FEDERAL MEDIATION AND CONCILIATION SERVICE

Proceedings before

James M. Paulson, Arbitrator

In the matter of: **UNITED STEEL WORKERS, LOCAL 11-470,** and **EXXONMOBIL CORPORATION**	Case No. 08-54983 Employee Grievance

DECISION

PRELIMINARY STATEMENT

David Pisauro, represented Local 11-470, United Steelworkers.

John G. Crist, Crist, Krogh & Nord, LLC represented ExxonMobil Corporation.

The ExxonMobil Corporation, hereinafter the "Company", and Local 11-470 United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, hereinafter the "Union", are parties to a collective bargaining agreement[1], hereinafter the "Agreement", which provides for the arbitration of unresolved grievances. The grievance[2] in this matter involves the discipline of Mr. Employee. The parties stipulated at the hearing that they would waive the contractual requirement of a three person arbitration board and have the matter heard and decided by the single neutral arbitrator.[3] The parties agreed that James M. Paulson was the single neutral arbitrator selected to arbitrate the matter and his decision would be final and binding as that of the Board of Arbitration as

[1] Joint Exhibit No. 1.
[2] Joint Exhibit No. 1A.
[3] Tr. 5. References to transcript pages will be preceded by the abbreviation "Tr.".

described in the Agreement.

On November 18, 2009, a hearing was held at the Hilton Garden Inn, Billings, Montana. At the hearing the parties were each permitted to present testimony and documentary evidence. The Company called as its witnesses: David Noell, Laboratory Analyst and Chairman of the Workman's Committee; Sean Smyth former Operations Manager, Billings Refinery; Rick Lavold, former Section Supervisor, Billings Refinery; Julie Cantrell, Controls Advisor, Billings Refinery; and Francis "Bud" Carr, Senior Investigator Downstream Operations, Corporate. The Union called as its witnesses: Bruce Rukstad, Dayshift Coordinator and former Workman's Committee member and officer; Rick Anderson, Dayshift Coordinator and member of the Workman's Committee; and Mr. Employee, grievant.

At the close of the hearing the Arbitrator ruled that the parties' briefs were to be e-mailed thirty days after the receipt of the transcript. The Arbitrator received the briefs of both parties on January 28, 2010 and will issue his Decision and Award on or before March 1, 2010.

STATEMENT OF THE ISSUES

Pursuant to Article XIV, §1, ¶a of the Agreement, the parties mutually agreed to the following statement of the questions to be submitted to arbitration:

"Did the Company violate the Articles of Agreement when they disciplined Mr. Employee on July 9, 2007?

"If so, what shall the remedy be?"

RELEVANT CONTRACT PROVISIONS

ARTICLE I

Purpose

* * *

It is also agreed that should any disagreement arise between the Company and any or all members of the bargaining unit, the parties will immediately settle these disagreements as outlined herein. * * *

ARTICLE XII

Grievance Procedure

1. To provide an orderly method for adjusting disputes involving . . ., . . . claims by either party of a violation of the terms of this Agreement, or claims of unfair treatment involving either an interpretation or violation of the terms of this Agreement, this dispute or claim will be presented and processed in accordance with the following steps, time limits, and conditions set forth herein:

* * *

For complaints to be considered by the supervisor, they must be submitted within thirty (30) working days of the alleged occurrence.

* * *

3. The days of Monday through Friday, excluding holidays, are considered as working days for the time periods in both Article XII and Article XIV.

ARTICLE XIV

Arbitration

1. Any question as to the interpretation of the terms of this Agreement or any question of fact arising out of an alleged violation of the terms of this Agreement which is not otherwise settled, shall at the request of either party, be submitted to a board of arbitration, subject to the following provisions:

   a. The statement of the question to be submitted to the board of arbitration must be mutually agreed upon. In the event this statement of the question cannot be mutually agreed upon, either party may terminate the Agreement upon sixty (60) days written notice to the other party. . ..

