IN ARBITRATION

JOE M. HARRIS, ARBITRATOR

MEMPHIS LIGHT, GAS AND WATER DIVISION,	)	
EMPLOYER,	)	FMCS File No. 08-51713
and	)	Issue: Written Reprimand and Suspensions
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 1288,	)	
UNION.	)	

OPINION AND AWARD

APPEARANCES

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HEARING

At the request of the parties, the undersigned Arbitrator was appointed by the Federal Mediation and Conciliation Service to hear and decide the above referenced matter, initiated by a set of grievances challenging disciplinary action taken against four grievants: Dann Dixon, the Crew Leader, who was given a written reprimand followed by a five day suspension, and the three members of his crew, Donald Boxx, Lawrence Dunlap, and Keith Wilson, each of whom were also given five day suspensions. These four employees are hereinafter collectively referred to as "the Grievants."

A hearing was duly convened at a neutral location in Memphis, Tennessee, where sworn testimony was taken and transcribed. A transcript was prepared and a copy was provided to the Arbitrator. In addition, both parties submitted documents into evidence. At the conclusion of the hearing, the parties elected to file post-hearing briefs, which were filed in a timely manner. Both briefs were received by me on June 11, 2008, and on that day the hearing was declared closed.

ISSUE

The parties agree that the issue in this case, as in most disciplinary cases, is whether the employer had just cause to impose the discipline in each case, and if not, what the remedy should be.

APPLICABLE WORK RULES AND CONTRACTUAL PROVISIONS

> "Employees will be granted one (1) paid break or rest period of not more than fifteen (15) minutes in each four (4) hour period of regular or overtime hours worked."

MOU, Joint Exhibit One, Article 27, Par. 3

"A. Coffee Breaks/Rest Periods

"1. Rules applicable to all employees

"(a). A time limit of 15 minutes for coffee breaks/rest periods will be adhered to by all employees; this time limit is the total time absent from productive work."

"MLGW Personnel Policy Manual – Number 23-07," Par. V(A)(1)(a).

"A. Coffee Breaks/Rest Periods

"2. Rules applicable to Employees Performing Field Work or Traveling to and from Work in Division Vehicles.

"(a). Breaks will not be taken while traveling to the job site or before the first job or call of the day nor will breaks be taken after the last job or call of the afternoon. All crews or service personnel will drive directly to the job site or first call and will leave the job site or last call in time to arrive at the work center or office no more than 20 minutes before the end of the shift or workday."

"(b). All normal rest breaks will not exceed 15 minutes; all normal lunch breaks will not exceed 30 minutes. It will be the option of each department to combine the morning and afternoon breaks with the lunch period in order to have a one (1) hour lunch period. If such option is taken, the following will be understood:

1. The one (1) hour lunch period is in lieu of morning and afternoon breaks; no further or additional breaks will be

permitted.

2. Personnel will remain in the immediate geographical area and limit driving distance to a minimum."

"MLGW Personnel Policy Manual – Number 23-07," Par. V(A)(2)(1) and (2).

BACKGROUND

The City of Memphis owns and operates its electric, gas and water systems through its "Memphis Light, Gas And Water Division" ("the Division" or "the Employer"). Joint Exhibit One, page one. The Grievants are members of a bargaining unit represented by the International Brotherhood of Electrical Workers, Local Union 1288 ("the Union"). The Division and the Union are parties to a "Memorandum of Understanding" ("MOU") dated as of January 1, 2006.

Since utility rates for the Division are controlled by the City's Board of Commissioners, presumably an elected body, the public image of the Division is very important for all concerned. That public image surely suffered a bit in May, 2007, when a local television station ran a series of investigative reports entitled "The Breakfast Club," purporting to document an abuse of break times by line crews who were filmed stopping at local restaurants around 8 a.m. on a workday morning (Monday, May 14, 2007) to take "breakfast" breaks that allegedly violated Division break policy.

The Investigative Reporter who ran the series, Mr. Andy Wise, testified at the arbitration hearing and verified the news reports, which were submitted in evidence on a DVD disc. Mr. Wise also testified that he filmed Division work crews stopping at a "Danvers" restaurant "right at 8 o'clock a.m." on Monday morning, May 14, 2007, T-36, and that the crews he saw remained in the restaurant "for 25 to 30 minutes," T-37,

although his testimony was somewhat unclear about this, since he didn't realize at the time that there were actually two crews at Danvers that morning, and was unclear about which crew arrived first that morning. Another television crew filmed other workers who stopped at another "Danvers" restaurant for breaks that same morning.

On Tuesday evening, May 15, 2007, the "Breakfast Club" series began to run on local television, and the news reports continued "on every day of the week for the rest of the week," according to Hiram Maynard, General Foreman at the Brunswick Work Center. T-66. In anticipation of these news reports, Mr. Maynard interviewed each of the Crew Leaders involved under his supervision, and checked each Crew Leader's "file that we have at the office" to see if any of them had any "past violations"; they did not. T-98.

In two very important conversations, Mr. Maynard also spoke with Dann Dixon on that Monday and again on Tuesday. Mr. Maynard testified that Dixon informed him on Monday that his crew "went straight to the Danvers" that morning, and that he repeated this to him on Tuesday. Mr. Dixon denied that he ever told Maynard that, and testified that Maynard only asked him whether they had arrived at Danvers "after eight," to which he replied, "yes," or "everything was legal."

