

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ST. PAUL PARK REFINING CO. LLC,	:	
d/b/a ANDEAVOR	:	
	:	
Charged Party/Respondent,	:	CASES 18-CA-205871 and 18-CA-206697
	:	
and	:	
	:	
RICHARD TOPOR	:	
	:	
Charging Party/Petitioner.	:	
	:	
	:	
	:	

**ST. PAUL PARK REFINING COMPANY'S
NOTICE OF SUPPLEMENTAL AUTHORITY**

Pursuant to Rule 102.6, St. Paul Park Refining Company LLC (“SPPRC”) provides notice that on October 24, 2019, Arbitrator Martin Malin (“Arbitrator”) issued an award regarding Richard Topor’s employment (Exhibit A). The Arbitrator concluded Topor was negligent, and that SPPRC had just cause to issue Topor a final written warning and ten-day suspension (although the Arbitrator disagreed with the termination decision). Based on the deference owed that arbitral finding, SPPRC requests that the Board reverse its ruling and find SPPRC had independent cause to discipline Topor lawfully and, in the alternative, condition any order for reinstatement on the final written warning and suspension ordered by Arbitrator Malin.

Decisions regarding appropriate discipline are within the purview of the arbitrator. The Board defers to awards where: (1) the proceedings were “fair and regular,” (2) the decision was binding, (3) the issues were “factually parallel,” (4) the arbitrator was presented with the relevant facts, and (5) the award is not “clearly repugnant to the Act.” *See Spielberg Mfg. Co.*, 112

NLRB 1080 (1955); *Olin Corp.*, 268 NLRB 573 (1984).¹

Arbitrator Malin heard the grievance challenging Topor's discipline. The Arbitrator's decision binds the parties, and the proceedings were "fair and regular," based on the same witnesses and documents presented during the Board proceeding. The Arbitrator determined SPPRC had grounds to issue Topor a final written warning and suspension, without relying on prior discipline.

The Board previously concluded that Topor's *termination* was unlawful because it was allegedly based, in part, on prior unlawful discipline. Given the Eighth Circuit's decision in *Southern Bakeries*, which established that relying on prior unlawful discipline does not render later discipline unlawful, the question of whether Topor was lawfully disciplined remains before the Board. The Arbitrator has examined this issue and concluded that discipline was appropriate. The Board should defer and revise its Order to find that Topor was lawfully disciplined and, alternatively, direct that any reinstatement be subject to a final written warning and suspension.

Date: October 29, 2019

Respectfully submitted,

/s/ Marko Mrkonich

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ATTORNEYS FOR CHARGED
PARTY/RESPONDENT

4816-8025-9243.2 080755.1059

¹ To the extent *Babcock & Wilcox*, 361 NLRB No. 132 (2014) is inconsistent, the Board should take this opportunity to overrule it.

EXHIBIT A

In The Matter of the Arbitration Between

International Brotherhood of Teamsters Local 120)
)
and)
)
St. Paul Park Refining Co. (Northern Tier Energy))
)
FMCS No. 180109-00275)
Richard Topor Termination)

OPINION AND AWARD

The hearing in the above captioned matter was held on June 17-20, 2019, at the Holiday Inn in Lake Elmo, Minnesota, before Martin H. Malin, serving as the sole impartial arbitrator by selection of the parties. The Union was represented by Mr. Frederick Perillo, its attorney. The Company was represented by Mr. Marko J. Mrkonich and Ms. Alice D. Kirkland, its attorneys. The hearing was held pursuant to a collective bargaining agreement between the parties effective January 1, 2017 – December 31, 2020 (Jt. Ex. 1).

At the hearing, both parties were afforded full opportunity to call, examine and cross-examine witnesses, introduce documentary evidence and present arguments. A verbatim record of the proceeding was maintained and a transcript prepared. Both parties filed post-hearing briefs. The parties stipulated that this matter is properly before me for resolution (Tr. 9).

The Issue

The parties stipulated that the issue presented for resolution is (Tr. 9):

Was the discharge of the Grievant, Richard Topor, for just cause and, if not, what is the appropriate remedy?

The Contract

The following provision of the collective bargaining agreement has been cited as relevant to the instant proceedings:¹

Article 17, Discipline and Discharge, provides:

Section 17.1 Discipline

Disciplinary actions (excluding discharge) will be taken within ten calendar days of the employer's knowledge of the event. This time frame will apply except for unique

¹For purposes of brevity, I have not reproduced every contract provision cited by the parties. I wish to assure the parties that I have considered every provision cited even though I may not have reproduced all of them.

circumstances that would require more than ten days to gather all relevant facts. The Company Representative will give the Union written notice of the delay, which should last no more than 30 days from the date of the initial investigation meeting.

Section 17.2 Discharge

Discharge shall be for just cause. The following offenses will result in discharge on the first offense regardless of past work record and standing in discipline process.

Dishonesty, sleeping, possession of drugs or alcohol, possession of guns or other weapons on Company Representative property, deliberate sabotage or willful destruction of Company Representative or employee property, insubordination (failure to follow a direct work order) and violence resulting in bodily harm. Any employee charged with an offense involving discharge shall be informed of such offense in writing within five (5) calendar days of the employer's knowledge of such offense. In the event discharge is found unjustified, the arbitrator will have the discretion to award or not award back pay.

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Background

The Company operates a refinery that refines crude oil into motor fuels and other useable products (Tr. 43-44). At the time of his termination, Grievant was a vacancy relief operator (VRO), assigned to the north reformer. VRO is the highest position in its line of progression (Tr. 56). The north reformer had four processing units: HDH or gas oil hydrotreater which removed sulfur from the oil, DDS or distillate diesel hydrotreater which removed sulfur from diesel product, isomerization unit which increased the octane of certain fuel, and saturated gas plant which split light-range molecules into different fractions (Tr. 46-47)

Grievant reported to supervisors Dale Caswell and Gary Regenscheid who, in turn, reported to Area Superintendent Briana Jung, who reported to Operations Manager Michael Whatley, who reported to Refinery Manager Rick Hastings (Tr. 43, 48-49). Grievant was part of a crew consisting of the VRO, two console operators and one field operator (Tr. 58-59).

Mr. Whatley testified that coaching is intended to get an employee with substandard performance to recognize the issue and commit to improvement. He contrasted coaching with discipline which he characterized as a "clear and documented mark to . . . exert a negative conclusion to an employee" (Tr. 83). He explained that "discipline is a step towards . . . potential termination whereas coaching is built specifically to get somebody to improve their performance" (Tr. 84).

On November 14, 2016, Grievant was issued a ten-day suspension and final warning for failing to follow instructions, refusing to discuss mitigation steps, insubordination, unauthorized

removal of Company property and failure to be accurate and truthful during the investigation (Resp. Ex. 10). The Union grieved the discipline and, on March 27, 2018, Arbitrator Douglas Knudson denied the grievance (Resp. Ex. 11).

On November 9, 2016, Grievant filed an unfair labor practice charge, which he amended on January 30 and February 2, 2017. The charges included the claim that the ten-day suspension and final warning violated sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. The NLRB Regional Director issued a complaint and on December 20, 2017, the NLRB Administrative Law Judge issued a decision finding that the Company had violated section 8(a)(1) by, *inter alia*, issuing the suspension and final warning due to Grievant's protected concerted activity. The ALJ recommended that the Board order, *inter alia*, that the Company make Grievant whole and remove from its files the suspension and final warning and not use them against Grievant in any way. On May 8, 2018, the Board affirmed the ALJ's rulings and adopted his recommended order in relevant part. *St. Paul Park Refining Co.*, 366 NLRB No. 83 (May 8, 2018). On July 8, 2019, The United States Court of Appeals for the Eighth Circuit denied the Company's appeal and enforced the Board's order. *St. Paul Park Refining Co. V. NLRB*, 929 F.3d 610 (8th Cir. 2019). The court denied the Company's petition for rehearing en banc on September 17, 2019.

On January 9, 2017, Grievant was asked to take a foul water sample in the HDH processing unit. He reported that the pipe was frozen and he could not get a sample. Two days later, a foreman instructed Grievant to thaw the pipe and Grievant did so. Grievant was coached about the expectation that as a VRO he would be proactive and that simply reporting the frozen pipe did not meet that expectation.