* * *

2. * * * The decision of the majority of the board of arbitration shall be final and binding upon the employee, the Union, and the Company as it applies to the question submitted for its decision and shall exclusively determine the same . . ..

3. The board of arbitration shall not have the authority to add to, subtract from, modify, change or alter any of the provisions of this Agreement by the decision which they render.

ARTICLE XVI

Miscellaneous

* * *

2. An employee discharged unfairly, and who is later reinstated, is to receive back pay for the time lost as a result of the discharge, provided such employee requests reinstatement within two (2) weeks after the discharge.

ARTICLE XXII

Reservations of Management

* * *

2. The right to discipline and discharge is likewise solely the responsibility of the Company, provided that claims of . . . wrongful or unjust discipline or discharges shall be subject to settlement as provided in this Agreement.

STATEMENT OF FACTS[4]

Background Facts

The grievant, Mr. Employee, started his employment with the Company in 1981at its plant in Houston, Texas. In 1995 the grievant moved to the Billings Refinery and remained there until the disciplinary action under review in this case. Mr. Employee had approximately 27 years of service with the Company and was 62 years of age at the time of the hearing. He last held the position of Utilities II Operator.[5]

In the 2006 to 2007 time frame the grievant's duties as an operator covered many different things including, but not limited to, running samples, gauging tanks and also filling in so-called car seal[6] checklists on the condition and the position of certain valves.[7] In performing

[4] The following recitation is intended to describe in summary undisputed facts involved in this matter. Additional and disputed facts and legal issues will be discussed, as may be necessary, later in this Decision.

[5]Company Exhibit No. 12, p. 4; Tr. 121, 301-302.

[6] The term "car seal" refers to valves in either an open or closed position which have a metal band placed around the handle so as to prevent changing the position of the valve without cutting the metal band. These valves are car sealed in their normal position and are only occasionally (possibly every several years) changed during maintenance operations

the car seal checklist duty, the grievant had to physically go to each valve on the checklist and observe its condition and position. This would involve the grievant driving a Company truck to the location of the valves, getting out of the truck, and sometimes climbing permanent stairs to observe the valve. He would not physically take his paper checklist on the clipboard with him as he would need both hands to climb the ladder. He would observe several valves and then return to his truck and fill out the checklist. This task would require sufficient memory to keep in mind the position and condition of the valves.[8]

Specific Facts Giving Rise to the Grievance

On May 1, 2007 Richard Lavold assumed the position of Section Supervisor for offsite, Fuels IIC.[9] His duties in this position included, among other things, reviewing checklists of Operators such as the grievant as well as preparing reports for internal personnel responsible for environmental matters.[10] Shortly after assuming this position, he was asked by the environmental department to gather up the car seal checklist forms to be submitted to the EPA.[11]

Upon a review of the past year of one particular car seal check list form[12], Supervisor Lavold noticed a discrepancy between the checklists filled out by the grievant and other operators. The checklist in question covers fifteen valves; is filled out once a month by an operator; and is then turned in to the supervisor for review. Over the past year (June, 2006 to May, 2007) the grievant filled out the checklist five times and other operators the remaining times. In each of the five times the grievant filled out the checklist, he erroneously indicated that the flare header bypass valve on vessel D-942 was open when, in fact, it was car sealed closed[13]. Over the twelve month period, other operators inspecting the position of the valve correctly indicated that it was closed in their monthly checklist reports.[14]

As a result of his review, Supervisor Lavold, among other things, concluded that the grievant "had not made his rounds properly and not documented the position of the valve properly."[15] Mr. Lavold then contacted Refinery Controls Auditor Julie Cantrell because the grievant's erroneous checklist reports were "looking like possibly an irregularity. . .."[16] An "irregularity" constitutes an "ethics" issue and may involve matters such as falsification of

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("turnarounds"). Tr. 90-98.

[7] Tr. 303.

[8] Tr. 318.

[9] Tr. 83, 122.

[10] Tr. 113-114,122.

[11] Tr. 113-114.