After "gathering this information," Mr. Maynard "passed" it "up the line to [his boss] Ron Duncan, the Assistant Manager," who conferred with Diana Veazey, then Vice President of Construction and Maintenance, concerning what to do. Duncan and Veazey reached a joint decision to issue written reprimands to each of the Crew Leaders involved. Duncan told Maynard to issue the written reprimands, and he did so. *See,* Joint Exhibit Two, Dixon's reprimand. No crew members were disciplined at this point, however, because, all the witnesses agreed, it was the responsibility of the Crew Leaders

to ensure compliance with break times, so the practice of the Division was to only discipline Crew Leaders for violations of break policy.

In the meantime, Mr. Clemente Washington, Sr., Acting Manager of Human Resources, also viewed the television broadcast on Tuesday evening, and conferred with the H.R. Generalist "assigned to those divisions" the next day. T-148-149. Mr. Washington subsequently discovered that reprimands had been issued without involvement or input from Human Resources, which caused him to become "a little concerned," because "the normal process is to go through HR before any kind of discipline would be rendered." T-151. Therefore, Mr. Washington testified, Human Resources began its own "investigation" into the matter, which included taped interviews of each of the crew leaders and crew members involved in the news story. T-153. Mr. Dixon and the other three Grievants were interviewed on June 5, 2007. Although the tapes of the interviews were not introduced in evidence, Mr. Washington stated that he was present during the interviews, or heard them on tape, and testified to his recollection of what the Grievants said.

Based on this second investigation, Mr. Washington and others decided "that the entire crew was not telling us the truth, because the entire crew was saying that they went to the job first versus the information that Hiram got from Dann Dixon saying that they went to Danvers first." T-164. As a result, each of the four Grievants was given a five day suspension without pay for "giving false statements and impeding an investigation." T-164. The instant grievances followed, and were not resolved through the parties' internal grievance procedure, so they have now been presented to this Arbitrator for review and resolution. The issue is whether there was just cause for the initial written

reprimand given to Dann Dixon, and the five day suspensions subsequently given to Mr. Dixon and the other three Grievants.

DISCUSSION

1. Dann Dixon's Reprimand And Enforcement of the Break Rules

The first issue is whether Dann Dixon's written reprimand was supported by just cause. There are two bases for this reprimand: first, that Mr. Dixon took his crew on break in excess of fifteen minutes, and second, that he took them "straight to Danvers" for the morning break, violating a rule prohibiting breaks "before the first job or call of the day." Joint Exhibit Two; Personnel Policy Manual, No. 23-06, Joint Exhibit Six, Par. V(A)(1)(a) and V(A)(2)(a). The fifteen minute limit is found in both the MOU, Joint Exhibit One (Article 27, Section 3), and the "Personnel Policy Manual," Joint Exhibit Six. These rules, which are quoted on pages 1 through 3 above, are relatively straightforward and clear, but the evidence as to how they have been applied and enforced is not so clear.

Several Union witnesses testified that if they "went over" on a break in the morning, they could "make it up" on the next break, or at lunch. Mr. Larry Elrod was present at Ron Duncan's meeting with the workers on Tuesday morning, and testified "what I got out of the meeting was that we had an hour, you know, of breaks a day; and if we went over in the morning, to take it off the breaks either at lunch or in our afternoon breaks." T-227. With regard to taking breaks during the "first hour" versus breaking before the "first job of the day," Mr. Elrod said, "well, there's always been kind of a shaded area there," as to whether the rules were independent of one another. T-231. Likewise, William Williams testified that Ron Duncan said if "you stay a little bit over on

the morning break, you know, just take it off your afternoon break, you know, use common sense." T-238. On the other hand, Ron Duncan, Assistant Manager over Electric Distribution, said that he didn't recall making any such statements and that in fact, he wouldn't have done so: he said, "I'm management, I wouldn't tell them they would not have to follow the fifteen minute break policy." T-126.

Yet there is substantial evidence in the record tending to indicate that various aspects of the break rules were either misunderstood by both management and labor, or were indeed loosely enforced. At the same time, there is not much (or weak) evidence that break times were strictly enforced at all times. An example is the testimony of Mr. Duncan. When he first heard on Monday that there was a news report coming out, the first thing that came to his mind was "break": he "was suspicious [that] it might have something to do with a break," even though at that point, he didn't "know what was going on." T-125. The same day, before the news report came out, and before he had learned any more about it, Duncan sent "an e-mail out to all the general supervisors and the VP's, just stating that you need to go over your break policy with all your employees in your area." T-124. And on Tuesday morning, before the telecast came out that evening, Mr. Duncan went to the Brunswick Service Center to go over the break policy with those workers.

This combination of reactions by Mr. Duncan shows that he was expecting a negative news story about employee breaks, and that he was trying to get ahead of the story as much as he could. Significantly, he took all of these measures before he learned what the story was about. To some extent this is not surprising, since the most likely problem to come up when workers are out in the field, on their own and away from

supervision, would be the potential for "goofing off," or taking excessive breaks, in public. But even that in itself is informative, since it highlights how difficult it must be for management to closely track break times while crews are out and about all over the City without direct supervision being present. Though I understand and sympathize with this inherent difficulty, it is nevertheless evidence that lends support to the Union's position that breaks were not strictly limited to fifteen minutes each, that you could stay a little longer on one break if you made it up on another, and that the kind of rigid enforcement regimen advocated by the Division is more wishful thinking than realistic historical fact.