Mr. Whatley testified that Grievant should have endeavored to troubleshoot the sample point and to determine why it had frozen in the first place (Tr. 112). Ms. Jung testified that when another crew attempted to open the line, there were multiple leaks (Tr. 605).

Grievant testified that it was ten degrees outside and the sample station was frozen with a tag saying the valve was leaking. He checked with the operator who had applied the tag and was advised that a work order had been entered. He found the work order and also found that the sample container was in pieces. Consequently, he emailed up the chain of command to find out if the sample station had been repaired and asking about the sample container. Grievant testified that a couple of days later another crew was able to get a sample because the weather had warmed to close to 32 degrees (Tr. 1157-60).

Mr. Whatley testified that on February 9, 2017, the Company was trying to restart the isomerization unit and Grievant had been directed to get the unit running but had failed to do so. Mr. Whatley met with Grievant and, according to Mr. Whatley, Grievant stated that he was assisting another operator with compressor drainage and his supervisor was aware of that (Tr. 114). Mr. Whatley testified that Mr. Whatley then "realized that everything had been done in accordance with company policy, and we moved on" (Tr. 117).

Ms. Jung testified that on February 9, 2017, she and foreman Javier Rodriguez were performing a housekeeping audit when they walked into the satellite and she heard Grievant use an expletive in a loud voice (Tr. 535). She was also concerned that the isomerization unit was not yet up and running. Ms. Jung called Mr. Regenscheid and Mr. Caswell over to the satellite and the three of them met with Grievant. A discussion ensued about issues with the start-up of the isomerization unit and an agreement resulted as to how they would proceed. Ms. Jung addressed Grievant about the expletive and Grievant said he did not know what she was talking about. When Ms. Jung stated that she had heard Grievant use it, Grievant apologized and said it would not happen again (Tr. 534-41). On cross-examination, Ms. Jung acknowledged that the incident has not been repeated since her conversation with Grievant (Tr. 616).

Mr. Regenscheid testified that on April 5, 2017, he was notified that conduit was sliding down a compressor and it was necessary to take the unit down as quickly as possible so that the electrical department, which was standing by, could repair the conduit (Tr. 678). Mr. Regenscheid testified that he advised Grievant to take the unit down quickly and Grievant acknowledged the directive (Tr. 679). According to Mr. Regenscheid, several hours later, the unit had not been reduced sufficiently and when he inquired of Grievant as to its status, Grievant advised that he was reducing the unit by 500 barrels per hour pursuant to a memo that, according to Mr. Regenscheid, did not apply to emergency situations (Tr. 680). Mr. Regenscheid testified that the unit should have been reduced by 2,000 barrels per hour and that he sat at the console with Grievant instructing him to reduce the unit in 500 barrel increments every 15 to 20 minutes. According to Mr. Regenscheid, Grievant performed as instructed but did so slowly, first looking at other units as if making small changes in them (Tr. 680-82).

Grievant testified that he began reducing the unit by 500 barrels per hour because that was what Mr. Regenscheid instructed him to do. According to Grievant, later he and Mr. Regenscheid worked together to bring the unit down faster. Grievant testified that Mr. Regenscheid expressed no dissatisfaction with Grievant's performance until Grievant's performance review in August (Tr. 1163-66, 1287).

Mr. Whatley testified that on May 12, 2017, Grievant was told to install a bypass to direct flow around a heat exchanger. According to Mr. Whatley, Grievant raised concerns with the condition and design of the piping. Management investigated the concerns and tried to locate additional components that Grievant had stated were needed. However, the following day, another VRO put the bypass into service without the additional components and Mr. Whatley determined that Grievant was incorrect in his analysis (Tr. 120-21). Mr. Whatley testified that he was concerned that Grievant's analysis reflected a lack of understanding of what a dead leg was, specifically that Grievant did not realize that in blocking in a line, the line was out of service and could not be a dead leg. Mr. Whatley further testified that Grievant did not seem to understand the behavior of the chemical involved and that the additional components were not needed to take the line out of service and clear it (Tr. 122-23).

Grievant testified that in holding off installing the bypass, he was following Ms. Jung's

instructions after he reported the dead leg to supervision (Tr. 1167-68). Ms. Jung testified that on May 11, when she checked on the progress of installing the bypass, Grievant advised her that they needed to install a blind and a low-point bleeder to avoid a dead leg. Ms. Jung responded that she would try to get the parts. The following day, according to Ms. Jung, the VRO on Crew 2 asked why the bypass had not been installed. Ms. Jung responded that she was waiting for a low-point bleeder and the VRO advised that that was not necessary and showed her how the bypass could be installed without it. Crew 2 installed the bypass (Tr. 544-47).

Mr. Whatley testified that he and Ms. Jung met with Grievant to discuss these matters. According to Mr. Whatley, Grievant "did not accept the thermodynamic principles that were behind the behavior, the chemical process," and did not accept that he was mistaken concerning the alleged dead leg (Tr. 123-24). Mr. Whatley testified that Grievant maintained that as a nine-year VRO he understood the process well and that because of his leadership no one on his crew had ever been hurt (Tr. 126).

Mr. Whatley testified that, in light of the January water sample incident and the bypass installation incident and Grievant's lack of a positive response to coaching, he decided to issue a formal letter documenting poor performance and drafted the letter (Tr. 127-28, Resp. Ex. 22). The letter was issued to Grievant on May 15, 2017 (Tr. 131), but it was later removed from his file and returned to him (Tr. 131). Mr. Whatley explained that the letter was not considered discipline but was documentation that could be used in subsequent performance evaluations which could affect compensation (Tr. 131-32).

On May 19, 2017, Mr. Caswell directed Grievant to troubleshoot insufficient fuel getting to the DDS charge heater (Tr. 128-29). Grievant emailed a list of actions that he suggested be taken to maximize the charge heater (Resp. Ex. 23). Mr. Whatley testified that Grievant's performance in this regard was substandard because he should have taken those actions himself to resolve the problem, not merely provided a list of suggestions (Tr. 134-35).

Mr. Whatley testified that he met with Grievant on May 20, 2017, and Grievant expressed a desire to improve and to be provided with examples of areas that needed improvement. As a result, according to Mr. Whatley, they agreed that the letter documenting poor performance would not be placed in Grievant's file (Tr. 137). However, Mr. Whatley testified, at a meeting on May 30, 2017, Grievant reverted to his former ways of refusing to accept responsibility for not meeting performance expectations set by management (Tr. 137-38).

Grievant testified that on May 20, Mr. Whatley told Grievant that Mr. Whatley wanted Grievant's commitment to improve his performance and without such a commitment would issue Grievant a performance letter. According to Grievant, he asked Mr. Whatley what he should do to improve and Mr. Whatley said he would get back to Grievant on that but never did (Tr. 1173-74).

Mr. Whatley met with Grievant on June 12, 2017. Also present were Ms. Jung, HR

Representative Christa Powers and Union Representative Chris Riley (See Resp. Ex. 26). At the meeting, Mr. Whatley returned the deficient performance letter to Grievant. Mr. Whatley characterized the purpose of the meeting as "to get Rick to give his commitment to accepting our performance evaluations, accepting our coaching, giving us his commitment to actually improve" (Tr. 138).

Ms. Powers testified that during the meeting, Mr. Whatley sought Grievant's input on ways to move forward to enable Grievant to improve his performance. According to Ms. Powers, Grievant continuously asked for examples of poor performance but Mr. Whatley responded that the meeting was not a performance review but was about finding ways to move forward with performance improvement (Tr. 472-73). According to Ms. Powers, at one point, Mr. Riley and Grievant stepped outside of the room for ten to 15 minutes. Mr. Riley then called Ms. Powers into the hall. According to Ms. Powers, Mr. Riley advised her, not in the presence of Grievant, that he was not making progress in trying to convince Grievant to follow management's efforts to have him improve his performance (Tr. 472-74). Grievant testified that when he and Mr. Riley stepped outside Mr. Riley said that the meeting was not going anywhere, Grievant agreed and they returned to the room (Tr. 1293).

Ms. Jung testified that during the meeting Mr. Whatley advised Grievant that other crews were saying that they were getting a lot of work passed to them from Grievant's crew. Grievant, according to Ms. Jung, pressed Mr. Whatley for examples but Mr. Whatley said the meeting was not about examples but about focusing on how to improve Grievant's performance (Tr. 557). Grievant testified that he asked for examples of his performance deficiencies but was not given any either at the meeting or at any other time prior to his discharge (Tr. 1184).