[12] Company Exhibits Nos. 9 & 10.

[13] Company Exhibit No. 9; Tr. 114, 117.

[14] Company Exhibit No. 10; Tr. 115.

[15] Tr. 117.

[16] Tr. 118.

documents or stealing. The Company takes ethics matters very seriously.[17]

Ms. Cantrell reviewed the information provided by Mr. Lavold and also concluded that the situation may involve a potential ethics violation.[18] In Ms. Cantrell's position she has the responsibility to follow corporate 8010 Irregularity Guidelines. Those guidelines indicate that personnel at the local facility are not to investigate the situation themselves but rather turn the matter over to corporate Audit. As a result, she decided to contact corporate. Prior to doing so, however, she asked that photographs be taken of the valve to further document the matter. Eventually, corporate assigned Senior Investigator Bud Carr to look into the matter.[19]

Mr. Carr came from the corporate office in Houston to Billings to interview Mr. Employee on July 9th. Present at the interview were: Mr. Carr, Ms. Cantrell, Supervisor Andy Sullivan, Workman's Committee member Rick Anderson and the grievant.[20] Ms. Cantrell made notes of the interview, which were reviewed by Mr. Anderson and the grievant.[21] During the course of the interview, among other things, the following occurred: (1) Mr. Employee said that he understood what he was supposed to do regarding filing out the checklist as part of his job. (2) Mr. Employee was confronted by Mr. Carr with the discrepancies between his checklist reports and those of other operators. (3) The grievant gave several different answers as to why he filled out the checklist erroneously, including: it might have been his glasses, he might have been confused, his supervisor did not tell him to correct his entry, and generally that he had no explanation.[22] (4) Mr. Employee adamantly insisted that he went out each time and inspected the valves and that he did not falsify the reports, "pencil whip" the form or merely fill it in without actually checking.[23]

After the interview with the grievant, Mr. Carr met with local management, specifically Human Resources Manager Dale Getz "to explain that I didn't hear anything to give me an explanation as to why the forms were completed the way they were."[24] On July 9, 2007 Mr. Employee was verbally informed by local management that he was "suspended from work with pay, pending completion of a Company investigation."[25] On July 11th the Union filed a grievance on behalf of Mr. Employee stating that "Mr. Employee was unjustly disciplined on 7-9-07." Supervisor Lavold denied the grievance the same day.[26]

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[17] Tr. 119.

[18] Ms. Cantrell testified that: "it just looked like it would be impossible to do by mistake." Tr. 160

[19] Tr. 156-161.

[20] Tr. 158-159, 162

[21] Tr. 163.

[22] Company Exhibit No. 12, pps. 11-19, Tr. 194.

[23] Company Exhibit No. 12, pps. 10-12.

[24] Tr. 201.

[25] Joint Exhibit No. 1; Company Exhibit No. 20.

[26] Joint Exhibit No. 2.

Post Grievance Facts

On July 16, 2007 the Union appealed the grievance to the second step. A second step meeting was held July 18th. The grievance was denied by Operations Department Head Smyth by letter dated July 20, 2007 while noting that the suspension of Mr. Employee would remain in effect "pending the results of an internal investigation."[27] Further processing of the grievance was held in "recess" pending the Company responding to an information request from the Union.[28]

Sometime in early August corporate determined that a "reportable irregularity" had occurred and that meant Mr. Employee was to be terminated.[29] Billings Operations Manager Smyth met with Mr. Employee to inform him that his employment was being terminated.[30] At the meeting Mr. Employee was given a letter from Human Resources Manager Getz stating that the termination was effective August 17, 2007.[31]

On August 29, 2007 Mr. Employee sent a letter to the Billings Plant Manager "requesting to be reinstated as a regular ExxonMobil employee."[32] Mr. Employee wrote the letter to satisfy the contractual obligation that for a discharged employee to receive back pay, he must request reinstatement within two weeks of his termination.[33]

A third step grievance conference was held on September 27th. By letter dated September 28, 2007 the Refinery Manager Geoffrey Croft denied the grievance.[34]

