

IN RE ARBITRATION BETWEEN:

GAS WORKERS UNION LOCAL 340

and

CENTERPOINT ENERGY

DECISION AND AWARD OF ARBITRATOR

FMCS CASE # 110911-58671-3

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FMCS CASE # 110911-58671-3
Dan Stephens Grievance

APPEARANCES:

FOR THE UNION:

Rockford Chrastil, Attorney for the union
Dan Stephens, grievant
Cecil Ian Brown, Local 340 union President
Rob Basset, Special Foreperson

FOR THE EMPLOYER:

Paul Zech, Attorney for the employer
Michael Fahey, Director of Employee Relations
Christie Singleton, Operations Specialist
Roger Brandel, Area Manager for North District

PRELIMINARY STATEMENT

The hearing in the matter was held on December 13 and 19, 2011 at the FMCS Office in Minneapolis, MN. The parties submitted post-hearing Briefs dated January 31, 2012 at which point the record was closed.

JURISDICTION

The parties are signatories to a collective bargaining agreement dated May 1, 2009 through April, 30, 2011. There were no procedural arbitrability issues raised by either party.

ISSUES

Was there “absolute cause” for the termination of the grievant pursuant to Article 26? If not was there just cause for the termination of the grievant? If not, what shall the remedy be?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 26

DISCIPLINE AND DISCHARGE

The Company has the right to employ or promote in accordance with the provisions of this Agreement, to enforce discipline, to discharge employees for cause, including failure to recognize authority, to discharge or discipline new employees with or without cause before they shall have completed their applicable probationary period (such new employees retain the right to file grievances alleging contractual violations). Without excluding other causes for discharge, the following shall constitute absolute causes from which there shall be no appeal to negotiation or arbitration between the Company and the union (except that the question of whether the employee has been guilty of the facts constituting such absolute causes shall be a negotiable controversy) namely:

1. Use of, or being under the influence of, alcohol or non-medical drugs at any time during the workday.
2. Dishonesty
3. Neglect of Duty
4. Abuse of Sick Leave

EMPLOYER'S POSITION

The employer took the position that there was just cause to terminate the grievant for his actions herein. In support of this position the employer made the following contentions:

1. The employer asserted that the grievant is a long time employee who is well aware of his responsibilities and obligations to rate and repair gas leaks as necessary and of his duty to document his activities so that both the company and MOPS, Minnesota Office of Pipeline Safety, and other state and federal regulators would know what he did and why. The employer further asserted that the grievant had been advised for months that his performance in many areas of his work was deficient and needed to improve. This was especially true in the area of documentation.

2. The employer made much of the fact that the grievant is a foreman responsible for his crew and to "direct, investigate and to resolve any maintenance issues regarding the Company's system." Tr. at 204. Other essential functions of the position include the duty to follow the operations manual procedures and inspect work of the crew for compliance with all company codes and state and federal agencies and to complete record keeping to ensure accurate information is maintained in a timely manner.

3. The foreperson is also responsible for grading leaks. Grade A leaks require very prompt action to protect life and property and to repair the leak. See employer exhibit 18, which sets forth the actions that must be taken to secure the area to prevent injury and to call for appropriate action, including emergency locates. See also Tr. at p. 70. The employer noted that buildings have been demolished and people have been killed and gravely injured from explosions when proper precautions are not followed.¹

¹ A "locate" is required to determine where the underground lines are and to determine if other lines are near the gas line. One can request a standard locate, which is done within 48 hours of the call, or an emergency locate, to repair more serious leaks, and is done right away. Requesting an emergency locate is generally done if there is a more serious, or grade A leaks as those are known, whereas a standard locate is generally done for a less serious, "B" leak, which need to be repaired within 12 months of finding it. See employer exhibit 18.

4. The employer pointed to the grievant's past record and noted that in the summer of 2010, the grievant was routinely advised that his performance was deficient. He received multiple coachings and counselings about his performance, lack of documentation, inadequate documentation, his failure to respond to calls, and his failure to do what he was told, including failure to do what he was told by his fellow supervisors.

5. The employer went through a litany of warnings, and coachings where the grievant's deficiencies, especially in the area of appropriate documentation were specifically discussed with him. In September 2010 on four separate occasions, i.e. September 10, 13, 21 and 27, 2010, the grievant's supervisor met with him to discuss the performance problems. He was issued a formal written warning on September 27, 2010; which was not grieved.

6. In addition, the grievant was again counseled in November 2010 regarding re-routing of work and again in December 2010 regarding documentation. As late as February 2011, his 2010 performance evaluation listed his performance as deficient. There were several more coachings and warnings in February and March, see employer exhibit 60, including one as late as March 1, 2011 for deficient performance and other problems with documentation and failure to complete assigned tasks. The employer asserted that this incident deserves special attention not only because of the proximity in time but also because it involves the same sort of failure to respond appropriately to emergency calls.