As stated in the *Elkouri* text, "employees are entitled to clear notice that rules will be enforced," so "where rules are not strictly enforced, but violations are accepted by management, employees are lulled into believing that such rules are not serious" and "in effect, employees are 'sandbagged' into violating the rules and then are unfairly punished for a violation." *Elkouri and Elkouri*, How Arbitration Works (6th Ed.), pp. 994-995. In my opinion, that is what likely happened here – slight infractions of break rules were tolerated or ignored by management until the Division got embarrassed by the Andy Wise news story, and then strict enforcement began.

The same principle applies to rules that are poorly communicated and not well understood, and here there is evidence of such misunderstanding and confusion. For example, right after being handed Joint Exhibit Two at the hearing and being asked to read it, Mr. Duncan misunderstood it, stating "Hiram had put on here [Joint Exhibit Two] that you took your break *before the first hour of the day* and you stayed longer than 15 minutes." T-133. That is not what the reprimand says: it says "you took your break

before the first job of the day and you stayed longer than fifteen minutes." Joint Exhibit Two, p. 1. So even in reading the reprimand, Mr. Duncan misstated what it said, thinking that it relied on the "first hour" requirement, when it actually relied on the "first job" requirement. This indicates that the two elements of the break rule were considered interchangeable and amounted to the same thing in practice.

In addition, Mr. Duncan said that he only instructed Hiram Maynard "to issue all four of the crew leaders a written reprimand for breaking more than fifteen minutes," T-132, and "that was all I told Hiram to write them up for." T-133. He said that Mr. Maynard added the "first job" offense on his own and without Duncan's knowledge or input. T-132-133. Mr. Duncan even said that the Dixon reprimand, Joint Exhibit Two, was "not the one" sent to him by Maynard, and that he asked for a copy of the reprimand, but that he didn't even see Joint Exhibit Two until "a couple of days later." T-133. When asked if "Hiram told you what that was about," Mr. Duncan replied, "no he didn't." T-133-134.

It is also noteworthy that Duncan limited his instructions to Maynard to issuing a reprimand for exceeding the fifteen minute limit, and did not include anything else, *after* he had seen the Tuesday night news broadcast, and after he had interviewed all affected employees about what had happened. So having all relevant information before him, Mr. Duncan decided not to issue Dixon's reprimand for any infraction other than exceeding fifteen minutes. Indeed, he made a point of saying that he did not ask Maynard to issue a reprimand for anything else, and that Maynard apparently took that upon himself.

Also, when asked if he knew when he issued the reprimands, that Dixon and his crew "were saying that they had stopped at a job before [going to] Danvers," Mr.

Maynard replied "no," he "didn't have that knowledge." T-112. This means that Maynard issued Dixon's reprimand, and added the "first job" violation to it, without even questioning Dixon about that, and without knowing that Dixon and his crew were claiming they did stop at a job prior to taking a break. This leads to the conclusion that Mr. Maynard based his decision entirely on the statement he claims Dann Dixon made to him (which is denied by Dixon), or on the crew's schedule or the news telecast, but in any event without knowing what the crew had to say about it. This would surely qualify as an incomplete and inadequate investigation, but at the same time, Ron Duncan testified that he *did* know that Dixon and his crew were asserting that they had stopped at a job prior to the first break, and he knew that when he and Diana Veazey decided to issue the reprimands to the crew leaders, including Dann Dixon.

Obviously, Mr. Duncan believed Dann Dixon and his crew when they told him that they went to a job before taking a break, which leads to an obvious discrepancy: if Hiram Maynard was told by Dann Dixon that he "went straight to Danvers" that morning, he almost certainly did not pass this information on to his boss Ron Duncan. This casts more doubt on the allegation that Dixon ever made the contested statement to Mr. Maynard. At the very least, it is a certainty that management did not have the same point of view and did not come to agreement on the bases for Dann Dixon's reprimand before it was issued, and this evidence weakens the Division's argument that all aspects of the break rules were fully understood and uniformly enforced.

Also at the forefront here is the very news report that prompted this case. Andy Wise reported that Dixon's crew "went directly to Danvers for breakfast prior to going to their first job," T-47, despite admitting that he didn't follow the crew from the Brunswick

Work Center – that he first saw them when they arrived at Danvers. When he was asked about this, Mr. Wise replied that his report was "based on what Mr. [Glen] Thomas [Division spokesman who appeared in the newscast] told me on their schedule," explaining that Mr. Thomas researched "the record" to "corroborate when they left Brunswick ... and when they arrived at the job site, and the distance in between." T-47. But this has nothing to do with the question of whether they took a break "before the first job of the day."