On October 3, 2007 the Union notified the Company of its decision to submit the grievance to arbitration. Pursuant to the requirement of the Agreement that the parties "must" mutually agree on the "question" to be submitted, Worker's Committee Chairman Noell proposed as a first question a general one covering the "discipline" of Mr. Employee without limiting that question to an incident or time frame.[35]

On October 16th Human Resources Manager Getz did not agree to the Union's proposed statement of the first question and proposed that question be limited to the "discipline" meted out to Mr. Employee on July 9, 2007. He did agree with the Union's proposed second question to be submitted to the Board of Arbitration that the Board may determine what the remedy would be if

[27] Joint Exhibit No. 3.
[28] Tr. 284-285.
[29] Tr. 76.
[30] Tr. 77.
[31] Company Exhibit No. 4.
[32] Union Exhibit No. 2.
[33] Tr. 321.
[34] Joint Exhibit No. 3.
[35] Company Exhibit No. 5.

it found a violation of the Agreement in its answer to the first question.[36]

On October 24th, the Union responded to the Company's proposed question by suggesting the addition of Mr. Employee' subsequent termination also being presented to the Board of Arbitration. On November 7th Mr. Getz responded on behalf of the Company clearly stating that he refused to add Mr. Employee' discharge to the questions because the Union had failed to file a timely grievance protesting the termination. He reiterated the Company's proposed statement of the questions. Finally, on April 2, 2008 on behalf of the Union, Mr. Noell accepted the statement of the questions for the Board as proposed by Mr. Getz in his November 7, 2007 letter.[37]

CONTENTIONS OF THE PARTIES

Company Contentions

Questions before the Arbitrator

In its prehearing motion, prehearing Brief, during the hearing and in its post hearing Brief, the Company vigorously argued that the Arbitrator could not consider the question of whether the discharge of Mr. Employee violated the terms of the Agreement. In support of this position, the Company made several arguments: (1) The Arbitrator is limited by the terms of the Agreement to deciding the "question" mutually agreed on by the parties and for him to do otherwise would be to "alter the provisions of the Agreement" contrary to the clear prohibition against him doing so. (2) The Agreement requires that the parties agree on the question and the question agreed upon by the parties specifically limits the matter to be decided to the discipline meted out to Mr. Employee on July 9, 2007 and nothing more—specifically not his discharge on August 17, 2007. (3) The Union has conceded that whether it filed a timely grievance with respect to Mr. Employee's termination is the subject of another grievance (Grievance 29-2007) and should be decided in that case. (4) If the Arbitrator were to consider the timeliness issue, he should find that the Union did not file a timely grievance protesting the discharge and, therefore, that question is not before the Arbitrator.

Validity of the Suspension of Mr. Employee

The Company put forward several contentions as to why Mr. Employee's suspension did not violate the Agreement: (1) Mr. Employee received pay even though he was not required to work; in other words, he suffered no financial harm. (2) Relieving him from his duties was justified because of what he had done; that is, he falsified company records five times with no plausible answer as to why he had done so. Accordingly, he should not be allowed to continue to do checklists because the Company had justifiably lost faith in his ability to do so honestly. (3)

[36] Company Exhibit No. 5.
[37] Company Exhibit No. 5.

It was reasonable and prudent for the Company to take the time that it did to carefully consider whether Mr. Employee' conduct constituted an ethics violation. The Company also put forward its position on an appropriate remedy should the Arbitrator find that the suspension violated the Agreement. In such an event, the Arbitrator should just remove the discipline from his record as he suffered no monetary loss.

The Termination of Mr. Employee

Should the Arbitrator reach the issue of the discharge of Mr. Employee, the Company argued that there was just cause for his termination. The Company listed several factors that arbitrators consider when reviewing whether there was just cause for a discharge: (1) Was the grievant given adequate notice that his particular conduct would have disciplinary consequences? (2) Did the employer fairly investigate, allow union representation and consider the employee's defense? (3) Did the employee actually commit the offense for which he was disciplined? (4) Was the rule reasonable related to safe operations or reasonable job performance expectations? (5) Was the discipline proportionate to the seriousness of the offense, the work record and seniority of the employee and evenhandedly dispensed to other employees committing the same offense?