7. The March 1st incident also involved an emergency call-out. Since the grievant failed to respond at first supervisors sent another employee, who was also a union Steward, out to the site to monitor the site and document what was going on. When he arrived the grievant was in the process of requesting regular locates for the job, which were inappropriate since the leak was a grade A leak. He should have called for emergency locates.

8. The employer asserted that the other employee essentially caught the grievant shirking his responsibility and argued with him to do the correct things and get emergency locates to the site to repair the A leak. See employer exhibit 10, tr. at 133, 242-43. Even though he was not given a formal discipline at that time he was once again verbally coached about the need to properly perform his duties and to document his actions. The employer noted that this incident is especially relevant given the proximity in time and because it was a very similar incident to the ones that led to his termination; less than 3 weeks later.

9. The employer asserted most strenuously that by the time of his termination in March 2011, the grievant was well aware that his job was in jeopardy.

10. The employer acknowledged that past record is appropriate only to determine the remedy but pointed to several past instances where the grievant simply did not do as he was told. There were multiple examples noted by the employer of poor or even nonexistent documentation making it difficult if not impossible to determine what the grievant did when he got to a site or to justify to any regulators who may have inquired what happened and why. The grievant was well aware of his obligations in this regard but did not follow through on many of his obligations. Further, there were times when he did; making it clear that he knows how to do this if he wants to spend the time necessary to document his actions.

11. The employer relied on two incidents, both of which occurred within a few days of each other, i.e. March 18 and 21, 2011 for the termination. The first took place at an address on Belden Avenue in Minneapolis. The grievant was called out to repair what had been initially classified as a Grade B leak. He completely failed to document his actions that day and when another technician arrived later, that person classified the leak as a Grade A leak, which required immediate action.

12. The employer asserted that this constituted neglect of duty under Article 26 set forth above and that the sole issue for determination by the arbitrator is “whether the employee has been guilty of the facts” here. The employer asserted that the issue of just cause is not involved since the grievant’s actions fall within the purview of the “absolute cause” for discharge in Article 26. The employer asserted that the grievant left without properly documenting the leak and that he failed to properly assess it and graded it a “B” leak when it was in fact a far more serious grade A leak. This neglect could easily have caused considerable damage or injury if it had been left as it was without being properly repaired.

13. With regard to the Belden incident, the daughter of the owners checked on the home and smelled gas. She called the employer to send technicians to determine the problem. The first crew tested the site and decided that the leak was a Grade B leak at the time they were there. The employer noted however that leaks can change over time and suddenly become worse. Tr. at 72-74. employer exhibit 13.

14. The grievant was at the site around 9:30 and claimed he took readings to verify the amount and location of gas leakage but there was inadequate documentation of these readings. He left the site but his documentation was so inadequate that it did not inform anyone as to what he found there. Later that day, the daughter, unaware that there had already been a crew at the Belden location, went back and called again when she still smelled gas. Yet another technician was sent out and this time determined that there was a grade A leak at the home. Tr. at 76-77. The employer asserted that the grievant neglected his duty by leaving what was later found to be a grade A leak and that his documentation was woefully inadequate.

15. The second incident also occurred on March 18, 2011 on Skycroft Dr. in Minneapolis. There the grievant was confronted with a grade A leak yet failed to document any of his actions and abandoned the jobsite; leaving a potentially deadly leak. He even tried to conceal his error and his blatant neglect by calling in an emergency repair after the fact and after he had been confronted with his mistake.

16. The first set of technicians documented a possible grade A leak coming from a “varmint” hole near a tree in the front yard. The technician documented 100% LEL, lower explosive limit, from this hole, see, ER Ex. 12. Based on these findings an emergency order was given to the grievant.

17. The employer asserted that the grievant went to the site but rather than following through with the appropriate procedures to get emergency locates and take steps to repair the leak, he documented that there was nothing coming from the home and downgraded the leak to a B and left; thus leaving a potentially hazardous, even deadly, leak in place over the weekend. His documentation was incomplete and left insufficient information as to what he found and why he downgraded the leak. MOPS might well have fined the employer in this instance because of the inadequate documentation. There must be adequate document of such a downgrade and the grievant was well aware of this requirement; not only from the clear policy but also because of the multiple times he had been warned about this very requirement.

18. The employer pointed to Article 26 and asserted that the Company retains the power to determine if a set of facts constitutes absolute cause, i.e. neglect of duty, and thus taking it out of the traditional just cause analysis. Here the facts, according to the employer showed that the grievant simply abandoned his job and left two A leaks without taking proper action to repair them.

19. The employer further asserted that even if the arbitrator were to determine that these acts did not equate to absolute cause for termination, the grievance should be denied using a just cause analysis by any measure. The grievant had been warned repeatedly about his failure to document his action yet he completely failed to perform his duties in that regard here. It was virtually impossible to tell what he did or why from the documentation provided to the Company after he went to these locations; thereby placing the company in the position of facing possible fines or sanctions from MOPS and potential liability had anything tragic occurred here.