Furthermore, Mr. Thomas stated on television that he "didn't think [Dixon's] crew was in violation because of the distance of the work site." T-47. Again, no mention was made in the TV report, or in Mr. Thomas's public statement, that there was a rule requiring crews to proceed to the first job site before taking the morning break. Note, too, that Mr. Thomas was the public spokesman designated by the Division to speak on its behalf regarding the news story, a story focused solely on Division break policy and whether it had been violated. It strains credulity to think that Mr. Thomas went on camera to speak out publicly on this topic in front of an investigative reporter without first consulting someone in management who was considered knowledgeable.

Despite all this, Mr. Thomas's first comment to the news media concerning Dann Dixon's crew was that he "didn't think they were in violation" of the break rules "because of the distance of the work site." T-46. Nor did Thomas mention whether supervisor approval had been obtained or was even needed – he simply cited the distance to the job site. If he was unsure, he could have said that he would have to check and see if supervisor approval had been obtained, but he didn't say that. Nor did he testify at the hearing to explain any of this. Unfortunately for the Division's case, his lone comment,

without more, is undeniably inconsistent with the more strict application of the break rule now advocated by the Division in this arbitration, and it again reflects confusion and misunderstanding about the details of the break rules.

Also important is the only documented conversation between Hiram Maynard and Dann Dixon regarding the break rules, which took place over the Division's radio system, and was therefore recorded. The recording was played at the arbitration hearing, and Mr. Maynard confirmed under oath that the only question he asked Dixon in that conversation was whether he and his crew had stopped "after 8 a.m.", T-106, and that Dixon's answer was "everything was legal." T-106. Mr. Dixon confirmed essentially the same conversation under oath as well. Importantly, Maynard did *not* ask Dixon in this conversation whether the crew went to a job site before going to Danvers, and that fact is undisputed.

It is true that Maynard testified that he asked this question in another conversation, either on a cell phone or in person, but his initial recollection, which remained unchanged and unwavering until the Union asked for a tape of the radio transmission, was that the conversation took place over the radio. Only when the tape failed to confirm his recollection did Mr. Maynard change his mind and decide that this important question and answer occurred in some other conversation. I don't mean to imply that Mr. Maynard was not telling the truth as he recalled it, but this evidence bears on his ability to recall accurately what happened that week, when it happened, what exactly was said, and when it was said. This shows that his recollection was at least partially flawed, which raises the question of what else he might have failed to accurately recall.

It is also important that the tape recording reflected the first conversation Maynard had with Dixon, on Monday, when he first learned that Andy Wise was following Dixon's crew, and so it reflects his initial response upon first hearing the information. This means that the question that first came to mind for Mr. Maynard, and the only question that came up in that first conversation, was whether the crew had stopped before 8 a.m., or during the first hour of the shift, *not* whether they had gone to a job before taking a morning break. Mr. Dixon's reply was likewise important for what was not said; his response was "everything was legal," meaning that he and Maynard were both solely concerned with the time of day, or whether the crew had stopped during the first hour of the shift, not whether they had gone to a job before their break.

All of this suggests an understanding of the rule that is consistent with the position of the Union, that the "first hour" requirement grew into, and became indistinct from, the "first job" requirement, with the latter often effectively replacing the former in practice and understanding, and vice versa.

As a practical matter, in their effect, the two requirements *are* confusingly similar, and could easily be considered interchangeable, since it would seem rare that a crew could stop at the first job, finish it, and go on break in less than one hour in any event – indeed, that is the very premise on which the Division's suspension case rests, and the premise which caused the reaction from Human Resources to be so skeptical in the first place. Conversely, it would seem rare that a crew could leave the Brunswick work center (with the expectation that they should leave before 7:15 a.m. each morning) and arrive at a break site before 8:00 a.m. with no job in between. The evidence was undisputed that the driving time from the Brunswick Work Center to Delaney Square was about nine

minutes, and from Delaney Square to Danvers about 17 minutes. These things being so, the question arises as to what purpose of the "first hour" rule might serve, if any? Note that the policy itself requires that "breaks will not be taken while traveling to the job site," Personnel Policy Manual – Number 23-07, Par. V(A)(2)(1), a requirement which renders Mr. Thomas's comment to Andy Wise about the "distance to the job site" irrelevant and meaningless.

The Division tried gamely to assert that both requirements were enforced at all times and without exception, that one did not replace the other, that no breaks were permitted before the first hour of the shift *and* no breaks were allowed before the first job of the day. But the understanding of the witnesses, both Union and Management, clearly gravitated in the other direction – that the two requirements were often confused and considered interchangeable, that one requirement often replaced the other. Even a part of Mr. Maynard's testimony served to illustrate this point, as shown in the following exchange:

> Q. Now tell me, Mr. Maynard, what is the significance of 8 o'clock?
>
> A. There – I guess the rule states after your first job. But somewhere along the line in evolution of this policy, it – it was sent out that you didn't take your first break in the first hour or the last hour of the day. And that's where I got the after 8 o'clock."
>
> T-106.

This testimony is important for two reasons: first, Mr. Maynard was less than sure in describing the "first job" requirement; he said that he "guess[ed] the rule states after your first job," implying that even in saying that, he wasn't sure about it. It also sounds very much like Mr. Maynard thought the two requirements meant essentially the same thing and were effectively interchangeable: that if you stopped after the first hour, you didn't have to stop at a job first, and vice versa. On the other hand, it is certainly true that Mr. Maynard took it upon himself to add the "first job" element to the reprimand, and that means that at some point prior to Wednesday, before the reprimands were issued, Mr. Maynard became conversant with this detail of the rule. But knowing the rule, he came up short on the facts, and did not inform Mr. Duncan of his finding that the "first job" requirement was violated. Mr. Duncan, who was better informed because of his investigation, decided not to add any more to the reprimand than the fifteen minute limit.