Ms. Jung testified that on July 27, 2017, H2S levels in the flare were high and that triggered a high priority to troubleshoot and get it under control. Ms. Jung was concerned that by 1:00, the north reformer area had not completed its troubleshooting. She met with Grievant and other involved employees and Grievant expressed concern that it was hot outside and operators could be taxed by the amount of climbing involved to get samples. Ms. Jung advised Grievant and the others that she appreciated that and that it was necessary for them to convey their concerns to their supervisors so that they could determine how to manage the task. Ms. Jung opined that the conversation went well (Tr. 564-67). Grievant testified that Ms. Jung and Mr. Regenscheid criticized him for not pushing the operators to complete the job faster. Grievant testified that he had no supervisory authority and that the operators needed time because of their age and the climbing involved (Tr. 1185-86).

Mr. Whatley testified that he conducted a preliminary off-cycle review meeting with Grievant on August 11, 2017. Mr. Whatley explained that his practice was to conduct such a meeting with any subordinate who was going to receive a substandard performance appraisal so that the formal appraisal would not come as a surprise. According to Mr. Whatley, Grievant continued to assert that his performance was fine (Tr. 150-51). A copy of the expected review was distributed at the meeting. Grievant and Union Representative Brandon Riley were taking

notes on the documents and were instructed to stop taking notes. At the end of the meeting, Ms. Jung took the notes from them. The documents containing the notes were later destroyed by the Company (Tr. 211-12).

Ms. Jung testified that at the conclusion of the discussion, Mr. Whatley asked for all copies to be returned, advising Grievant that he would receive that final version of the performance review after it had been entered into the computer system. According to Ms. Jung, Grievant asked Mr. Riley to copy his notes but Mr. Whatley stated that it was not the time to take notes and Grievant would receive the final version of the review through the computer system. Ms. Jung testified that after Grievant and Mr. Riley left, Mr. Whatley gave her the documents and she shredded them (Tr. 574-76).

Grievant testified that he was told this was his midterm review, not that it was a pre-review review. Grievant testified that his prior reviews had all been with his immediate supervisor, Mr. Regenscheid. He had never had a review with Ms. Jung or Mr. Whatley or those in their positions. According to Grievant, Ms. Jung and Mr. Whatley distributed a review document and Grievant wrote notes on the document but at the end of the meeting they took the document back and would not allow Grievant to copy his notes (Tr. 1188-90).

The formal off-cycle performance review was conducted on August 24, 2017. Mr. Whatley testified that he conducted the review in lieu of Mr. Regenscheid who was on vacation at the time (Tr. 152-53). Grievant received a rating of 3, meets expectations, for attendance and safety and environmental awareness; a 2, generally meets expectations, for job skills and ability to learn and a 1, unsatisfactory, for teamwork and initiative, and work quality and ability to follow work instructions (Resp. Ex. 33).²

Grievant testified that Union Steward Steve Schram accompanied him to the meeting. According to Grievant, when Mr. Whatley discussed the April 5 incident, Mr. Schram, who was the electrician who repaired the conduit, objected saying that there was no emergency (Tr. 1192).

In the final version of the review, however, Ms. Jung changed the 1 ratings to 2 (Tr. 580-81). Mr. Regenscheid testified that when he returned from vacation, he found the reviews for his subordinates in his email inbox with a message to deliver them as soon as possible. According to Mr. Regenscheid, he did not know that Mr. Whatley had already delivered the review or that it had been changed from the one Mr. Whatley delivered. When he met with Grievant, Grievant told him the review had been changed and asked why he was getting so many reviews (Tr. 692-94). Grievant testified that Mr. Regenscheid told him he was getting another review. When Grievant said he already had had two reviews, Mr. Regenscheid said, "Well, I have another one for you" (Tr. 1193-94).

²Although the evaluation form provides for ratings of four and five, in practice, according to Mr. Whatley, the highest rating an employee receives is a three and it is common for employees to have a mix of twos and threes in their ratings (Tr. 220).

On the night of September 14, 2017 into the morning of September 15, Grievant, as a VRO, was working as a console operator in the DDS unit (Tr. 61, 66). As explained by Mr. Whatley, the DDS unit blends diesel range fuel with hydrogen over a catalyst to reduce the level of sulfur in the product (Tr. 66). The refinery was undergoing a turnaround, a process where units are shut down, cleaned, inspected and repaired as needed (Tr. 51). Whereas normally, employees work 12-hour rotating shifts followed by long breaks (Tr. 51), during a turnaround employees work the same shift every day almost continuously (Tr. 51-52). Mr. Whatley testified that the industry standard is to limit employees to 14 consecutive days but under the parties' collective bargaining agreement, the limit is 21, with managers required after 14 to review the individual for fatigue and document the review (Tr. 186).

Mr. Regenscheid testified that console operators are trained and it is a best practice when a new alarm comes in to check all open alarms (Tr. 701). He further testified that at shift change, the outgoing operator is expected to brief the incoming operator with respect to any open high alert alarms (Tr. 703).

Craig Wheatley, who at the time was Process Control Supervisor, testified that at one time, the north reformer console operator was responsible for alarms emanating from the tank farm. In 2015 or 2016, the Company installed a fifth console in the control room and began moving responsibility for the tank alarms to the fifth console operator. During the transition period, which encompassed September 2017, the tank alarms were supposed to register on the north reformer board and the fifth console but at times one would not register on the fifth console. During this transition, the north reformer operator's responsibility when receiving a tank alarm was to alert the fifth console operator to the alarm to ensure that it had come in on the fifth console as well. The operator of the fifth console was responsible for responding to the alarm (Tr. 345-50). Examining an event journal showing tank alarms for the period roughly comparable to Grievant's shift on September 14-15 (Resp. Ex. 38, p.2), Mr. Wheatley opined that the number of tank alarms was typical for an eleven-hour period of time (Tr. 365). On cross-examination, Mr. Wheatley identified a document headed "Pass Up Items - Closed" (Un. Ex. 3). Mr. Wheatley testified that a pass-up concern is something anyone in the refinery may submit expressing a safety-related concern (Tr. 430). The document includes an inquiry as to when the tank alarms would be removed from the north reformer console and transferred to the new blender (fifth) console and a goal of completing this in late 2015 (Tr. 430-32). Mr. Wheatley acknowledged that the tank alarms were not removed from the north reformer board until 2018 (Tr. 433).

Mr. Wheatley identified a trend report of the DDS charge unit (Resp. Ex. 34) showing the drum starting to charge around midnight on September 13, 2017, ramping up until it stabilized around 5:30 p.m. on September 14 and remaining stable through 5:30 a.m. on September 15 (Tr. 350-52). The document also showed the trend line for liquid in the knock-out drum. As interpreted by Mr. Wheatley, it showed a consistently low level of liquid in the drum between 5:30 p.m. and 9:38 p.m. on September 14, but at 9:30 pm. It began to build. At 1:38:03 a.m., it reached the 50 percent mark which would have triggered the high alarm. It continued to build

until it reached almost 100 percent and then leveled off until 5:52:03 a.m. when it dropped to zero. Mr. Wheatley testified that when it leveled off just below 100%, it had reached the highest level at which the indicators were able to record but it could have continued to fill above that level, i.e. beyond the capacity of the indicators to record (Tr. 353-55, See also Resp. Ex. 37).

Mr. Wheatley identified an event journal of process alarms for the north reformer board. It showed a high alarm for the knockout drum at a value of 50.02 at 1:33:30 on September 15 (Resp. Ex. 38, Tr. 362-63). The journal for high priority alarms showed the drum returning to a level below alarm stage at 5:57:24 a.m. (Tr. 366, Resp. Ex. 38, p.3). The event journal limited to the knockout drum showed that the high alarm was acknowledged on the north reformer console at 1:33:56 a.m. on September 15 (Resp. Ex. 38, p. 4, Tr. 368, 417).³ It was one of several alarms acknowledged from that console at the same time (Tr. 459-61).

Mr. Wheatley prepared at the request of Ms. Powers an accounting of all acknowledged alarms on the north reformer console for each day in the month of September (Tr. 382). The report shows the smallest number was 51 on September 2 and the largest was 459 on September 7. On September 14, there were 94 acknowledged alarms and on September 15 there were 86 (Resp. Ex. 41).