20. The grievant then tried to cover his tracks when confronted about the lack of documentation and the downgrade and only after that he indicated that there was an emergency and requested emergency locates – after a grade A leak had been allowed to persist all weekend. The employer asserted that the claim that his computer was not working cannot be believed. He raised it for the first time at the hearing and had never raised it before, despite having several chances to do so. Moreover, the computer was working fine when he went on it the following Monday, March 21st.

21. The employer asserted that both of these incidents constituted absolute causes for termination pursuant to the provisions of Article 26. The employer acknowledged that generally an employer may not unilaterally call something an absolute cause for discharge absent clear contractual language but asserted that such language exists here and that in this instance the grievant clearly neglected his duty at both Belden when he failed to repair a grade A leak or document any of his activities there and left it for another crew to fix. At Skycroft when he actually knew there was a grade A leak and again simply ignored it and left it over the weekend. The employer asserted that these incidents were eerily similar to the event on March 1st when another crewmember forced him to acknowledge a grade A leak and that the sole difference was that this time there was no other person to make sure he did his job.

22. Further, the CBA defines the absolute causes and one of those is “neglect of duty,” which is precisely what occurred here. Accordingly, the arbitrator’s jurisdiction is limited per the terms of Article 26 to determine if the facts are true.

23. The employer also asserted that even if absolute cause does not exist, just cause certainly does and that the grievant’s prior record when coupled with his failures to follow through to repair these serious leaks or to document his actions fully supports discharge. The employer countered the claim of disparate treatment and asserted that this grievant’s record justified a far greater penalty because of the sheer number of times he has been spoken to, warned and even disciplined for these ongoing failures. While others have not been discharged for instances like this, none have the same record or the same level of negligence as does this grievant.

24. Finally, the grievant’s record demonstrates an unwillingness or inability to follow directions and to document his actions as he has been told. The employer asserted that the employer fully considered other options but that ultimately the arbitrator should not substitute his judgment for that of the employer in a case such as this. Discharge was thus appropriate.

The Company seeks an award denying the grievance in its entirety.

UNION'S POSITION:

The union took the position that there was not just cause for the termination of the grievant and that he should be reinstated with full back pay and benefits. In support of this the union made the following contentions:

1. The grievant began his employment with the Company on or about April 17, 1989 and at all times relevant to this matter, was employed in the Construction and Maintenance (C & M) Department. The union asserted that he is very experienced and knows how to rate gas leaks as either grade A or B leaks and knows how to respond to those appropriately by getting the correct "locates" for them and to repair them as necessary.

2. The union noted that the grading of leaks is not an exact science and that the hazard any particular leak poses will depend on where it is, how much gas is escaping, whether the leak is in or near the structure, as opposed to out in the yard someplace, ground conditions, soil conditions, weather, and season, i.e. whether there is frost in the ground or not.

3. The union further asserted and put on testimony to show that the condition of a leak can change over time; sometimes over very short periods of time. The union further noted that what was appropriately graded a B leak in the morning can change and become an A leak by the afternoon depending on a variety of circumstances. The mere fact that a leak changes cannot be a reflection of the person who initially graded it.

4. The grievant is a very experienced technician who has never received any disciplinary action for failing to handle an assignment to check and grade a leak such as are involved in this matter. While his documentation may not be perfect, his actions were documented on time sheets and provided sufficient information so that a person coming onto the sites in question in this matter would have been able to determine what was going on and what if anything further needed to be done.

5. The union noted that the employer bears a heavy burden to sustain a discharge of such a long term and valued employee. The union further cast the grievant's supervisor, Ms. Singleton, as not well versed in the technical aspects of what employees such as the grievant do and that she does not frankly understand much about what they do or how they do it and has little practical experience in grading leaks, documenting work or supervising this type of work force. As such she had little to offer in the way of relevant or probative evidence upon which the Company could base a case for discharge.

6. At the Belden site, the union was quick to point out that the crew that was there before the grievant actually also graded the leak as a B leak. The leak was downgraded to B by another foreperson, who was not disciplined in any way due to that. This downgrading was based on the factors set forth above and was based on that person's experience in grading leaks depending on their character, location and severity. See Tr. at 102-104.

7. The grievant was dispatched on a non-emergency basis to deal with the leak after the owner's daughter had called again. Thus, the allegation by the employer set forth in its termination letter that the grievant had been dispatched to an A leak was simply incorrect. See employer exhibit 16, setting forth that the grievant had been "dispatched to a grade A leak" at the Belden address. Other fitters and technicians had tested the leak and also found it to be a grade B leak. There was no evidence to suggest that these people failed to test the leak. Further, it was clear that they too called for regular/standard locates and also left it to be repaired later.

8. The fact that the employer's basis was wrong severely undercuts the allegation set forth in the termination letter and should thus be disregarded by the arbitrator. The leak there was a B leak and the grievant acted appropriately when he got there and found that it was still a B leak.