Adding to the lack of clarity, Ronald Duncan testified that he thought there was a "written policy" prohibiting breaks during the first hour of a shift, but when asked to find it in the documentary evidence, he was unable to do so. Responding to a question from Union counsel, after Mr. Duncan had searched unsuccessfully for the written policy, he replied, "to be honest, ma'am, I read it yesterday and it also is a past practice." T-144. Then, when pressed further, Mr. Duncan said he "could have sworn it was in the format" of a policy, but finally admitted that the "one hour" rule "could have been in the bulletin I read" the day before. T-146. Mr. Maynard was also aware of this bulletin, which he thought was in the form of a "letter that came out from one of our managers." T-107.

What is most interesting about this testimony is that both Duncan and Maynard were aware of the written bulletin, or letter, and both said that it was the source of the

"first hour" requirement. Mr. Duncan actually testified that he read the bulletin the day before the arbitration hearing. And yet despite its apparent importance, the bulletin itself was not placed in evidence by the Division. This evidence, or the lack thereof, bears directly upon the interplay between the two requirements and whether one could be construed to supercede or replace the other. When evidence that appears to be "strongly pertinent" to an issue is withheld by a party, arbitrators are "entitled to infer that [such evidence] would have been adverse to the position of that party." *Elkouri and Elkouri,* How Arbitration Works (6th Ed.), pp. 381-382. In this instance, the inference leads to the conclusion that the omitted document was at best unclear, or at worst, could be read against the Division's presentation in this case, i.e., that both rules were to be enforced equally and separately, and not in lieu of one another.

And finally on this point, Human Resources Manager Clemente Washington, Sr. initially ignored the "first job" requirement in his testimony, and added it as an afterthought. In a puzzling exchange, Mr. Washington originally testified that Dann Dixon was reprimanded only for exceeding fifteen minutes on break, then changed his testimony to include the "first job" rule, as follows:

> Q. That doesn't really make sense, does it, sir, since Dann Dixon had already received discipline and it's the crew leader that receives the discipline?
>
> A. I'm talking about the policy by going to the job second and going to Danvers first.
>
> Q. Well, Mr. Dixon was already disciplined for that, wasn't he?

A. No. He was only disciplined for – the reprimand was for staying over 15 minutes on a break.

Q. Well, that's not really true, is it?

A. Yes, it is.

Q. Okay. Well, let's look at that then.

A. As well as going to the job first.

Q. Oh. Now it's as well as –

A. Dann Dixon only.

Q. Right.

T- 198-199.

Though Mr. Washington ultimately got it right, even he became a little confused in discussing how the Division break policy was applied in this case.

But the *coup d'grace* in all of this evidence is the fact that this whole episode began because a local citizen (Mr. Embrey) became concerned by watching Division crews stopping at Danvers restaurants early in the morning hours on work days, for some period of time. Although Mr. Embrey did not indicate how often or for how long he had seen the crews taking these early breaks, or how long the breaks were, it is certain that he saw enough to decide that something irregular was going on, something that he deemed sufficiently unusual to prompt him to contact a local news channel running a "whistleblower" series.

The importance of this is that it provides uncontradicted evidence that the "breakfast breaks," in their duration, time of day, and frequency, had been going on for some period of time prior to the morning Andy Wise filmed one of the breaks. In other

words, the break in this case was not an isolated incident. Mr. Embrey apparently observed a pattern of work crews stopping at one or more Danvers restaurants early in the morning hours and taking time to eat breakfast; he saw these events for some time before he called in as a "whistleblower." This also support's the Union's contention that the break rules were not strictly enforced prior to the TV report, that if you "went over a little bit" on one break, you could "make it up on another," and it also invites the deduction made earlier that management knew about these practices and implicitly condoned them.

While none of these items of evidence, taken alone, would be sufficient to carry the day for the Union, the conclusion is still inescapable that the general tenor of all of the evidence, considered as a whole, reveals confusion over the break policy and whether the one hour requirement replaced or superceded the first job requirement, or vice versa, and whether employees could make up break time if they went over. I realize that the Division is quite clear on all of these points now, but the question is whether the rules and their meaning were clearly communicated and understood by those employees who received discipline for their violation, in this case Dann Dixon. These issues are also relevant to the question of whether the other Grievants fabricated their statements that the crew went to a job before going to Danvers that morning. If they didn't understand this to be a strict requirement at the time they made those statements, then they had no motive to lie.

Taken altogether and considered as a whole, this evidence establishes that Dann Dixon was given a written reprimand for conduct that had been going on for some time, with the implicit, if not express, consent of his bosses – and the evidence shows that he was certainly not the only one. There were at least four crews caught eating at Danvers

that morning, and four Crew Leaders were reprimanded for the same thing. It is a requirement of just cause that employees be "on notice that rules will be enforced," so "where rules are not strictly enforced [as in this case] but violations are accepted by management, employees are lulled into believing that such rules are not serious" and "in effect, employees are 'sand bagged' into violating the rules and then are unfairly punished for a violation." *Elkouri and Elkouri*, How Arbitration Works (6th Ed.), pp. 994-995. For these reasons, it is my conclusion that the written reprimand given to Dann Dixon was not supported by just cause.