Mark Rasmussen, lead shift supervisor in the central control room, testified that on the morning of September 15, 2017, Console Operator P.J. Gabrielson alerted him to the trend line on his computer screen which showed the fluid level in the drum increasing, crossing the point at which the high alarm would have been triggered at 1:38:03 a.m., continuing to climb until it flat-lined at and remained there until 5:52:03 a.m., when it dropped reflecting that the tank was drained (Tr. 283-89, Resp. Ex. 34). According to Mr. Rasmussen, Mr. Gabrielson had resolved the matter when he reported it but seemed concerned about it (Tr. 291). Mr. Rasmussen reported the matter at his regular 7:00 a.m. supervisors' meeting (Tr. 292).

Grievant testified that on the night of September 14, he had to make numerous changes with respect to the Penex due to the quantity of butane being added and the shut down of the hydrogen plant. Consequently, he left his console and went to consult with Mr. Regenscheid five times (Tr. 1110-13). Grievant related that he considered it a very busy shift because of the moves on the Penex and the interaction with Mr. Regenscheid (Tr. 1137).

Grievant testified that he did not ignore the alarm; rather he missed it (Tr. 1145). Grievant offered the following explanation for missing the alarm (Tr. 1145-47):

One, no one gave me a heads up that I had an alarm. So when I came back to my board, I wasn't looking for an alarm.

³Acknowledging the alarm turns off the sound and the flashing light but the alarm remains lit on the console. It is also possible to silence the sound without acknowledging the alarm.

Two, I received a lot of bogus tank alarms during that time. And I don't know if . . . my board was ringing, and I don't know if someone was mad or not happy with all the noise that it was making, but they may not have wanted to tell me because they were pissed off because it was the middle of the night, and they're on the way, and my board's going off.

Our alarm summary . . . That lists all the alarms that we have. On the north reformer console, their alarm summary has 50 to 100 alarms that are always in alarm. So what happens, the first current alarm that comes in goes to the top. And then it starts moving down the list. More and more alarms, the further it gets down on the list.

When I run a board, I have a small trend menu that I put up, right on the alarm summary, that are critical tag numbers that I need to watch at all times. I feel what happened is maybe that alarm got below that trend menu, so I couldn't see it anymore because I had so many alarms during the time.

Then because we had 50 to 100 bogus alarms on the alarm summary, we also have a number of lights on the keyboard, so the keyboard would be lit up all over the board. So if you have an alarm, you have a solid color on your board. So I had – it looked like a Christmas tree.

So I had a lot of trouble finding current alarms, other than sitting right there and seeing the alarm summary first come up. And without me being in the chair, really affected seeing that alarm.

On cross-examination, Grievant elaborated that he believed he was away from the console when the high alarm sounded because normally, when he got an alarm he responded to it right away. He also reasoned that the alarms were ringing for an extended period of time and if he were at the console he would have silenced them in two or three seconds (Tr. 1201-02). However, he conceded that in a memo he sent to Mr. Hastings on September 27, 2017, he stated that he acknowledged the alarm (Tr. 1206, Resp. Ex. 75). He also conceded that in a hearing before the National Labor Relations Board on unfair labor practice charges he filed as a result of his termination he testified that he acknowledged the alarm (Tr. 1208-09, Resp. Ex. 76).

Mr. Regenscheid testified that when he left at the end of his shift the morning of September 15, he was unaware of the high alarm on the drum. He related that Ms. Jung called him at home and asked, among other things, whether he knew that the knock-out drum was full and he replied that he did not (Tr. 702-03).

Mr. Whatley testified that in the afternoon of September 15, Ms. Jung reported that the operator who relieved Grievant discovered a high level alarm in the DDS compressor knock-out drum and took immediate action to have the drum drained (Tr. 159). Mr. Whatley testified that compressors compress gasses into different densities but, because liquids are not compressible,

if they get into a compressor they apply a great amount of hydraulic pressure that can cause the compressor to explode (Tr. 63). To protect against that, safety levels are set by engineers (Tr. 64-65). It does not appear that the high high alarm sent a signal to the console prior to the day shift operator having the drum drained (Tr. 182).

The high alarm appears to be set six feet above the bottom of the drum (Tr. 179-90, Un. Ex. 1). Above the high alarm is the high high alarm (Tr. 181, Un. Ex. 1).⁴ At the top of the drum is a demister pad which causes minuscule droplets in the gas to coalesce and then drop down in the drum as their coalesced size enables gravity to overcome the upward force of the gas (Tr. 183-84, 768, Un. Ex. 1). However, according to Mr. Whatley, as the level of liquid in the drum rises, it can overwhelm the demister pad, sweeping liquid into the gas stream and directly to the compressor (Tr. 237).

Mr. Whatley testified that he asked Dave Barnholt to conduct an investigation of the incident. Mr. Barnholt was Operations Superintendent in another area but had previously been Operations Superintendent in the area then supervised by Ms. Jung (Tr. 159). Mr. Whatley did not tell Mr. Barnholt what specifically to investigate other than to investigate the events of the night of September 14-15 (Tr. 223). Ms. Powers assisted Mr. Barnholt (Tr. 476-77). In addition to the missed alarm, Mr. Barnholt also investigated an issue concerning isobutane purity. In his report, dated September 19, 2017, Mr. Barnholt found that Grievant followed proper protocols with respect to the isobutane purity matters but failed to properly perform his duties with respect to the knockout drum alarm. He found that the high priority alarm was triggered at 1:33 a.m. and that Grievant missed the alarm and failed to identify the rising liquid level from 1:33 a.m. until the end of his shift (Resp. Ex. 31).

Mr. Barnholt testified that Mr. Whatley advised him to investigate the possibility that moves with respect to the Penex were not made promptly and that a high level alarm on a knockout vessel was not responded to for several hours (Tr. 770-71). Mr. Whatley testified that, in accordance with his standard practice, he pulled radio traffic for the night shift of September 14. He observed that the traffic on the north reformer was very light. He asked Grievant about it and, according to Mr. Barnholt, Grievant advised that because of Grievant's experience as a VRO, he did not have to speak to the field very often. Mr. Barnholt opined that Grievant's response did not make sense because a console operator's need to communicate with people in the field was independent of the console operator's experience (Tr. 776-77). Because Mr. Regenscheid had advised that the north reformer console operators tended to communicate over the phone rather than by radio, he pulled telephone logs but they did not add anything to the investigation (Tr. 779).

Mr. Barnholt testified that he obtained trend of feed rates for the DDS unit (Resp. Ex. 34) which showed it was running and stable the night of September 14 (Tr. 781). He also examined

⁴Operations Superintendent Dave Barnholt testified that the high alarm is about two feet up from the bottom and the high high alarm is about three and a half feet up from the bottom (Tr. 824, 826-27).

the trend for the knock-out drum (Resp. Ex. 34, p. 2), which showed that the liquid began rising at 9:38 p.m., triggered the high priority alarm at around 1:30 and dropped to zero at 5:52 a.m. (Tr. 782-84). From his examination of trend charts, Mr. Barnholt concluded that the high alarm was triggered at 1:33:40 a.m. and someone in the control room acknowledged the alarm about 15 seconds later. The drum went out of alarm after the day shift began (Tr. 786-87).

Mr. Barnholt testified that he and Ms. Powers interviewed Mr. Regenscheid on September 18. Mr. Barnholt testified that after the interview, with respect to the Penex issue, “[w]e determined that Mr. Topor had made moves in the unit, perhaps not as fast as it could have been, but he communicated with the supervisor and he was found not to be an issue” (Tr. 789). With respect to the knock-out drum, Mr. Regenscheid advised Mr. Barnholt and Ms. Powers that he was not aware of the alarm until Ms. Jung called him at home (Tr. 790).

Mr. Barnholt testified that he and Ms. Powers interviewed Mr. Rasmussen on September 18. According to Mr. Barnholt, Mr. Rasmussen advised that to have the drum drained, Mr. Gabrielson communicated with the field operator by telephone, rather than on the radio (Tr. 791).

Mr. Barnholt testified that he interviewed Mr. Gabrielson by telephone. Ms. Powers was not present for the interview (Tr. 778). According to Mr. Barnholt, Mr. Gabrielson advised that he saw that the knock-out drum was in high alarm when he came on shift and immediately called the field operator to drain the drum. Mr. Gabrielson also advised Mr. Barnholt that Grievant did not mention the high alarm during shift turnover and when Grievant returned to work the night of September 15, he seemed surprised to learn of the high alarm (Tr. 792).