9. The union posited a theory that the real reason the Belden leak was fixed later that day was because the owners' daughter, unaware that a Centerpoint crew had already been there, tested and graded the leak and determined that it was not a serious threat and left, called again when she returned and still smelled gas.

10. The union asserted that when this occurs, the company sometimes treats it as a “nuisance” call and upgrades the leak to an A leak, not because it meets the criteria of an actual A leak but rather because the customer is getting upset about it and wants it fixed right away. The union argued that this is what happened here and that the leak was never a grade A leak.

11. With regard to the Skycroft incident the union claimed that the leak was only a “possible” A leak and that the gas smell was emanating from a varmint hole located some distance from the house. There was also a dearth of information from the service technician as to where the leak actually was or whether it had been repaired by tightening the “Normacs” and other joints.² See Tr. at page 62 and employer exhibit 12. There had already been several prior attempts to repair the leak by other technicians without apparent success – the grievant was not involved in any of those. See, Tr. at 62-63. The union also pointed out that the service technician replaced the Normac fitting and found no further gas leaks. He also found no readings inside the home or immediately outside.

12. When the grievant went to the home he and others who were there tested the area and found only 6% LEL, but found no other readings. He further testified that he did not smell gas outside the home. Tr. at 217, 218-221. The union pointed out that based on these readings and this evidence the leak was appropriately downgraded to a grade B and he called for standard locates so the line could be replaced the following week. The union asserted that the leak was not therefore a grade A leak and that the grievant should not be held accountable for neglect of a grade A leak when it was in fact not.

13. When confronted with the apparent fact that his computer had left the matter “open” over the weekend and that it had been classed as an “emergency leak” the grievant explained to Ms. Singleton what occurred and determined to fix it that day; again deciding that it was something of a nuisance call, similar to Belden, and took steps to fix the leak that day by calling for emergency locates so the matter could be handled right away.

² A Normac is a coupling joining two sections of gas pipe that sometimes can loosen over time. The evidence showed that these need to be tightened periodically by exposing them somehow and tightening them up to prevent leakage. They can also sometimes need to be replaced depending on their condition.

14. The union and the grievant asserted most strenuously that there was no attempt to hide what had happened nor was there any tacit to explicit acknowledgement that the grievant had negligently or deliberately left a Grade A leak over the weekend. At worst this was a computer error and/or a documentation error but there was no evidence that the grievant intentionally left a grade A leak, which both the union and the grievant acknowledge would be a serious safety concern for obvious reasons.

15. The union further assailed the investigation and noted that Ms. Singleton did nothing after the encounter with the grievant on the morning of the 21st to determine why the matter was left open on the computer nor did she try to find out what the grievant was going to do to rectify the situation and get the leak fixed. She had no evidence to determine that the leak was in fact ever a grade A and simply assumed it was based on nothing.

16. The union asserted that the investigation was woefully inadequate and was based on hearsay statements, performed by a person, Ms. Singleton, who lacked knowledge of what those under her supervision actually do and reached incorrect conclusions. See above, the union asserted that there was never a grade A leak at Belden – it was always a B and that Skycroft was also not a true A leak when the grievant was there and was appropriately downgraded to a B leak after extensive testing done by the grievant and by others who were there as well. Ms. Singleton did not even send anyone out to Skycroft to determine if the leak really was ever a grade A, but rather assumed it was based on an erroneous computer entry. Clearly, she pre-determined the grievant's guilt before doing any sort of checking on the facts.

17. The union objected vehemently to the employer's attempt to bring in other incidents that were not used as the basis of determination in the March 31, 2011 letter. While these may be used to determine an appropriate penalty they may not be used to determine guilt or innocence of the two bases for the termination and any attempt to do so should be rejected.

18. The union further noted that none of the other employees Ms. Singleton apparently talked to about these incidents were called at the hearing and their testimony must similarly be rejected as unfounded hearsay. This was especially true of the hearsay statements by Mr. McCoy as well as Mr. Jorgenson. The union asserted that these blatant hearsay statements, some of which were brought up for the first time at the hearing, cannot be used to sustain a discharge. The union also raised an objection to the evidence of a March 1, 2011 incident, which was not used as a basis of the discharge

19. One of the union's main arguments was that none of this rises to the level of a so-called "absolute cause" set forth in Article 26. The union noted that if the employer can unilaterally determine if a given offense falls within the category of absolute cause, it would effectively negate the just cause provisions of the labor agreement and render any sort of arbitral review of the merits of a given matter as well as the penalty, meaningless. This is clearly not what the language says nor what it was intended nor how it has been applied.

20. The union posited an alternative interpretation of the language of Article 26 and indicate that all it means is that the 4 listed offenses are agreed upon reasons for discharge under the circumstances but does not grant the company the right to unilaterally take the case away from arbitral review. Each case must be reviewed on a case-by-case basis and just cause for discipline/discharge must be reviewed under the circumstances.