2. The Four Suspensions and Double Jeopardy

Next to be considered are the four suspensions. The Union argues convincingly that under "the doctrine of industrial double jeopardy," an employee may not be "punished twice for the same infraction," that "once discipline for a given offense is imposed, it cannot thereafter be increased, nor may another punishment be imposed," and "the double jeopardy doctrine prohibits employers from attempting to impose multiple punishments for what is essentially a single act." Union Brief, p. 14, *citing Elkouri and Elkouri*, How Arbitration Works (6th Ed.), p. 982, and cases.[1] The Union is correct about this, and I agree that that is what happened in this case. Nor is this some esoteric legal concept; its underlying rationale lies in the idea of "fundamental fairness, as guaranteed by the contractual requirement of 'just cause' for discipline." *Elkouri and Elkouri*, How Arbitration Works (6th Ed.), pp. 980-981. Since "just cause" is the issue in this case, the doctrine of double jeopardy will be considered next.

[1] In fact, the *Elkouri* text cites one of this Arbitrator's opinions to support the "double jeopardy" doctrine: fn. 294, *Crown Cork & Seal Co.*, 111 LA 83, 87 (Harris, Jr. 1998).

Certainly Mr. Duncan conducted a more than adequate investigation before he and Diana Veazey decided upon the initial discipline given in this case. He testified that he asked Hiram Maynard to find out who was involved, he watched one or more of the news reports on television, and the next morning he called Hiram Maynard to check on the crew leaders' past disciplinary records. T-132. On Wednesday, he went to the Brunswick Work Center "to speak with the crews and the crew leaders individually, one at a time," T-134, because he "wanted to hear their side of the story," T-134, and he "wrote down" what they said. Once he had gathered all of this information, he contacted his supervisor, Vice President Diana Veazey, and they jointly decided to issue written reprimands to the crew leaders, because "right off the bat, the policy states to give them a written reprimand." T-132. Hiram Maynard agreed that "written reprimands" were "what the policy calls for." T-98. So reprimands were given to the crew leaders, with full knowledge of all facts, after a complete investigation, with the consent of all the managers involved (except Clemente Washington, Sr., who was not consulted beforehand, and whose involvement, which caused its own set of problems, will be discussed below).

This is not a case where there was an "understanding" that the discipline "might not be final." *See, Elkouri and Elkouri*, How Arbitration Works (6th Ed.), p. 982. Once the discipline was issued, Mr. Duncan testified emphatically that "yes, I considered it over, I had disciplined for break policy," T-139, and "once I did that, I was through." He even added that he "wasn't involved" in the subsequent action taken by Human Resources. T-140-141. In addition, the employee who received the original discipline, Dann Dixon, also "thought it was over" once he was given the reprimand. He testified, "I

wasn't happy with it," but "that was it – [Mr. Maynard] gave me a copy of it [the reprimand] and off we went." T-275.

As a matter of fact, everyone involved thought it was "final" and "over" until Mr. Washington decided that it was not. When Mr. Washington discovered the reprimands had been issued, he became "concerned" because "the process wasn't followed," T-151, saying that his only interest was "to check to make sure" that "they did the process correctly." T-178. In fact, he even admitted that he did not "retract the reprimands" because they were "appropriate for the infraction ... at the time, from what we knew." T-179. But Mr. Washington's testimony in this regard is a bit disingenuous, since Ron Duncan had already done a complete investigation, had interviewed all concerned, and had administered discipline based on "what *he* knew" and what his boss knew, from that investigation. Furthermore, he and Hiram Maynard both testified that the reprimands were proper and what was "called for" under the break policy. Mr. Washington never disagreed that the break policy was not followed to the letter. Instead, he came up with a separate rule violation, as discussed below.

Certainly Mr. Washington had every right to "check" to see that the "correct process" was followed, but that is not what he did. He "reopened" the case, initiated his own investigation, started all over from the beginning, interviewed all of the employees involved all over again, and reconsidered the whole incident. This exercise involved virtually the same "process," the same incident, and essentially the same set of facts as those that led to the first discipline. In the end, no different conclusions were reached concerning the break policy itself; instead, "separate offense(s)" of "lying" and "obstructing an investigation" were unveiled in a masqueraded attempt to avoid the very

thing now raised by the Union: "double jeopardy." In other words, this is a quintessential case of double jeopardy, caused only by the omission of Human Resources from the original "process."

No doubt Human Resources should have been involved to begin with (although Ron Duncan testified without contradiction that he called Human Resources on Tuesday, was unable to reach anyone, and left a voice mail, T-129). But what is confounding to me in all of this is *what* "process" was not followed in the original investigation and discipline, other than a failure to involve Human Resources? What did Mr. Duncan actually fail to do, other than wait for a return phone call from Human Resources? As noted above, his investigation was more than adequate; the evidence is uncontested that he and his boss, Vice President Diana Veazey, had legal authority to administer discipline, and their decision was within policy guidelines, even "appropriate" under the circumstances, according to Mr. Washington himself based on "what we knew at the time."