Mr. Barnholt testified that he and Ms. Powers interviewed the employee working as temporary foreman the night of September 14. According to Mr. Barnholt, the temp foreman had no recollection of any communication from the console to the field to address a high alarm (Tr. 793). Mr. Barnholt and Ms. Powers also interviewed the field operator who expressed concern that he might have missed a radio communication to drain the drum but they assured him that there was no record of such a communication (Tr. 793-94).

Mr. Barnholt and Ms. Powers did not interview the five other console operators who were scheduled to be in the control room the night of September 14 (Tr. 844-45). Mr. Barnholt did not determine who acknowledged the alarm. He recognized that it could have been one of the other console operators if Grievant was out of the room when the alarm came in and it would have been undesirable for another operator to acknowledge an alarm on Grievant’s console and not advise Grievant when Grievant returned (Tr. 864). But he opined that which operator acknowledged the alarm “was a minor piece of the puzzle” (Tr. 860), because someone hitting acknowledge all was not the reason the alarm was not responded to for four hours (Tr. 861).

Mr. Barnholt testified that he and Ms. Powers interviewed Grievant on September 18. According to Mr. Barnholt, Grievant acknowledged that he missed the alarm, saying the matter was on him. Grievant also related that he was very busy that night with many “bogus alarms,”

may have been away from the console when the alarm came in and may have missed it because of the tank alarms. Grievant related to Mr. Barnholt that he looked at the entire alarm summary every time a new alarm came in (Tr. 797-99).

Ms. Powers testified that after the report was drafted but before it was transmitted, Grievant invited her and Mr. Barnholt to come to examine the drum (Tr. 478). A September 20, 2017 email from Grievant to Mr. Barnholt and Ms. Powers contained the invitation and remarked, among other things, that the “[t]he float chamber even at 100% is a small part of this vessel, then you have the high level alarm and then the outlet of this vessel is on top. Before any liquid could go to the compressor it would actual (sic) take days to fill up.” (Resp. Ex. 44). In her notes of the meeting, Ms. Powers opined, “It was clear that Mr. Topper believes the drum has to be completely full of liquid before it would carry over into the compressor. (sic) When in fact liquid can be carried out with the vapors if it gets too close or above the inlet nozzle” (Resp. Ex. 45).

Mr. Barnholt testified that in the meeting at the drum, Grievant demonstrated that he did not understand how the vessel operated (Tr. 815). According to Mr. Barnholt, Grievant stated that he believed that the vessel had to completely fill with liquid before liquid could enter the compressor, something Mr. Barnholt related was not correct (Tr. 814). Mr. Barnholt testified that Grievant stated it would have taken days for the drum to fill with liquid but, according to Mr. Barnholt, the liquid only had to rise to a point close to the inlet nozzle for entrainment sufficient to reach the compressor to occur (Tr. 812).

Grievant testified that he took photos of the alarm summary of the consoles for the north and south reformers that morning and showed them to Mr. Barnholt and Ms. Powers. According to Grievant, the photos showed that the north reformer board had 59 active alarms while the south reformer board had 9 (Tr. 1321).

Mr. Barnholt testified that Grievant referenced Incident 42222 (See Un. Ex. 6) as an event similar to the knock-out drum incident under investigation. According to Mr. Barnholt, they pulled up the incident report and reviewed it together. Mr. Barnholt testified that unlike the knock-out drum incident, in Incident 42222 the operators identified an issue and did everything they could to respond to the issue but were unsuccessful and the compressor tripped. No employees were culpable (Tr. 808).

VRO and Chief Steward Dean Benson testified that he was working the crude console next to the south reformer console operated by Mike Woskie. According to Mr. Benson, north reformer console operator Jason Christner advised Mr. Woskie of a need to get a level up immediately but Mr. Woskie replied that he was fine and not to worry about it. Mr. Benson testified it eventually resulted in a shutdown (Tr. 1-22). On cross-examination, Mr. Benson admitted that he did not know if Mr. Woskie was responding to the alarms (Tr. 1029-30) and did not know why the unit shut down or whether any employee was culpable (Tr. 1032).

Mr. Christner testified that when he came on shift he noticed that the DU unit was shut down and was aware that when the DU unit shut down there was a tendency to shut down the HDH unit. He told several people including Mr. Woskie that it was important to not shut down the HDH unit. According to Mr. Christner, he noticed that the liquid in the product separator in the DU unit was at a high level and told Mr. Woskie that he needed to take action but Mr. Woskie replied that he would be fine (Tr. 1053-46).

Grievant testified that he was in the field and noticed the increasing liquid build-up. According to Grievant, he called Mr. Christner and told him to open the valve immediately (Tr. 1323-24).

In rebuttal, Mr. Barnholt testified that "personnel identified an issue, and they were actively trying to mitigate the problem. An investigation found no fault be personnel due to other circumstances" (Tr. 1328).

Mr. Benson testified to an incident where in August 2017 the solvent deasphalting unit was in alarm for two weeks and ran out of oil and shut down. Mr. Benson testified that he witnessed a conversation between Mr. Rasmussen and the console operator Tony Meyer where Mr. Rasmussen stated that Mr. Meyer had not noted the alarm in cNotes, the log where abnormal conditions are recorded, and Mr. Meyer responded that he thought he had done so and expressed concern that the system may not have accepted his notation if another employee had cNotes open at the same time (Tr. 1013-20). On cross-examination, Mr. Benson testified that the unit was relatively new at the time and still struggling to meet production (Tr. 1034-35).

In rebuttal, Mr. Barnholt testified that the hot oil level in the heater had declined to the point where it triggered a low priority alarm. According to Mr. Barnholt, the console operator noticed the alarm and entered a note to that effect. Mr. Barnholt explained that with low priority alarms, the operator's responsibility is to notify supervision as there is time to get more hot oil ordered. The operator did that but the day foreman failed to act. Mr. Barnholt testified that the operator was coached about the need to follow up after entering the note to make sure that others were taking action and the day foreman was coached about the need to look for such notes (Tr. 1326-27).

Mr. Barnholt and Ms. Powers recommended that grievant be disciplined but they did not recommend a specific level of discipline. On September 20, 2017, at 11:31 p.m., Human Resources Manager Tim Kerntz emailed Mr. Hastings advising of the follow-up meeting that Mr. Barnholt and Ms. Powers would be having with Grievant and further advising (Resp. Ex. 73):

I wanted to let you know that unless something surprising is revealed when Dave meets with Rick again, it is almost certain that the recommendation will be to terminate his employment. This recommendation is due to Rick's ongoing failure to improve his performance despite many repeated coaching efforts of his supervision, and especially due to the risk he creates for our personnel and facility due to his bouts of inexcusable

inattention and/or non-performance of duties. For these reasons, and even without him being on a final warning, that would be my recommendation, unless he offers something which would fully excuse his recent failure to perform.

In a memo dated September 21, 2017 (Resp. Ex. 74), Mr. Kerntz recommended that Grievant's employment be terminated. The memo related that Grievant had "repeatedly been coached, counseled and even written up on those concerns in an attempt to improve his performance; however, recent events demonstrate that such efforts have been unsuccessful, and his inattention has endangered both personnel and facilities." The memo attached a summary of incidents and coachings from January through August 2017 and added, "I should also note that he received a Final Written Warning and suspension in November 2016 for failing to follow supervisory instructions and insubordination." The memo detailed the September 14-15 incident with the high alarm and continued, "All prior coaching, counseling, reviews and even discipline have had no significant lasting effect upon him, which is highly disappointing. This most recent event of the DDS alarm demonstrated that his attitude toward his job duties and the actual performance thereof likely presents a danger to other employees and to our facilities . . ."

On direct examination, Mr. Kerntz testified that Grievant's suspension and final written warning was not a basis for his recommendation of termination and he would have made the same recommendation had there been no suspension and final written warning (Tr. 921). Mr. Kerntz signed the letter advising Grievant of his discharge (Jt. Ex. 2). The letter states, in part, "The basis for your discharge is that your performance has failed to meet company standards and has also placed your fellow employees and company facilities at risk. This includes, but is not limited to, your failure, while on a final written warning, to respond to a high priority alarm while working as a console operator. Even aside from the final warning, the combination of this recent safety-related performance failure and your failure to improve your performance despite the many repeated coaching efforts from your supervisors warrants your termination."