21. The union also noted that the phrase "neglect of duty" is not defined and if the employer's interpretation is allowed, could well extend to virtually any infraction of a company rule, no matter how trivial or what the underlying circumstances are. To read it that way would again virtually negate the clear language requiring just cause for discipline.

22. Since the list includes such serious issues as dishonesty, use of drug or alcohol on the job and abuse of sick leave, the term "neglect" must be read in that context and be interpreted in light of the words around it. That must therefore mean that neglect of duty is far more than a simple failure to follow directions or to follow some rule but rather is a willful, deliberate disregard for one's duty.

23. The union cited several prior arbitral awards on this subject and argued that prior arbitrators have refused to buy into the employer's argument in this regard. The union argued that the matter must be reviewed as a standard just cause analysis and that the arbitrator has the power to modify the penalty.

24. The essence of the union's case is thus that there was no neglect of duty at all for the two incidents used as the basis for the discharge, the investigation was poorly done at best and relied on hearsay and even simply wrong information and that the employer's position on the notion of absolute cause is unfounded by the CBA language and by arbitral precedent between these parties.

The union seeks an award sustaining the grievance and reinstating the grievant with full back pay and accrued contractual benefits. .

MEMORANDUM AND DISCUSSION

FACTUAL BACKGROUND

Many of the operative facts of this case were hotly contested. By way of background though the uncontroverted facts showed that the grievant is a 22-year employee with the employer and is a foreman in the Construction and Maintenance, C & M, Department. The evidence showed that until his current supervisor took over the supervision of the C & M Department the grievant's record was clean and further that his performance was generally regarded as acceptable.

As will be discussed below, Ms. Singleton, his current supervisor, began noting deficiencies in the grievant's performance relatively soon after she began in her role. These will be discussed below in the context of the grievant's prior record and what impact that may have on the ultimate outcome.

One of the grievant's duties is to inspect for gas leaks, grade them in terms of their severity and to repair them as necessary. The evidence showed that this is a common duty and that the grievant is sometimes required to go to sites and determine whether there is a leak, where it is coming from, perform appropriate testing with various pieces of testing equipment and to take the necessary steps to get the leak repaired depending on how serious it is.

The evidence showed too that before an underground leak can be repaired the technicians are required to call for “locates,” which is a test to determine where the gas line is and where any other underground utility lines or obstacles are so that one does not damage or break a line. This is of course required to protect property but also for the safety of the workers so they do not inadvertently come into contact with an underground electrical line or sprinkler lines or the like. Locates can be either a regular/standard or an emergency locate. This varies with the severity of the leak and whether it is a grade A leak, which must be repaired immediately or a grade B leak, which can be repaired later.³ Clearly, a grade A leak requires “prompt action to protect life and property, and continuous action until the conditions are no longer hazardous.” Employer Exhibit Ex. 18.

As will be discussed more below, the grievant has been warned, coached and counseled multiple times about his performance. These warnings included the need to provide more complete documentation, the need to respond more quickly to calls, especially emergency calls, re-routing of work without supervisory approval, and failures to follow up on work orders.

He received a written warning in September 2010 for a variety of concerns, including poor documentation of his work; failure to respond to calls promptly, failure to communicate appropriately with co-workers and supervisors. That disciplinary warning was not grieved and advised the grievant that further performance issues could lead to further disciplinary action.

The evidence showed though that other than the one formal written warning referenced above, there is no other disciplinary action on the grievant’s record. On this record, the evidence showed that the grievant was on notice that his documentation needed to improve and that there were occasional problems with his willingness to respond to calls. Here the documentation issue was a concern as there were no allegations that he failed to respond to the calls at Belden or Skycroft in a timely fashion.

³ A grade A is characterized as follows: A leak that represents an existing or probable hazard to persons or property, and requires immediate repair or continuous action until the conditions are no longer hazardous. Obviously an A leak is one that presents a serious potential for harm and must be repaired immediately. A grade B leak is characterized as follows: A leak that is recognized as being non-hazardous at the time of detection, but justifies scheduled repair based on probable future hazard. There was evidence that a grade B leak can be left for several months before requiring repair.

Moreover, while past record may be relevant to the appropriateness of the penalty if a violation of policy or directives are found for the two incidents that led directly to his discharge, they may not be used to determine whether he violated directives or was guilty of neglect of duty for either of those two incidents. That question rises and falls on the facts of those two incidents alone.

THE BELDEN INCIDENT

Turning first to the Belden incident the evidence showed that indeed there was a crew there prior to the grievant's arrival. They had been called by the owner's daughter who was apparently checking on her parents' home on Belden Ave. since they were away for the winter. She smelled gas and called that concern in.

Another service technician was there the day prior to the grievant's arrival and performed tests to determine the source of the odor and graded the leak as a B leak. That technician was not called to testify at the hearing but the records clearly show that the leak was classed as a B leak, not a grade A leak as the employer's termination letter indicated.