The Company analyzed each of the above listed factors and concluded that Mr. Employee had been treated properly. He was certainly made aware of the rule against falsification of records and the consequences of doing so. The investigation was fairly and objectively conducted. He was provided a full opportunity to explain his conduct. Mr. Employee admitted that he incorrectly filed out the checklist and had no plausible explanation for doing so. The Company's conclusion that Mr. Employee was lying when he said that he did do the inspection was reasonable. There is no argument from the Union that the rule against falsification of Company documents is not related to safe operations and expected job performance. Finally, the Company contends that discharge was proportionate to the offense keeping in mind Mr. Employee's seniority and also how other employees were treated for engaging in similar conduct. In the course of the Company's argument, it analyzes numerous arbitration decisions demonstrating that its treatment of Mr. Employee was consistent with the way other arbitrators had recognized as being proper in dealing with similar cases.

Union Contentions

Questions before the Arbitrator

The Union contends that the questions before the Arbitrator do include Mr. Employee' termination on August 17, 2007. The Union makes the following arguments and points: (1) The Union understood within a few days of filing its grievance that Mr. Employee would be terminated based on its discussion with the Company—this was an ethics violation which always resulted in termination. (2) The Union was misled by the Company's suspension of Mr. Employee with pay as this was the only time that an employee had not been allowed to work while a matter was under investigation. (3) In the Union's view the Company had already made

the decision to terminate Mr. Employee as the time of his suspension—there was no further "investigation" of any facts and Mr. Carr had already decided to disbelieve Mr. Employee's position that he had actually inspected the valve in question. (4) The "discipline" the Union grieved was all inclusive—the suspension and resulting termination.

Propriety of Disciplinary Action

The Union raises several arguments as to why the discipline to Mr. Employee was without just cause.

First, the Car Seal Valve Checklist was unique and confusing. Of the fifteen valves listed only one is properly in the closed position. Otherwise all of the checks would be in the same column. His supervisor for the time period made the same mistake.

Second, the checklist form requires that Mr. Employee verify the placement of a running blind. During the time period in question, sometimes the running blind was in place and sometimes not. Mr. Employee got the placement of the running blind position correct on each of the five reports. He could have only done this by actually making a field visit.

Third, Mr. Employee was not given evenhanded treatment. He was not the only one to incorrectly fill out the checklist. Others got the color wrong. They got no discipline. The supervisor missed that Mr. Employee had not filled out the check list correctly. She got no discipline.

Fourth, Mr. Employee's seniority and work record were not properly considered. He had 27 years of service and an exceptional attendance record. He had filled out thousands of checklists and it was excessive to terminate his employment for one mistake on one line of a checklist.

DECISION

Questions before the Arbitrator

Overview

The first matter to be decided is what questions[38] are and are not before the Arbitrator. The arguments of both parties have been carefully reviewed. The simple answer is that the

[38] The Agreement uses the word "question" in the singular in describing what is to be presented to the board of arbitration. By stipulation the parties have waived any such limitation in the Agreement by placing two questions or issues before the Arbitrator.

agreed upon statement of the issues, as set forth earlier in this Decision, are the questions or issues before the Arbitrator. This does not necessarily mean that either party has properly described the scope of those issues in their Briefs.

It is clear that the scope of the grievance or the intent of the Union in filing the grievance does not set the parameters of the questions before the Arbitrator. The process of the parties agreeing to the "question" to be "submitted" to the board of arbitration after the grievance procedure is completed sets forth the scope of the Arbitrator's authority. It is important to note that the parties did not submit just one "question". The Arbitrator is to determine whether or not the contract was violated and, if he finds that it was, then he is to fashion a remedy for that violation. Accordingly, an analysis of the language agreed on by the parties in framing the questions is necessary in order to determine the scope of the issues before the Arbitrator.