I realize that the normally accepted scenario in these matters is that line managers consult with human resources professionals before giving discipline (in some cases, human resources is only consulted where there is serious discipline, such as a suspension or discharge). But generally speaking, as in this case, the *managers* make the final decision, with input and advice from Human Resources. As Mr. Washington himself testified, the role of Human Resources is to ensure that discipline is administered fairly and equitably. That is as it should be, but there is no claim here that the initial reprimands given to the Crew Leaders were unfair, inequitable, or even out of line with Division policy. I can't say whether Mr. Washington decided that the discipline should

have been stronger, or thought that Mr. Duncan didn't conduct an adequate investigation, or whether he was just "concerned" because he wasn't involved – but there is no need to reach those questions. For Mr. Washington made it very clear that his intention in getting involved after the fact was to make the point that Human Resources should have been involved "in the process."

In other words, this case bears all of the hallmarks of an intramural dispute at the management level, because Human Resources was left entirely out of the loop in a disciplinary matter of some importance. And this occurred despite Mr. Washington's "letter" advising managers of a newly implemented policy changing Human Resources "to the HR generalist design," whereby "any HR function, including discipline, should go through the HR generalist." T-200-201. Indeed, Mr. Washington may well have felt that line management had acted hastily and in advisedly, whether the discipline was "appropriate" or not. And if so, he surely had a right to lodge an objection. But that is a matter to be settled among management and does not concern the Union or the bargaining unit employees, who were subjected to double jeopardy for a single rule violation.

With Mr. Maynard's help, Mr. Duncan investigated the incident, consulted with his boss, a Vice President, and administered discipline. No one disputed that the discipline was in accordance with the break policy at that time, including Clemente Washington, Sr. After that, Mr. Duncan said he thought "it was over." So did Mr. Dixon and his crew members. Indeed, Ron Duncan and Hiram Maynard were both "disciplined" themselves because they failed to follow the correct "process." T-202. This is evidence of a management mistake, a miscommunication, and a resulting punishment

of bargaining unit employees for the same incident for which discipline had already been rendered.

This leads to the second problem with the suspensions. Despite the Division's protestations to the contrary, Mr. Washington's interviews were not conducted in a completely impartial, objective and fair minded way. Instead of assuming innocence or beginning with an open mind, the manner in which Mr. Washington questioned the Grievants tends to show that he approached his task with the belief that the Grievants were lying, and he set out to prove it. Sure, Mr. Washington may have been friendly and well mannered; and I certainly do not believe that Dann Dixon was "intimidated" into making false statements; but the evidence is nonetheless clear that Mr. Washington coaxed and cajoled the Grievants into what turned out to be a trap. The interviews were conducted by beginning with the idea of painstakingly constructing a "timeline" such as might be used in a criminal trial, where the accused has the right to remain silent, where a case must be built on circumstantial evidence.

Mr. Dixon testified that he was "interrogated, not questioned" by Mr. Washington, that "saying 'no' was not an option," that when he said he didn't know, Washington would respond, "oh, come on now, help me out; give me a hand, or give me an estimate." T-280. Apparently not knowing that he was being "set up," Mr. Dixon answered the questions as best he could, not remembering precise times and details, trying to be helpful and not thinking that he would be held to exactness. Mr. Dixon described the questioning like this:

> "So when he said – you know, he said, well, could it have
>
> been a half hour?

Well, it could have been.

Could it have been an hour?

Yeah, it could have been.

When you're questioning somebody like that and you're not thinking that you're going to be held to accuracy because of an estimate, yeah, you could probably say just about anything."

Testimony of Dann Dixon, T-280.

This strikes me as a devastatingly accurate portrayal of the question and answer session with Mr. Washington. I realize that a small portion of the questioning of Mr. Dixon was played on a tape recording, but the tape was not admitted in evidence, and I don't know what preceded or followed that small portion. And Mr. Dixon's description of the questioning was confirmed by another Grievant, Lawrence Dunlap, who even said he was asked to "guess," while Mr. Washington himself admitted that he may have asked the Grievants to "estimate" the times now relied on in this case.

Asking these kinds of questions, under these circumstances, Mr. Washington got exactly what he should have expected: widely varying time estimates, people saying I don't recall, and when asked if it "could have been" an hour or half hour, responding to such leading questions, "yeah it could have been." The fallacy is that from these understandable responses, Washington built a case of lying against the Grievants, based primarily on the time estimates that he had extracted from them.

For other than Mr. Maynard's recollection, which was shown to be unreliable, this "timeline" is the only prop on which the claim of lying rests; it is the basis for the conclusion that it was "impossible" for the Grievants to have really gone to Delaney

Square that morning, and that hence, that they were all making that up. If the timeline is accepted as the only possibility, then the claim of lying would be correct. However, in spite of the leading questions and the stark differences in time estimates, there still remains significant credible evidence of flaws in the Division's premise.