Thus, when the grievant was dispatched to Belden on March 18, 2012 he reasonably believed that the leak was in fact a B leak; not an A, which, as described above would have called for a much different response. This fact undercut much of the employer's claim with respect to the Belden scenario. See also, Tr. at 112; wherein the employer's main witness acknowledged that the grievant had not in fact been dispatched to a grade A leak.

The evidence showed that the grievant performed appropriate testing and also graded the leak a B leak when he arrived. He further indicated that he called the technician, a Mr. Howard, who confirmed that he graded the leak a B leak.⁴

⁴ As noted above, Mr. Howard was not called at the hearing nor was there any evidence that he was disciplined for his role in this matter. His documentation was frankly somewhat better and that is, and has been, a continuing problem for the grievant. However, poor documentation does not equate to neglect of duty on this record; even though there was some very real cause for concern in this regard, especially in light of the number of times the grievant has been warned and coached about his documentation.

Further, when the next crew was dispatched later, there was no evidence to suggest that the leak was in fact a grade A leak even though that crew was asked to treat the leak as an A grade leak and to take steps to repair the leak right away. None of the members of that second crew were called either at the hearing so we were left to rely upon the documentation of their findings and actions as well.

The union's assertion regarding the most likely scenario had some merit on this record regarding why the employer regarded this as a grade A leak later. The record showed that the owner's daughter checked again on the home after the first technician had been there and still smelled gas so she called again.⁵ There was also evidence to suggest that when the company receives multiple calls from the same address they do occasionally grade the leak an A leak, not so much due to the factors described above but rather because they treat the call as a nuisance and thus want it fixed more quickly. There was some evidence that this is precisely what happened here.

As will be discussed more below, there was insufficient evidence to establish "neglect of duty" and insufficient basis on this record to establish that the actions at Belden constituted anything approaching an absolute cause for discharge. While the grievant's documentation was not what it should have been, that is a matter for a traditional just cause analysis.

THE SKYCROFT INCIDENT

The Skycroft incident presented a different scenario. The evidence showed that the grievant was dispatched to a possible grade A leak although it was not completely clear where it was or whether the gas was emanating from somewhere close to the home or from a varmint hole in the yard.

In any event, contrary to Belden, this was classified as a grade A leak and the grievant knew when he was dispatched to Skycroft that he was dealing with a grade A leak as opposed to a B leak.⁶ There was evidence that CenterPoint employees were at the home on March 16th and graded the leak as a B leak at that time but made arrangements to have service crews out on the 18th to repair the leak.

⁵ The evidence showed too that a B leak can still involve the odor of gas but this is not the sole factor to be considered in determining the appropriate grading of a leak. Thus the faint odor of gas does not necessarily render the leak a grade A.

Mr. McLaughlin, the technician who was first dispatched to the home on March 18th was also not called to testify but his documents showed that he classified the leak as a possible grade A leak. This was based on findings he made around the home and by a tree where there was a possible leak caused by a varmint and he so documented that. Important to this discussion is that he graded the leak as an A leak at that time and it was for that reason the grievant was sent to the home on March 18th.

The grievant received an emergency order to go to Skycroft and arrived there at approximately 3:15 that day but his documentation as to what steps he took to test for leaks were cryptic and incomplete at best. He left some notes on a timecard which was not proper and did not provide sufficient evidence for others who may have been sent to the home to determine what had been done, why, where and what levels of gas were found. These details are of course crucial in both grading a leak and to provide adequate information for repair crews to fix the leak.

The grievant called for regular locates, implying that he had downgraded the leak to a B leak, which is not in and of itself necessarily improper (the evidence showed that leaks are upgraded and downgraded frequently depending on the testing that is done. C & M employees do carry different testing equipment that is somewhat more sensitive than Service Plus technicians. Here though the problem was the lack of documentation for what occurred and why the leak was downgraded.

The grievant left the home that day and apparently felt that the repair could wait to be repaired until the following week. There was some evidence that the grievant's assistant felt that emergency locates were appropriate and may have told the grievant that as well. He also was not called to testify so it was not established firmly what he said or why. It was clear that the employer interviewed him as part of this investigation but without his testimony it was somewhat unclear what exactly transpired that day between the two men.

⁶ The record showed that Skycroft has been the subject of several calls for service. In January 2011 there was another call to repair a leak and the records the grievant had access to showed that. On this record it should have been clear to the grievant that this address has had some problems and deserved grade A attention, for lack of a better term.

The essential claim is that the grievant left a grade A leak over the weekend without taking proper action to get emergency locates and to fix that leak immediately; whether it was the weekend or not. His testimony though is accepted that he felt that the leak was a grade B leak and could wait. Without any contravening evidence on the record established by clear and competent evidence there is no way to challenge that conclusion. Thus, again, there was insufficient evidence to warrant a true finding of neglect of duty such that it took this case into the realm of an absolute cause for discharge under Article 26.