The First Question

Two aspects of the language used by the parties in the first question to be submitted stand out. The first is the action to be reviewed and the second is time frame on that action. The action to be reviewed is the "discipline" meted out to Mr. Employee. In industrial relations, discipline refers to any form of adverse treatment to an employee. Discipline covers matters such as a verbal warning/reprimand, a written warning/reprimand, a suspension, a demotion or a discharge/termination. In this regard, it must be kept in mind that Mr. Employee was not just suspended. He was suspended with pay pending the Company completing its "investigation." In fact, and has the Company has acknowledged, the Company had completed its investigation before suspending the grievant. The Company, properly so, was carefully considering what discipline beyond the suspension with pay should be given to Mr. Employee. In other words, Mr. Employee was suspended *with conditions*. The conditions were that a final decision was to be made on the exact nature of the ultimate discipline to be handed out.

As to the time frame placed in the first question to the Arbitrator, the Arbitrator is to look at the "discipline" given to Mr. Employee on July 9, 2007. This means that the Arbitrator is to look at the situation (suspension pending final decision) at that time. Accordingly, the statement of the first question does not permit the Arbitrator to look past July 9th to determine if the Agreement was violated. The final decision of the Company to discharge Mr. Employee effective August 17, 2007 is not within the scope of what the Arbitrator can review under the *first* question submitted to him.

The Second Question

Under the second question submitted to the Arbitrator and if he finds a violation of the Agreement, he is to fashion a remedy.[39] Significantly, there are no specific limitations in the

[39] "An arbitrator's broad authority extends to remedies as well as interpretation." Nolan, *Labor and Employment Arbitration*, (West, 1998), p. 274. "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment

Agreement as to the remedy the Arbitrator may order other than the general admonition that he may not "add to, subtract from, modify, change or alter any of the provisions of [the] Agreement. . .."[40] Normally, the arbitrator is to "make the grievant whole" or put him in the place he would have been in "but for" the violation.[41] In this regard, arbitrators look at the situation of the employee at the time the award is made to determine what remedy is necessary to put the employee where he would be but for the violation. In this regard, arbitrators consider post violation conduct of the parties to be sure that the grievant is made whole but no more than made whole. For example, if a grievant fails to make reasonable efforts to mitigate his damages after a discharge, his back pay may be reduced or eliminated[42]. Likewise, if the Company altered a person's employment status premised on discipline that is set aside and such action would impact a "make whole" remedy, that action may be considered in fashioning a remedy.[43]

The July 9th Discipline

Burden of Proof

It is well established that an employer has the burden of proof in a discipline case. In essence there are two proof issues. The first is to prove the existence of the misconduct providing just cause for discipline. The second, assuming that the first is established, is to prove that the penalty meted out was warranted. Where the misconduct alleged is something less than criminal behavior, as here, the burden of proof is a "preponderance of evidence" standard; that is, the employer must establish that it is more likely than not that the factual events are as it asserts.[44] Where the employer has the burden of proof, any gap in or lack of evidence on a necessary factual issue means the employer has not met its burden of proof as to that matter.

Credibility and Weight of the Evidence

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to bear in order to reach a fair solution to the problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

[40]Article XIV, §3. "Some contracts simply prohibit certain types of remedies; others specify the remedy to be applied in the event of a certain breach; and still others limit the arbitrator's role to a determination of whether there has in fact been a breach, leaving the selection of a remedy to the parties themselves." Nolan, *supra*, p. 276.

[41] "The make whole remedy attempts to place the employee in the same position she would have been in if the improper discipline had not occurred." Brand & Biren, *Discipline and Discharge in Arbitration*, 2nd Ed. (BNA 2008), pp. 462-463.

[42] See generally, Elkouri & Elkouri, *How Arbitration Works*, 6th Ed., (BNA 2003), pp. 1224-1228.