When confronted with the discharge letter on cross-examination, Mr. Kerntz initially reiterated his position that the suspension and final written warning played no part in his recommendation to discharge. He maintained that the letter was merely saying, "[I]t just happens that you are on a final written warning" (Tr. 933). When pressed, "Did that decision include consideration of a final written warning or not?", Mr. Kerntz replied, "the answer is yes because when we review an employee record . . ." and was cut off by Union counsel (Tr. 935). On redirect, Mr. Kerntz elaborated, "[W]hen we consider disciplinary action, and especially in a case that may involve termination, we look at the employee's past record. And we look at all of the facts before we were to take action. So it is always part of consideration." However, he continued to maintain that Grievant was not discharged because he was on a final written warning and would have been discharged without the prior discipline (Tr. 961-62).

According to Mr. Whatley, Grievant had not respond positively to coaching. Mr. Whatley testified that Grievant did not accept accountability for his performance, often stating that his performance was fine and shifting responsibility to others and Grievant appeared to not

understand the behavior of the chemicals with which he was working (Tr. 85-87). Consequently, Mr. Whatley testified, after the incident of September 15, 2017, "we concluded that because of all the efforts been made, no attempt to work with us, no attempts at improving, repeated denial of accountability once again, during a very dangerous event, that is was just not safe to have him operating in the refinery" (Tr. 87).

Mr. Whatley testified that, standing alone, Grievant's failure to respond to the alarm for approximately four hours warranted discipline (Tr. 162). He recommended discharge, explaining (Tr. 162):

That act, coupled with all of the history with Mr. Topor, that fact of not accepting accountability, of not being assertive in performing his duties, not troubleshooting, not understanding certain process conditions, especially those related to safe operating conditions, that it would have been irresponsible for me to continue to allow him to operate at the facility, because we had established that he was a risk to personnel and equipment and those things.

On cross-examination, when asked whether, by itself, missing the alarm would have been enough to justify discharge, Mr. Whatley replied, "As a stand-alone event, with no prior record of progressive discipline, the answer would be no." (Tr. 175). When asked whether the prior discipline included the ten-day suspension from November 2016, Mr. Whatley replied, "More specifically, the final written warning." (Tr. 176). Subsequently, he elaborated (Tr. 207-08):

[F]or an operator with a final written warning and a long history of not performing well, not understanding the process, all things that we were not targeting discipline, but are certainly factors in determining whether or not this employee has earned termination or has convinced us that he can safely operate, those things are tied together.

On redirect, he again testified that in recommending termination he considered the November 2016 final written warning (Tr. 242-43).

Mr. Hastings testified that he considered three factors in deciding to discharge Grievant. He regarded failure to attend to the alarm for four hours as gross negligence. He considered Grievant's attitude toward practices and procedures to be cavalier and not understanding the need to respond promptly to alarms, and Grievant had not been responsive to the coachings and opportunities to improve his performance (Tr. 996-97). He rejected the option of lesser discipline because he felt Grievant was unwilling to change how he operated (Tr. 997). With respect to the ten-day suspension and final warning, Mr. Hastings testified, "[T]hat did not play a role in the decision. I was aware that was on the record. But, like I said before, I think his actions in this particular case just highlighted why I thought he was . . . unfit to continue to operate at the refinery" (Tr. 998).

Mr. Kerntz acknowledged that the collective bargaining agreement provides, "Any

employee charged with an offense involving discharge shall be informed of such offense in writing within five (5) calendar days of the employer's knowledge of such offense." He maintained that the discharge was timely because Grievant "was not charged with anything until the investigation was complete and finalized, and there was a determination made" (Tr. 924). He opined that the Employer does not have knowledge of an offense until the investigation is completed (Tr. 958) and testified that in his six years at the refinery this contract provision has always been interpreted in that manner (Tr. 960).

Grievant filed unfair labor practice charges over his discharge. The ALJ recommended finding that the discharge violated the NLRA and the NLRB adopted the recommendation. *St. Paul Park Refining Co.*, 368 NLRB No. 62 (Aug. 30, 2019). The Company has moved the NLRB for reconsideration.

Company's Position

The Company contends that its termination of Grievant was timely under the contract. The Company relies on Mr. Kerntz's testimony that the parties have consistently interpreted the date of the Employer's knowledge of the offense involving discharge as the date the investigation was completed and conclusions drawn that the employee committed an offense warranting discipline. The Company maintains that Grievant was notified of his termination within five days following the Company's knowledge of the offense.

The Company maintains that there is no dispute that it was Grievant's responsibility to respond to the high priority alarm in the morning of September 15 and he failed to do so, leaving the alarm unresponded to until Mr. Gabrielson arrived for the day shift, saw the alarm and had the knock-out drum drained. The Company urges that there had never been another instance of an operator failing to respond to an alarm for over four hours. In the Company's view, this incident was a near-miss and could have resulted in a catastrophic explosion had liquid gotten into the compressor.

The Company contends that discharge was appropriate because it was no longer safe to maintain Grievant in its employ. The Company points to the numerous instances in which Company supervisors and managers coached Grievant on improving his performance and Grievant failed to respond to the coaching. The Company urges that Grievant consistently demonstrated a lack of understanding of the chemical processes involved in the refinery and consistently failed to accept accountability for his actions. The Company acknowledges that Grievant initially took responsibility for his negligence on September 15, telling Mr. Barnholt that the incident was "on me," but he quickly resorted to his regular pattern of deflecting responsibility, blaming others and demonstrating a lack of understanding of the chemical processes involved.

The Company argues that it conducted a fair and thorough investigation. The Company avers that it selected Mr. Barnholt to lead the investigation because he had expertise with respect

to the north reformer console and was not involved in Grievant's prior suspension and final warning. The Company urges that Mr. Barnholt and Ms. Powers interviewed all of the relevant witnesses and gathered all of the relevant evidence. They provided Grievant with three opportunities to present his side of the story.

The Company maintains that senior management did not rubber stamp the findings of Mr. Barnholt and Ms. Powers. Rather, says the Company, they carefully assessed them and concluded that Grievant was culpable and that the appropriate discipline was to terminate his employment. Similarly, according to the Company, the ultimate decision maker, Mr. Hastings, made his own independent analysis of the information provided to him before concluding that termination was appropriate.

The Company urges that discharge was expressly authorized by the collective bargaining agreement. The Company points to the contract's management rights clause, Article 28, which authorizes the Company to issue reasonable work rules and its work rule providing for discharge for "job negligence and unsafe work practices" (Resp. Ex. 3, Rule 6).

The Company contends that the two incidents referenced by the Union in which operators were not disciplined were not comparable to the instant matter. The Company argues that Incident Number 42222 did not involve culpable conduct of any employee involved. With respect to the deasphalting unit incident, the Company maintains that the operator did what he was supposed to do with a low priority alarm, he noted it in cNotes but was coached for failing to follow up to ensure that supervision had responded to the alarm and the foreman was coached for failing to notice and respond to the note.

The Company maintains that the September 15 incident by itself warranted discharge. However, when viewed in light of Grievant's overall record, the justification for the Company's decision is even stronger. The Company urges that despite all of the coachings and counselings Grievant continued to resist accepting responsibility for his unsatisfactory performance and continued to resist efforts to help him improve. In the Company's view, its conclusion that Grievant would not change his ways was reasonable and should be deferred to by me. The Company urges that the NLRB proceedings are irrelevant to the grievance before me. In the Company's view, Arbitrator Knudson's award finding just cause for Grievant's ten-day suspension and final warning is final and binding and the issue before me is whether the discharge violates the contract. For purposes of determining whether there was just cause for Grievant's discharge, I must accept Arbitrator Knudson's award and conclude that termination for gross negligence while under a final written warning does not violate the collective bargaining agreement. The Company asks that the grievance be denied.

Union's Position

The Union contends that the Company violated Section 17.2's requirement that "[a]ny employee charged with an offense involving discharge shall be informed of such offense in

writing within five (5) calendar days of the employer's knowledge of such offense." The Union argues that Section 17.2 does not require that the discharge be imposed within five days of the Employer's knowledge; it only requires notice to the accused employee that he is under investigation that could lead to discharge. The Union rejects the Company's interpretation as essentially nullifying the time limits by allowing the Company to take as long as it likes to investigate, conclude to discharge and then notify the employee. The Union contrasts the language of Section 17.2 with that of Section 17.1 which deals with lesser discipline and requires that discipline be taken, i.e. imposed, within ten days of the Employer's knowledge of the event.