Andy Wise testified that the crew he filmed entering Danvers (which later turned out to be Dann Dixon's crew) entered the restaurant "right at 8 o'clock," T-36, and that "they" remained in Danvers "for 25 to 30 minutes," which he knew because he "watched the clock." T-37. This was clear enough, to be sure; but he also testified that "initially I thought there was only one crew there" until Glen Thomas advised him that there were two. T-49. And when asked if he saw "anyone other than these four [i.e., Dixon's crew] go into Danvers," Andy Wise replied "those are the four that I remember," T-48-49, and when asked if he remembered "seeing anyone else," he responded negatively, saying, "huh-uh." T-49. He also said that there were no other crews there when he arrived "at 7:40, 7:45" that morning, but he did *not* say that they all arrived at the same time, i.e., "right at 8:00 a.m."; to the contrary, he said that "they all arrived at the – during the time I was there documenting their arrival," T-49-50, necessarily meaning that the crews arrived at different times while he was "documenting their arrival." Though he never said how long it took to "document their arrival," he did say that he was there at least "25 to 30 minutes" while the crews were inside Danvers.

Finally, when Andy Wise was asked if he knew where the "bucket truck" came from, he said, "no, I do not," explaining that he did not "understand," nor did he "pretend to understand, utility procedures as far as who gets what truck and what truck is used on what site and how many and that kind of thing." T-50. Mr. Wise said that what he was

"going on" in his testimony was "what [he] captured [on video] at the restaurant during that – that frame of time." T-50. As noted, that "frame of time" was 25 to 30 minutes.

All of this leaves entirely open the question of which crew arrived at Danvers first, a question that was emphatically answered by the Grievants in uncontradicted testimony. Considered in its entirety, this is *not* convincing testimony that Dann Dixon's crew arrived at Danvers at 8:00 a.m. that morning. Instead, almost all of it is quite consistent with the testimony of Dixon and Dunlap, who said that another crew arrived at Danvers before them. T-270, 320. Mr. Dixon testified that "two [Division] trucks "were already there" when they arrived, "an overhead crew truck or material truck and a bucket truck," T-270, and Mr. Dunlap agreed that when they arrived at Danvers, "there was an overhead crew [already] there," and that he actually saw some of the overhead crew members. T-320.

So a summary of this evidence is that Andy Wise thought he filmed Dann Dixon's crew entering Danvers "right at 8:00 o'clock," and that they stayed there "25 to 30 minutes," T-37, but the Dixon crew were "the four I remember," he didn't recall any other crews, and he did not say that all of the workers arrived at the same time, only "during the time [he] was there documenting their arrival," an unstated period of time within a total time frame of 25 to 30 minutes. He also said he didn't know who got what truck and "what truck is used on what site and how many and that kind of thing." T-50.

Very little of this is inconsistent with the testimony of the two Grievants, who both testified that an "overhead crew" arrived at Danvers before them, meaning that they arrived during the time period that Andy Wise was there filming crews – and this testimony *was uncontradicted by any other witness*, including Andy Wise. In my

opinion, the Division's "timeframe" argument collapses under the weight of this evidence, because it means that it is entirely possible and plausible that Dann Dixon and his crew arrived at Danvers exactly when he said they did: "probably ten, fifteen minutes after eight o'clock." T-300. And this means that all of the rest of Dixon's testimony regarding times falls into place. He said that he left the Brunswick Work Center "about 7:05, 7:10," T-302, spent "probably a half hour to 45 minutes" at Delaney Square, T-304, and given the drive times estimated by Division witnesses and agreed to by Dixon, he and his crew would have arrived at Danvers exactly when he said they did, "probably ten, fifteen minutes after eight o'clock." T-302.

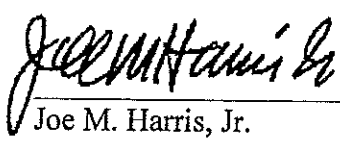
Stated another way, accepting all of this evidence and trying to make sense of it without attributing lying to any witness, it was *not* "impossible" for Dixon and his crew to have done what they said they did and to have arrived at Danvers when they said they did. The upshot is that the Division failed to carry its burden of proof, failed to establish by a preponderance of the evidence that "the entire crew was not telling us the truth," and so all four Grievants' suspensions for "giving false statements and impeding an investigation" were not supported by just cause, because the evidence failed to establish that allegation.

AWARD

The grievances are sustained. The evidence failed to establish that Memphis Light, Gas & Water Division ("the Division") had just cause to issue a written reprimand to Grievant Dann Dixon, and also failed to establish that the Division had just cause to issue five day suspensions without pay to Grievants Dann Dixon, Donald Boxx, Lawrence Dunlap, and Keith Wilson (collectively, "the Grievants"), and it therefore violated the Memorandum of Understanding ("the MOU"). The Division shall remove the written reprimand from the file of Grievant Dann Dixon and shall disregard it in considering any future decisions of any kind regarding Mr. Dixon's employment. In addition, the five day suspensions of each of the Grievants are hereby overturned, and the Division shall make payment to each of the Grievants for wages lost as a result of the violation of the MOU, calculated as set forth below.

The payment of lost wages shall be calculated as follows: using the same pay rate that would have been earned by each Grievant under the MOU had he not been suspended for five days, calculate the income that he would have earned during the five day time period beginning on the effective date of his suspension, and this amount shall be the amount awarded to each Grievant.

This 15th day of July, 2008.



Joe M. Harris, Jr.
Arbitrator

Atlanta, Georgia