[43] Elkouri & Elkouri references an arbitration case where "the employer was ordered to review the grievant's performance appraisals to determine whether a suspension, [which the arbitrator had set aside] . . ., had negatively affected the appraisals and, if so, to correct them." *Supra*, p. 1205.

[44] See generally, Elkouri & Elkouri, *supra*, pp. 948-949.

A determination of whether or not Mr. Employee engaged in misconduct depends, in part, on the credibility of the grievant. To the extent the case can be decided without making credibility judgments, this Arbitrator will do so. Arbitrators have expressed many different approaches to resolving matters of credibility.[45] This Arbitrator makes the assumption that all witnesses are truthful until there is reason to believe otherwise. Factors such as consistency with other evidence, interest in the outcome of the proceedings, clarity of memory, and first hand knowledge of events affect credibility resolutions. If a preponderance of the evidence on the matter does not resolve a credibility question, the party with the burden of proof does not prevail in proving their version of events.[46]

Company Conclusion in light of the Evidence

As the Company stated in its Brief:

> "After investigating this case, and speaking to Mr. Employee, ExxonMobil believed that Mr. Employee was not checking the valves. He was, instead, pencil-whipping the form and falsifying an important company record."[47]

More specifically, the Company adopted the conclusion of its Senior Investigator Bud Carr that Mr. Employee "did not physically inspect the equipment before completing the monthly [car seal valve check list]".[48] The primary focus of Mr. Carr was that the grievant could not have missed the position of the valve in question five times in a row if he was in fact inspecting it each time.[49]

This Company conclusion that Mr. Employee was lying was vital to its belief that an ethics violation occurred. In order for a "falsification" of a business record to be established, the employee must "intentionally" or "deliberately" put in false information.[50] Should the Arbitrator disagree with this conclusion, the entire premise of the Company for any discipline falls.[51]

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[45] See generally, Elkouri & Elkouri, *supra*, pp. 413-417.

[46] "Sometimes the burden-of-proof concept becomes of critical significance when severe conflict exists in the evidence." Elkouri & Elkouri, s*upra*, p. 415, n. 383 (citation omitted).

[47] Company Brief, p. 25.

[48] Company Exhibit No. 16.

[49] The Company argument (Company Brief, p. 25) that because Mr. Employee had no "plausible" explanation for his erroneous check marks means that he must be lying begs the question. Having no "plausible" explanation is consistent with an inadvertent error—which, in turn, is a "plausible" explanation for the errors. There is no hard evidence of actually lying.

[50] Controls Advisor Cantrell testified that in order for there to be an ethics violation and a reportable "irregularity" the falsification must be "purposeful", "deliberate" or "intentional" and not inadvertent or accidental. Tr. 147, 152, 156. Company Exhibit No. 13, p. 7.

[51] The Company has not argued in the alternative that if the Arbitrator believes that the

Nature of the Grievant's Erroneous Report

The Arbitrator is not satisfied that the Company has met its burden of proof by a preponderance of the evidence that the grievant's filling in the position of the valve was "deliberate" because he was not actually checking the position of the valve and was merely "pencil whipping." While the Company's conclusion is a possible explanation of what happened, it did not present sufficient evidence to conclude that its view is "more likely than not" what in fact happened. There are a number of reasons for this conclusion.

First, the Union pointed out that the checklist form Mr. Employee filled out also required him to verify the position of a running blind. Apparently, Employee correctly reported the position of the running blind on each checklist. In order to do this he would have had to make a field visit because the running blind could be and sometimes was in a different position each time he went out. If he had only pencil-whipped the position of the running blind, he would have to have made five lucky guesses. The probability is that he made the inspections. Even though the Union brought this point out on cross examination of Senior Investigator Carr[52], neither Mr. Carr nor the Company had any explanation for this evidence notwithstanding the fact it tends to contradict Mr. Carr's basic conclusion.