When confronted about this the following Monday the grievant told his supervisor that he had downgraded the leak and thought he had entered the appropriate remarks in the computer but the computer must have malfunctioned and not allowed those comments for some reason. He did not apparently mention any sort of computer malfunction when interviewed about this on March 28, 2011 nor was there documentation of a computer problem. See Tr. at 97. There was insufficient evidence on this record to establish this and the implication is that the grievant went back and re-did his documentation to reflect what he had done the preceding Friday.

On Monday the grievant characterized the leak as an emergency leak and the employer raised a very real concern that this could not only have been extraordinarily dangerous but could also have subjected the company a fine by MOPS due to the apparent documentation that the A leak had been left unattended and unrepaired for several days.

This does not necessarily imply any nefarious motives by the grievant but does demonstrate the inadequacy of his documentation. Ms. Singleton testified credibly that she was not at all clear as to why the leak had been downgraded and was understandably quite concerned that as far as she could see a grade A leak had been left unattended for an entire weekend.

ABSOLUTE CAUSE ANALYSIS

The employer's main argument is that the grievant's actions constituted one of the stated absolute causes for termination set forth in Article 26. The employer asserted that it gets to determine if an employee's action equate to an absolute cause and that once that is done it takes it out of the purview of a traditional just cause analysis and allows only a determination of whether the facts as alleged occurred. Here, as noted above, in neither of the two incidents relied upon as absolute causes for the termination was there an adequate showing of true neglect of duty. Several things were problematic in this regard.

First, if carried to its logical conclusion the employer's argument that the CBA language allows a unilateral determination of whether a given set of facts rises to the level of an absolute cause would effectively negate the just cause provision of the labor agreement. Such a result would effectively amount to a forfeiture of the just cause provision of the contract by allowing the employer to unilaterally and without arbitral review, simply call something an "absolute cause" and thus remove a disciplinary decision from most of the review. This is not only disfavored by the great weight of arbitrators but is also not the way these parties have administered their agreement. It is also inconsistent with several prior awards between these parties.

Further, virtually any violation of a work rule could, using the employer's definition, equate to "neglect of duty" and be taken out of the just cause analysis. Under the terms of this language such would be a perversion of the language and the contractual intent, which is very strongly in favor of allowing arbitral review under a traditional just cause analysis for alleged infractions leading to disciplinary action.

In *Minnegasco v Gas Workers Union #340*, FMCS 88-04327, (Flagler 1988) the arbitrator was faced with a similar argument and what appeared to be the same language. Arbitrator Flagler similarly rejected the notion that the facts limited his review and further defined the term “neglect of duty” as a “unreasonable failure to either perform an acceptable part of the calls assigned to the grievant during the time of his departure from the Company yard ... or to promptly notify his supervisor of his need to be relieved of his duties due to willful neglect.” The operative terms here are the words “unreasonable failure and willful neglect.” Similar to the findings by Arbitrator Flagler, simple poor performance does not equate with true neglect of duty.

Further, the definition of neglect does not square with what occurred here. The term “neglect” is defined as follows: “[T]o omit, fail, or forbear to do a thing that can be done, or that is required to be done ... [A]n absence of care or attention in the doing or omission of a given act. ... [A] deigned refusal, indifference or unwillingness to perform one's duty Black's Law Dictionary 1032 (6th ed. 1990); see also New Oxford American Dictionary 1173 (3rd Ed. 2010) (defining neglect as "the action of not taking proper care of someone or something ... failure to do something ”.

The essential distinction here is the difference between the failure to do something at all or the willful failure to perform where it was clear that to fail to perform is unreasonable and/or unsafe versus not doing it well enough or within defined parameters. The grievant is guilty of the latter but not the former on these facts.

Thus, this case does not fall within the purview of the absolute causes as defined in Article 26 and is does not proceed on an absolute cause analysis, but rather on a just cause analysis.

As further support for this conclusion, the union asserted that when one views the language of Article 26, it is clear from the words associated with the term “neglect of duty” that it means and is intended to apply to something very different than simply failure to follow policy or, as in this case, poor documentation.

While this is somewhat esoteric, one of the time-honored devices used to determine contractual intent is the concept of Eiusdem generis – meaning “of like things.” If the list in which a disputed term appears contains a series of offenses, the one that under examination will be interpreted to be of like kind to those appearing with it. See Elkouri and Elkouri, *How Arbitration Works*, BNA Book 5th Ed at 497-498.

Here the list contains dishonesty, abuse of sick leave and drunkenness on the job, which are certainly serious offenses. Neglect must therefore mean more than simple failure to complete documentation in order for it to be considered an absolute offense. While it is not within the purview of this matter to determine precisely what those situations might be, it is clear that this scenario did not fall into that category. Accordingly, the matter will be decided on a traditional just cause analysis.

