

ARBITRATION AWARD
In the matter of arbitration between

**WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION, FERRIES DIVISION**

AND

**PUGET SOUND METAL TRADES
COUNCIL**

Stephen Chaussee Demotion
FMCS No. 100505-03074-8

APPEARANCES FOR THE EMPLOYER

Don Anderson
Leah Maurseth

Jeff Pelton
Paul Brodeur

Jerry Holder
Vernon Day

APPEARANCES FOR THE UNION

Patrick Connor

Robert Scott

Stephen Cahusee

**ARBITRATOR
EDWIN R. RENDER**

By the terms of the contract between **WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, FERRIES DIVISION**, hereinafter referred to as the Employer, and the **PUGET SOUND METAL TRADES COUNCIL**, hereinafter referred to as the Union, there is a grievance procedure including arbitration. Accordingly, the parties selected **EDWIN R. RENDER, LOUISVILLE, KENTUCKY**, as impartial Arbitrator. A hearing was held on **June 3, 2011** in **Seattle, Washington**. Equal opportunity was given the parties for the preparation and presentation of evidence, examination and cross-examination of witnesses and oral argument. The parties submitted post-hearing briefs on **August 19, 2011**.

THE ISSUE

The stipulated issue in this case is whether the Employer had just cause to demote the Grievant from the position of carpenter shop foreman to lock shop lead worker, and, if not, what is the appropriate remedy.

RELEVANT EMPLOYER REGULATIONS

Note: If you are found to have violated rules 1 through 6, you may be immediately terminated from employment.

1. Insubordination. Deliberate refusal to obey a lawful order, or failure to cooperate in a WSF investigation. Deliberate refusal to obey a lawful order.

3. Theft. Stealing or improper use of WSF property. Removal of property without proper authorization, possession of stolen property, stealing or attempting to steal the personal property of a co-worker or customer.

4. Neglect of duties. Sleeping on duty or willful to perform assigned duties.

5. Falsification of Documents or Disclosure of Confidential Records. Alteration of records, including employment applications, pay records and/or improper disclosure of personnel, safety and medical records.

Note: Failure to abide by the following rules may lead to disciplinary action up to and including

immediate termination or, if less serious, to progressive discipline.

19. Poor Work Performance. Repeated failure to perform duties at the level or standard required of your assigned position.

THE CHARGES

The Employer's notification to the Grievant of demotion provides in part:

This is official notification of your immediate demotion from your position as a Carpenter Shop Foreman to a Carpenter Shop Journeyman with the Washington State Department of Transportation Ferries Division (WSF).

Background:

You have been employed by WSF since November 29, 1992 within the Carpenter Shop at the Eagle Harbor maintenance yard

On May 6, 2008, the State Auditor's Office (SAO) opened an investigation based on a Whistleblower report that a Carpenter Shop Terminal Leadman with WSF was using state resources for personal benefit. During the parallel WSF investigation, Human Resource Consultant, Jackie Beddo and Eagle Harbor Senior Port Engineer, Vern Day, interviewed each person in the Carpenter Shop. The same questions were asked of each employee. In addition, the employees were advised that their interviews were confidential and must remain confidential throughout the investigatory process. Your interview took place on May 20, 2009. You acknowledged that you were obliged to maintain the confidential nature of the investigation.

On May 26, 2009, an interview was conducted with Don Gillespie, Carpenter Lockshop Leadman. He came into the interview with a folder containing copies of several shop meeting attendance sheets which you had given him to show us that Mr. Nannery had attended these meetings where the subject was "hours of work." When Mr. Day asked Mr. Gillespie why he knew to bring this information to his interview, he said that you talked to him after your May 20, 2009 interview.

The SAO investigation uncovered discrepancies between Mr. Nannery's actual hours worked and what he reported on his timesheets. Your job description requires you to supervise each job, monitoring workers' performance and quality of work, to direct and check the work of others, and to complete time cards, checking for accuracy, clarity and completeness. However, during your interview with Ms. Beddo and Mr. Day, you variously commented that, "I don't give a shit," and "I don't care anymore," when asked about Mr. Nannery's unreported absences and your role as the Carpenter Shop Foreman.

Charges:

In light of the above-mentioned facts and circumstances, it is alleged that you have violated the following WSF Code of Conduct rules (Attachment 1):

Rule 1 Insubordination—your failure to keep the investigatory interview confidential.

Rule 19 Poor Work Performance—your position as Carpenter Shop is one of leadership within the Carpenter Shop. Your job duties (Attachment 2) specify your supervision and management of your workers and verifying the accuracy of their time

cards.

Determination:

Before I made my determination I followed up with Mr. Day regarding the “snickering” incident and also the date which he gave you Mr. Nannery’s schedule. Mr. Day recalls that you told him about your concerns about Mr. Nannery’s work schedule. However, Mr. Day does not recall “snickering” or commenting that there is money available in the budget for these types of things. Mr. Day said that he did follow up on your report. Also, Mr. Day said that Mr. Nannery’s baseball schedule was given to you in mid to late March, 2009, and was concurrently posted on the bulletin board that houses the shop’s vacation calendar.