Second, Mr. Employee' Supervisor missed catching his error for the same five months he made the error. The Arbitrator concludes from this that Mr. Employee' error could have been inadvertent, just as his supervisor's apparently was. Certainly, the Company excused her error as she apparently received no discipline.

Third, Mr. Employee was adamant that he in fact made the inspections and did not "pencil whip". Although he gave several different possible explanations for his mistake, they all boiled down to the basic point that he just mistakenly checked the wrong box. He repeatedly said that his error was inadvertent. His position in this regard was consistent at both his interview with Senior Investigator Carr and his testimony at the hearing.

Fourth, errors by other employees on checklists were not uncommon. Some employees got the color wrong.[53] Employees doing other check lists still make errors.[54]

Fifth, Mr. Employee had nothing to gain by putting the wrong answer on the checklist.

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grievant's failure to properly list the position of the valve was inadvertent, he should still receive some discipline. Indeed, evidence was presented that an inadvertent mistake by an employee in filling in a checklist was not grounds for discipline at all. It is viewed as a "training issue." Tr. 257, 260-262, 272.

[52] Tr. 129-130.

[53] Tr. 229.

[54] Tr. 261-262.

By contrast, in the arbitration case[55] offered in evidence by the Union, Mr. Short was stealing money from the Company. Mr. Employee had no incentive to deliberately show that valve was in the wrong position.

Sixth, the Arbitrator believes that Mr. Employee may not have been focused on the position of the valve in question once he saw that the car seal was in place. He and everyone else knew that valves were car sealed in their proper position.[56] Since he knew that nothing was amiss by only observing that the car seal was in place, he was possibly just careless in filling out the checklist as to the actual position of the valve.

Finally, the Arbitrator takes into consideration in determining Mr. Employee' veracity his demeanor, length of service and work record. Mr. Employee was serious, polite and sincere during the hearing. He has spent over half of his work life with the Company with having perfect attendance for a fourteen year period. These facts, while not conclusive, are inconsistent with the likelihood that he would deliberately falsify the position of a valve on a checklist.

The Company Did Not Have Just Cause for Discipline

In its Brief[57] the Company correctly laid out all of the factors it has to satisfy in order to have just cause to suspend Mr. Employee pending investigation. One of those factors is proving that Mr. Employee actually engaged in the conduct for which he was disciplined. Failure to meet its burden of proof on this point is fatal to the Company's case. The Company failed to prove by a preponderance of the evidence that Mr. Employee in fact engaged in the deliberate "falsification" for which he was disciplined. Accordingly, the Arbitrator finds that the Company violated the Agreement by suspending Mr. Employee pending further investigation on July 9, 2007.

Remedy

Since the Arbitrator has determined that no discipline should have been meted out to Mr. Employee, the make whole remedy for him requires reinstatement with seniority accumulation, back pay, lost overtime and that all subsequent actions taken by the Company based on or affected by that contract violation must be corrected. Clearly, "but for" the improper suspension pending investigation, Mr. Employee would not have been discharged.[58] Accordingly, his discharge must be removed from his personnel record and he must be compensated for all damages he suffered from being discharged. In making his back pay calculation, interim

[55] Union Exhibit No. 3.

[56] Tr. 102.

[57] Company Post Hearing Brief, pp. 20-21.

[58] In ordering this remedy, the Arbitrator is *not* deciding whether or not the discharge of Mr. Employee on August 17, 2007 was in violation of the Agreement. The Arbitrator is only ordering that he be made whole for his improper suspension on July 9th.

earnings must be subtracted.

CONCLUSION

As set forth above, the Arbitrator finds that the Company violated the Articles of Agreement when it disciplined Mr. Employee on July 9, 2007. Mr. Employee is to be made whole for this violation by: his reinstatement with seniority accumulation, back pay, lost overtime, and the correction of all subsequent Company action based on or affected by the contract violation. His back pay shall be reduced by interim earnings. The Arbitrator retains jurisdiction for sixty days from the date of this Decision to resolve disputes the parties may have over implementing this remedy.

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James M. Paulson, Arbitrator

February 19, 2010