JUST CAUSE ANALYSIS

Since it has been determined that this case does not fall within the class of absolute causes for discharge set forth in Article 26, it is therefore required that the matter be viewed as a traditional just cause matter. This initially entails whether there was adequate notice to the employee of the requirements of his job, any deficiencies in that performance and of the possible consequences of the failure to meet those requirements. Clearly, the grievant was on ample notice of what his job entailed. He is a very experienced C & M foreman and knows his job and what is entailed in performing it and, more to the point, documenting his actions.

Moreover, Ms. Singleton testified credibly and persuasively that the grievant had been warned multiple times about his documentation and of the need to do it correctly, thoroughly and promptly. Finally, there was evidence that he has been able to do it correctly in the past. The clear implication is that for whatever reason his performance in this regard falls below standards and that he simply decides not to do an adequate job of documenting his actions. That was especially true at Skycroft.

There is no question that the rule and Ms. Singleton's directives to the grievant regarding the need to document his actions are reasonable and necessary for safety of the employees the public alike. On that score there was little if any question. While the union asserted that the documentation was adequate the evidence showed that the grievant's documentation was either missing or in the wrong spot in many cases, i.e. on time sheets, which may well have been adequate to tell what he was doing and what he did at some point in the future but did little to inform co-workers of his actions when they might well have needed it.

The union asserted that the investigation was inadequate and there were some holes in the investigation. Investigations do not need to be perfect nor do they have to chase down every imaginable piece of evidence in order to pass muster under a just cause analysis. Without belaboring the point, the evidence of inadequate documentation was in this case mostly from the grievant's own documentation. Thus while the investigation was not perfect it was sufficient to establish the grievant's failure to properly document some of his activities at the Belden and Skycroft sites.

As noted above, the grievant's past record cannot be considered to determine if the grievant was guilty or not of failure to properly document his actions at Belden and Skycroft. It was taken into account to determine the appropriateness of the penalty. Here the employer failed to establish neglect of duty at Belden nor was there sufficient evidence that there ever was a Grade A leak there. Skycroft was something of another matter and while there may well not have been an actual Grade A leak there, his documentation was not clear and did not inform supervisors that there was not a grade A leak.

Without the prior record there would be no question that the penalty would have been vastly reduced, even to the point of a very short suspension. Here even though there was insufficient evidence to establish a termination of such a long-term employee especially in light of the evidence in this matter, there was clear evidence that the grievant needs to improve his documentation and to follow the directives of his supervisors and that he needs to make these changes immediately to avoid further disciplinary actions.

Several options were considered. Reinstatement with full back pay and benefits was rejected due to the findings that there were documentation problems in these incidents. Even though this did not rise to an absolute cause under the contract, under even a just cause analysis, the grievant's prior record and the multiple warnings he has been given made that result inappropriate.

Reinstatements without back pay and benefits was also considered but considered far too harsh in these circumstances despite the multiple warnings since those were not progressive disciplinary steps and only a written warning appears on his record. Certainly such coachings etc. are relevant to show notice they did not necessarily constitute progressive discipline. Accordingly, that result, which would have been the equivalent of an approximately 11-month suspension was considered far too harsh under these circumstances.

Finally, several options involving reinstatement with suspensions were considered. It is always difficult to simply impose a different penalty and arbitrators need to be cautious and very deliberative when amending penalties in cases like this. The just cause standard and the parties' agreement grants to the arbitrator the power to determine an appropriate penalty give the facts of each particular case.

Given the grievant's past record and his need to understand the gravamen of the situation in which he now finds himself in making sure he documents his actions per company policy and per the directives of his supervisors and managers reinstatement subject to a 30-day suspension was determined to be sufficient to send this clear message.

Thus the grievant is to be reinstated within 10 days of this Award with back pay and benefits from the date of his termination hereunder until the date of his reinstatement with appropriate contractual benefits reinstatement subject to the 30-day disciplinary suspension as discussed herein. Back pay shall be subject to mitigation and be reduced by interim earnings, unemployment or other governmental benefits paid to the grievant. The grievant and union shall provide adequate documentation of such interim earnings and/or payments to allow the employer to properly calculate the back pay award.

AWARD

The Grievance is SUSTAINED IN PART AND DENIED IN PART AS SET FORTH ABOVE.

The grievant is to be reinstated to his former position within 10 days of this Award with back pay and benefits for the date of his termination hereunder until the date of his reinstatement with appropriate contractual benefits reinstatement subject to the 30-day disciplinary suspension as discussed herein. Back pay shall be subject to mitigation and be reduced by interim earnings, unemployment or other governmental benefits paid to the grievant. The grievant and union shall provide adequate documentation of such interim earnings and/or payments to allow the employer to properly calculate the back pay award.

Dated: February 16, 2012

Jeffrey W. Jacobs, arbitrator

Gas Workers #340 and Centrepoint Energy – Stephens – AWARD