The Union maintains that the Company failed to prove just cause for Grievant's termination. The Union urges that the Company relied on Grievant's prior ten-day suspension and final warning which has been held to have been illegal. The Union maintains that arbitrators have no authority to overrule public law tribunals and, therefore, although the prior discipline may not have violated the contract, I must accept that it was illegal. The order enforced by the Eighth Circuit included a requirement that the unlawful discipline not be used against Grievant in any way, says the Union. Consequently, the Company may not rely on it to justify Grievant's discharge. The Union also asks that I take arbitral notice of the NLRB's most recent finding that Grievant's discharge constituted illegal retaliation for Grievant's protected conduct that led to his illegal suspension and final warning.

The Union urges that the coachings cited by the Company cannot justify Grievant's discharge. The Union maintains that the coachings were not discipline, were not in Grievant's personnel file, could not have been grieved by Grievant and, therefore, cannot substitute for progressive discipline necessary to support the discharge. The Union avers that Mr. Whatley admitted that, standing alone, the missed alarm would not have resulted in discharge.

The Union maintains that the Company has tolerated numerous serious instances of employee neglect without discharging and, in many cases, without disciplining the employees involved at all. The Union urges that this history further supports its contention that Grievant's discharge was retaliatory and illegal.

The Union argues that the Company failed to prove any culpable conduct on Grievant's part. The Union contends that the Company offered no evidence that the alarm was actually in service on September 15. The Union urges that the Company's records show that the alarm was first acknowledged by the system without affirmative action by an operator (as demonstrated on Un. Ex. 5, p. 6) and that the only explanation for such a phenomenon was that it was shelved. Grievant cannot be held responsible for missing an alarm that was not operable and, says the Union, the Company failed to prove that the alarm was operable.

The Union maintains that the Company failed to prove that discharge was an appropriate penalty for the offense of missing an alarm. The Union observes that the contract lists the offenses for which discharge may be imposed without any prior discipline: Dishonesty, sleeping, possession of drugs or alcohol, possession of guns or other weapons on Company Representative

property, deliberate sabotage or willful destruction of Company Representative or employee property, insubordination (failure to follow a direct work order) and violence resulting in bodily harm. Negligence or missing an alarm is not among them, says the Union, and no one had ever been terminated before for missing an alarm.

The Union asks that the grievance be sustained and that Grievant be reinstated and made whole.

Discussion

The arbitrator has considered the transcript and, his notes of the hearing, the exhibits, the parties' briefs and arguments, and all authority cited therein. Based on this review, I have concluded that the grievance must be sustained in part. The Company has not proven just cause for discharge but has proven just cause for a ten-day suspension and the discipline must be reduced to a ten-day suspension.

The Union argues that the Company has not proven any culpable conduct on Grievant's part warranting discipline. The Union contends that the Company has not even proven that the high priority alarm was even in service on September 15, 2017. The Union infers that the alarm was shelved based on the records which show that it was first acknowledged by the system rather than an operator. The Union's argument is creative but not persuasive. The evidence clearly shows that the high alarm was acknowledged on the north reformer console at 1:33:56 a.m. by an operator. If the alarm was not in service, this would not have happened. Moreover, there is no dispute that shortly after he came on shift, Mr. Gabrielson saw the alarm and took action to have the tank drained. This could not have happened if the alarm was not in service. Contrary to the Union's argument, the Company has definitely proven that the alarm was in service on September 15.

Furthermore, I find that the Company has proven that Grievant was negligent when he missed the alarm. Grievant initially admitted his responsibility, telling Mr. Barnholt that the matter was "on me." Furthermore, the various explanations that Grievant and the Union have offered for Grievant's missing the alarm are not persuasive. The Union argues that Grievant's missing the alarm was not culpable because it is likely that he was not at the console when the alarm came in. Another operator acknowledged the alarm as well as the other alarms on Grievant's console, no one advised Grievant of this when he returned to the console, there were also numerous tank alarms and other alarms which pushed the high priority alarm down on Grievant's screen to the point where he did not see it.

One key fact undermines all of the explanations offered for Grievant's missing the alarm. When Mr. Gabrielson began his shift, he quickly saw the alarm and took action to remedy the situation. Mr. Gabrielson came on shift more than four hours after the alarm had been triggered. Consequently, the alarm would have been even lower on Mr. Gabrielson's screen than it was on Grievant's. Yet Mr. Gabrielson had no trouble seeing the alarm and contacting the field to drain

the drum. If Mr. Gabrielson was able to find and remedy the alarm quickly after starting his shift, Grievant should have been able to do so sometime during the four hours between the time the alarm came in and the time he went off shift. I find that the Company has proven that Grievant was negligent in missing the alarm.⁵

Finding Grievant culpable leads to the question of whether his culpability provided just cause for his discharge or whether the contract required that a lesser penalty be imposed. Mr. Whatley candidly admitted that, standing alone, Grievant's having missed the alarm would not have resulted in his discharge.⁶ This admission leads to the question of whether the Company has proven sufficiently aggravating factors to establish just cause for discharge. That in turn leads to the question of what weight, if any, should be given to Grievant's prior ten-day suspension and final warning.

The Company argues that I am bound by Arbitrator Knudson's award that the Company had just cause for the suspension and final warning. I agree with the Company that I am bound by the Knudson award and its holding that the Company had a right under the contract to impose the suspension and final warning. But although the Company had a contractual right to discipline, the NLRB in a decision enforced by the Eighth Circuit Court of Appeals found that the Company exercised its contractual right in a manner that violated the NLRA. Thus the question arises, does the contractual requirement that discharge be for just cause allow the Company to use discipline that violates the positive law to aggravate the seriousness of an offense that, standing alone, would not justify discharge. Stating the question effectively answers it. Of course, the aggravation of a lesser offense to discharge by reliance on prior discipline found to be illegal is inconsistent with the contractual requirement of just cause for discharge.

The Company argues, however, that the discharge should stand regardless of the ten-day suspension and final warning. The Union asks that I take arbitral notice of the NLRB's recent decision finding that the discharge violated the NLRA. *St. Paul Park Refining Co.*, 368 N.L.R.B. No. 62 (Aug. 30, 2019). I decline to do so. The NLRB decided issues under the NLRA on a record made before its ALJ. My role is to resolve issues under the collective bargaining agreement on a record developed in the hearing before me. It is that record to which I now turn.

On the record before me, I find it more likely than not that the ten-day suspension and

⁵The Union faults the Company's investigation for not interviewing the five other console operators scheduled to work the night of September 14-15. I do not agree. Had Mr. Barnholt interviewed them, he might have learned whether someone other than Grievant acknowledged the alarm and whether that person advised Grievant of his actions. But even assuming that another operator acknowledged the alarm and neglected to so advise Grievant, it was still Grievant's responsibility to notice the alarm and take action to drain the drum.

⁶The Company argues that the contract recognizes its right to promulgate reasonable work rules and the work rules provide for discharge for negligence. But the work rules provide for discipline up to and including discharge, they do not require discharge, and implicit in the work rules is that the level of discipline depends on the surrounding facts and circumstances. In contrast, Section 17.2 of the contract enumerates offenses that will result in discharge and negligence is not among them. Moreover, the unilaterally promulgated work rules may not supercede the contractual requirement of just cause for discharge.

final warning was a significant factor in the Company's decision to terminate Grievant's employment. The letter advising Grievant of his discharge expressly referenced the suspension and final warning. As previously quoted, the letter advised Grievant:

The basis for your discharge is that your performance has failed to meet company standards and has also placed your fellow employees and company facilities at risk. This includes, but is not limited to, your failure, while on a final written warning, to respond to a high priority alarm while working as a console operator. Even aside from the final warning, the combination of this recent safety-related performance failure and your failure to improve your performance despite the many repeated coaching efforts from your supervisors warrants your termination.

The most natural reading of the letter is that Grievant's suspension and final warning played a role in the Company's decision to discharge him but that even without it, the Company would have discharged him anyway. The latter proposition, that the Company would have discharged Grievant even if he had not received the suspension and final warning, is, of course, speculative. The fact is Grievant did receive the discipline subsequently held to be illegal and the Company considered it in making its decision to discharge.

