesty claim this case involves maybe a few minutes, and maybe no minutes, of clearly established wasted time most. This argument does not control. Based, in part, on the telephone conversations with Mr. Johnson, Grievant's father, and Escanaba Public Safety, there was clearly established wasted time. This is inconsistent with CBA, Art. 9.

The Union argues that the CBA requires very bad conduct to constitute dishonesty; this is established by the nature of the other two forms of misconduct that allow for immediate discharge without a written notice within six months are inappropriate conduct

of the most egregious form - drunkenness or illegal narcotics while on duty; these two egregious forms of misconduct put flesh and bones on the term "dishonesty," and not every form of wasting time constitutes dishonesty. This argument does not control. The word dishonesty in the CBA stands by itself as a reason for first offense discharge. If the parties had wanted the egregiousness of a dishonesty violation to equal the egregiousness of a drunkenness or illegal narcotics violation to be the same, they would have said so. This is not a case of just wasting time. It is a case of spending time on non-work related activity. The non-worked related activity and hence the time card falsification was not *de minimis*.

The Union argues that the Employer has not accounted for the breaks Grievant was entitled to take. This argument does not control. If it were Grievant's contention that if part of the time in question were one or both of his 15 minute breaks,**[*19]** he could have said so, either during the investigatory meetings or when testifying at the arbitration hearing. There is no evidence in the Record that Grievant was on break or has ever represented he was on break during**[*19]** the period in question. It would be inappropriate for me to find that Grievant was on break during the time period in question, given the fact that nothing in the Record indicates that he was on break.

The Union argues that other than the 2018 discipline issued to Grievant concerning arriving late to work yet claiming pay for that time, the Employer has no evidence that it has applied the dishonesty rule in the past and the Employer has no work rules or any documentation that it used to explain to the employees its expectations concerning the term "dishonesty" as set forth in the CBA. This argument does not control. The first offense discharge honesty authorization is imbedded in the 2019-2013 CBA. The present CBA, Art. 9 establishes the dishonesty criteria. The Employer's expectations concerning honesty are in the present CBA. If the parties had wanted a more precise definition of dishonesty, they would have put it in the CBA. I do not have authority to rewrite the CBA. There is no evidence that any other employee allegedly violated Art 9.

The Union argues that assuming that the Employer has established its timeline, the amount of time at issue is not sufficient to constitute dishonesty as the Employer has applied that term in similar situations. This argument does not control. The present CBA establishes the criteria for dishonesty that occurs during the term of the present CBA. It has been indicated that:

> Theft cases should not turn on the amount an employee steals as long as the theft is proven. ...
>
> The employment relationship requires an employee to respect management's property and not take any of it. Employers cannot supervise employees so closely as to catch every theft every time. The employee's intention is at question in a discharge case for theft. Theft implicates a substantial and legitimate interest of management. Smith, p. 219.

This is especially the case where the honesty requirement is embedded in the CBA rather than in a unilaterally created work rule.

The Union argues that critical to the determination as to whether the time is accounted for is a determination as to whether Grievant made two trips back to the shop, both of which originated at the pit, or three trips, two originating at the pit and the third after he turned around and went back to the shop when Grievant realized he did not get the electrical test meter. This argument does not control. This is not two trips versus three trips situation. This is a what was Grievant doing within the time in question situation. Grievant testified that he "did not recall" what some of telephone conversations with Mr. Johnson were about and that the telephone conversations with his father concerned getting insurance on a vehicle.

The Union argues that the cellphone records tell**[*20]** different stories and the Employer has failed to carry its burden of proof on when Grievant left the pit. This argument does not control. The exact time that Grievant left the pit is**[*20]** not the crucial issue in this case. The crucial issue is what was Grievant doing during the time period in question. The Record is clear that Grievant was engaged in telephone conversations with Mr. Johnson the subject of which Grievant does not recall and telephone conversations with his father that concerned vehicle insurance.

The Union argues that the call with Mr. Ansel on November 21, 2019, proves nothing. It is Mr. Ansell's recollection that Grievant called Ansell and asked Ansell to relay something different than the truth. Grievant testified that this did not occur. I do not resolve these differing recollections. My findings are unrelated to this phone conversation between Grievant and Mr. Ansell.

November 20, 2019, afternoon allegations

During the hearing and in the post-hearing briefs, there was some review of events that occurred during the afternoon of November 20, 2019. There is no mention of the afternoon of November 20, 2019, in the November 27, 2019, discharge letter.

I have rendered a Decision and Award concerning the 8:45 a.m. to 9:50 a.m., November 20, 2019, allegations and issues. I am not making a determination concerning the afternoon of November 20, 2019.

The National Academy of Arbitrators, American Arbitration Association, and Federal Mediation & Conciliation Service, Code of Professional Responsibility for Arbitrators of Labor Management Disputes, C(1)(a), states:

C. Awards and Opinions

1. The award should be definite, certain, and **as concise as possible**.

a. When an opinion is required, factors to be considered by an arbitrator include: **desirability of brevity**, consistent with the nature of the case and any expressed desires of the parties; need to use a style and form that is understandable to responsible representatives of the parties, to the grievant and supervisors, and to others in the collective bargaining relationship; necessity of meeting the significant issues; forthrightness to an extent not harmful to the relationship of the parties; and **avoidance of gratuitous advice or discourse not essential to disposition of the issues**. Emphasis added. See Abrams, pp. 297-298.

Conclusion

The Employer established just cause to discharge Grievant.

The crucial points in this case include:

1. The CBA, Art. 9, first offense for dishonesty authorization was created by the parties in their CBA, not unilaterally by the Employer;
2. Between 9:02 a.m. and 9:50 a.m., November 19, 2019, Grievant spent 13 minutes on the telephone with Mr. Johnson [9:02 a.m. and 9:43 a.m.] and 6 minutes with Grievant's father [9:14 a.m., 9:27 a.m., and 9:34 a.m.] and Escanaba Public Safety [9:30 a.m.];
3. Grievant claimed for work time on his time card that he did not work;
4. This was not a *de minimis* violation of CBA, Art. 9;
5. Under CBA, Art. 9, progressive discipline**[*21]** is not required for a discharge for dishonesty;
6. The totality of the circumstances; and
7. The CBA.

This decision neither addresses nor decides**[*21]** issues not raised by the parties.

The Employer did not violate the CBA when it discharged the Grievant.

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, I deny the grievance.

Dated: December 30, 2020

/s/LEE HORNBERGER
Lee Hornberger
Arbitrator
Traverse City, Michigan