Moreover, Mr. Whatley testified that the suspension and final warning played an important role in his decision to recommend termination. He testified that if Grievant had no prior record of progressive discipline he would not have been discharged and the specific prior discipline that he referenced was the final written warning.

Mr. Kerntz who also recommended discharge testified that the suspension and final warning did not play a role in his recommendation. But his testimony did not hold up under cross-examination. When confronted with the termination letter, he maintained that the reference in the letter to the suspension and final warning merely meant, "it just happens that you are on a final written warning." That interpretation of the letter is inconsistent with the letter's wording that Grievant's failure to meet Company standards of performance included missing the alarm while on a final warning. I am unable to credit Mr. Kerntz's interpretation of the letter and I doubt that any reasonable employee would have read it that way. And, although he continued to maintain that the suspension and final warning played no role in the decision to discharge, he also admitted that the decision included consideration of the final warning because "when we consider disciplinary action, and especially in a case that may involve termination, we look at the employee's past record. And we look at all of the facts before we were to take action. So it is always part of consideration." I find it more likely than not that the illegal suspension and final warning played a significant role in Mr. Kerntz's decision to recommend discharge.

The ultimate decision maker was Mr. Hastings. He testified that he did not consider the suspension and final warning in deciding to terminate rather than impose lesser discipline although he was aware of it. But Mr. Hastings was working from and likely influenced by the recommendations of Mr. Kerntz and Mr. Whatley. And both Mr. Whatley and Mr. Kerntz's

recommendations were influenced by the suspension and final warning. I find it more likely than not that the illegal suspension and final warning played a significant role in Grievant's discharge.

Nevertheless, the Company argues that grievant's discharge should be upheld even if the suspension and final warning are disregarded. I do not find the Company's argument persuasive.

The Company relies on the coachings and performance evaluations and Grievant's lack of receptivity to them and failure to improve his performance. The Union maintains that the coachings and negative performance evaluations were part of an overall pattern of retaliation against Grievant for contesting his suspension and final warning and for the safety stop that was the basis for the suspension and final warning and that the NLRB and Eighth Circuit held was activity protected by the NLRA. I need not decide whether the coachings and performance appraisals were retaliatory or legitimate because, assuming that they were legitimate, they do not justify aggravating to discharge an act of negligence that standing alone would not have justified discharge.

The coaching sessions and performance appraisals were not disciplinary. Their purpose was to assist Grievant in improving his performance. Their purpose was not to place Grievant on notice that his performance deficiencies warranted discipline and that the level of discipline would increase if Grievant did not improve. I find Mr. Whatley's testimony in this regard is entitled to significant weight. He distinguished coachings from discipline, terming discipline a "clear and documented mark to . . . exert a negative conclusion to an employee" and "a step towards . . . potential termination whereas coaching is built specifically to get somebody to improve their performance." Mr. Whatley's testimony is consistent with how the parties treat coaching. Coaching is not recorded in an employee's personnel file, is not regarded as discipline and is not grievable. I find that Mr. Whatley's explanation of the difference between coaching and discipline represents the mutual understanding of the parties and that under the contract, coaching may not be used to progress to discharge employee behavior that in the absence of prior discipline warrants discipline less than discharge. For similar reasons, I find that negative performance evaluations may not be used to progress to discharge employee behavior that in the absence of prior discipline would not warrant discharge.

The Company has cited a plethora of published arbitration awards that it maintains supports its position that the record established just cause for Grievant's discharge. I have considered all of the authorities cited by the Company. They do not persuade me that the Company has proven just cause for Grievant's termination. Only a few merit specific discussion.

In *Union Tank Car Co.*, 110 L.A. 1128 (Latka 1998), the company terminated an employee for a first offense of violating a safety rule with respect to entering a confined space. The record reflected that in response to numerous accidents which resulted in three fatalities, the company implemented a zero tolerance policy for such safety rule violations, later modified to apply only to those violations that were life threatening. The record showed that the company rigorously enforced its confined space entry policy and that included terminations of at least 15

supervisors and a plant manager. Additionally, the collective bargaining agreement in *Union Tank Car*, was significantly different from the collective bargaining agreement in the instant matter. Whereas the instant contract contains a largely standard requirement of just cause which is generally interpreted to place the burden of proof on the employer, the *Union Tank Car* contract expressly provided, "In any proceeding involving discipline and/or discharge, the arbitrator shall presume the discipline and/or discharge was for just cause unless proven by a preponderance of evidence to the contrary," a factor expressly cited by the arbitrator in denying the grievance. The facts and circumstances present in *Union Tank Car* are so different from those present in the instant matter that I am unable to find the award helpful in resolving the instant grievance.

In *Mesa Airlines*, 118 L.A. 1390 (Nolan 2003), the grievant had been terminated for misconduct similar to the misconduct at issue and reinstated pursuant to a last chance agreement. Although the period that the last chance agreement was in effect had expired, the grievant still had an active warning for another incident of similar misconduct. Arbitrator Nolan denied the grievance, rejecting the argument that discipline less severe than discharge was required by the contract. Here too, the facts and circumstances are not sufficiently comparable to those in the instant matter for this award to be helpful in resolving the instant matter.

In *Public Service Co. of Colorado*, 129 L.A. 361 (DiFalco 2011), Arbitrator DiFalco denied the grievance over the discharge of a working foreman for failing to hold a safety job briefing before beginning a job. The working foreman had previously had a decision making leave for an incident similar to the one that led to his discharge and a ten-day suspension for another safety violation. Similarly, in *American Greetings Corp.*, 113 L.A. 1198 (Harris 2000), Arbitrator Harris denied the grievance of a discharged employee who, among other things, had previously received a third and final warning which was reduced to a second warning and another third and final warning. As discussed above, the only prior discipline that Grievant had was the ten-day suspension and final warning that were held by the NLRB and the Eighth Circuit to be illegal. The facts and circumstances in *Public Service Co. of Colorado* and *American Greetings* are significantly different from the instant matter and these awards are not helpful in resolving the instant grievance.

Thus, it is clear that the Company has proven just cause to discipline Grievant but has not proven just cause to discharge him. The appropriate remedy is to reduce the level of discipline but that begs the question of what level of discipline is appropriate. Grievant's negligence in missing the alarm for more than four hours is quite serious. I credit the consistent testimony of the Company's supervisors and managers that if liquid had entered the compressor there could have been an explosion, property damage and personal injury. I further credit their testimony that when the liquid reached a level that triggered the high priority alarm, there was a significantly greater risk of entrainment that could have gotten past the demister. Strong disciplinary action was appropriate to impress on Grievant the seriousness of his negligence and the important of being more vigilant in the future. Arbitrator Knudson interpreted the collective bargaining agreement as supporting a ten-day suspension and final warning for acts of serious

misbehavior even in the absence of prior discipline. In accordance with the Knudson award, I shall award that Grievant's discharge be reduced to a ten-day suspension and final written warning. Grievant shall be reinstated and made whole for his lost compensation in excess of what he would have lost in a ten-day suspension. In making Grievant whole, the Company may offset earnings that Grievant had from substitute employment he obtained following his discharge.

There remains the Union's argument that the Company violated Section 17.2 by failing to inform Grievant of his offense within five days of its knowledge of the offense. Both parties provide forceful arguments in support of their different interpretations of Section 17.2. I need not resolve this issue, however. As discussed above, the Company has proved just cause for a ten-day suspension and final written warning and had the Company imposed the discipline that the contractual requirement of just cause allows, the timing would have been governed by Section 17.1 and the discipline would have been timely.

AWARD

1. The grievance is sustained.
2. The discharge of the Grievant, Richard Topor, was not for just cause.
3. The Company has proven just cause to suspend Grievant, Richard Topor, for ten days and to issue him a final written warning.
4. The Company shall reduce Grievant's discharge to a ten-day suspension and final written warning.
5. The Company shall reinstate Grievant and make him whole for all compensation lost as a result of his discharge, except for compensation that Grievant would have lost in a ten-day suspension. The Company may offset earnings from substitute employment that Grievant obtained subsequent to his discharge.
6. The arbitrator shall retain jurisdiction for thirty days to resolve any disputes which may arise concerning the remedy. Either party may invoke the arbitrator's jurisdiction by written or electronic notice to the arbitrator and the other party within the thirty-day period. The parties may, by written agreement with a copy to the arbitrator, extend the period of retained jurisdiction in thirty-day increments.

Chicago, Illinois
October 24, 2019



Martin H. Malin, Arbitrator.