Based on the investigation by SAO and the information I gained through out meetings I conclude that you were aware of Mr. Nannery’s baseball schedule and you knowingly signed his incorrect timesheets as seen in Attachment 4—spreadsheet. Mr. Nannery took leave for thirteen (13) of forty-five (45) game days, leaving thirty-two (32) days where Mr. Nannery may have flexed his time but did not account for it on his timesheet. Mr. Nannery’s baseball schedule was given to you in the beginning of the season in mid to late March, 2009. Your responsibility as the Carpenter Shop Foreman is to audit timesheets for accuracy. You stated in the pre-disciplinary meeting that you keep a vacation calendar in the shop. Your responsibility when signing timesheets is to check the calendar against the timesheets that you are signing to make sure they accurately depict the employees work schedule.

As a Foreman within the Carpenter Shop you are

entrusted with the oversight and knowing the working hours as well as performance of your direct reports. You stated that on those game days you were aware that Mr. Nannery was deviating from his normal work schedule, but beyond that you didn't know his work schedule. I find this unacceptable from an employee who is placed in a position of leadership and fails to appropriately apply oversight and supervision to the staff.

GRIEVANT'S JOB DESCRIPTION

In Washington State Ferry System performs skilled work of the specific trade. Incumbents are fully qualified in all aspects of the work, including those of Foreperson. As Foreperson, lays out the work, physically and on paper (organizes, plans, prioritizes and directs). Estimates costs of material and labor and makes final decisions on how to proceed. Directs and instructs workers on repairs and maintenance to be performed. Supervises each job, monitoring workers' performance and quality of work. Is involved in the interview process. Requests purchase orders, researches products and materials. Uses computer, phones, places orders, completes time cards, checking for accuracy, clarity and completeness.

THE FACTS

The Employer is the Washington State Ferry System. The Union represents a bargaining unit of essentially maintenance employees who perform repair and maintenance work on the ferries and the various terminal facilities in the Puget Sound area. The bargaining unit includes leadman and first level foreman. The Grievant has been an employee of the Employer for

some twenty-five years.

The Employer is responsible for the operation of the Washington State Ferry System. The Employer's ferries transport automobiles, trucks and passengers on foot and bicycles from place to place in the Puget Sound area. The overall area in which this ferry system operates extends from Tacoma, Washington through Metropolitan Seattle and north at least to Anacortes. There are a number of terminals where cars and pedestrians board and disembark ferries, such as the one in downtown Seattle, Bremerton, Kingston, and Vashon Island. The Employer's main repair and maintenance facilities are located at Eagle Harbor. It must be noted that Eagle Harbor is a considerable distance from many of the other terminal facilities which are maintained by the Employer's employees.

Two of the Employer's maintenance groups are involved in this dispute. The Employer has what the parties refer to as a "carpenter shop" and a "lock shop." These are two separate facilities. However, there appears to be a fair amount of transfer of employees from one to the other. Several of the long-term employees who testified at the hearing stated they had worked both in the carpenter shop and in the lock shop. This is true even though the two shops are physically separated from each other.

There is another fairly unique feature of the employment relationship at

these facilities. Three employee classifications about which there was much testimony in this case are journeyman carpenter, lead carpenter, and carpenter foreman. All three of these classifications are in the bargaining unit. What is unique about this relationship is that the carpenter foreman and the lead carpenter appear to have more authority than foremen and lead men do under many contracts. In most contracts, a carpenter foreman would not be in the bargaining unit. The lead carpenter would not have any authority to discipline journeymen carpenters. However, under this contract, the lead carpenter and the carpenter foreman do have these kinds of responsibilities.

The arbitration hearing testimony centered around two fundamental sets of allegations. The first was that the Grievant failed to do his job as a carpenter foreman by failing to warn upper management that an employee named Mr. Nannery was coaching a high school baseball team when he should have been working. Another way of stating this charge against the Grievant is that the Grievant certified that Mr. Nannery had worked when, in fact, he had not. The second matter about which there was considerable testimony related to the Grievant's abrasive leadership style. Several employees testified that he was overbearing, intimidating, and a bully. It must be noted at the outset that this allegation and reason for demotion is not set out with any specificity in the September 1, 2009 notification of demotion. A charge of insubordination was

resolved in the grievance procedure. The testimony is summarized below in the order in which it was presented at the hearing.

Mr. Cleland is a carpenter lead man in the carpenter shop at Eagle Harbor. He supervises journeymen carpenters. He has been an employee for twenty years. He also served as a lead man in the lock shop for two years. He was a lead carpenter in the carpenter shop from 2000-2009, and he worked with both Mr. Nannery and a Mr. Gillespie. He said Mr. Gillespie, who had also been a carpenter foreman, was a good friend of the Grievant. For a time, the Grievant was the carpenter foreman, and Mr. Nannery was the carpenter lead man. For a time, Mr. Cleland was a lead man under the Grievant. He testified the employees in the carpenter shop did not like the Grievant. Communications between Mr. Nannery and the Grievant were very bad. He said the Grievant could be "hot or cold." He was difficult to get along with, and he was very negative. The Grievant and Mr. Nannery were at odds over many things. He testified about a meeting which was designed to "bury the hatchet." It is the Arbitrator's impression that Mr. Cleland was very hesitant to testify, and he "hedged" a good many of his statements. He said most of the journeymen carpenters would "rise to the occasion" despite the constant bickering between the Grievant and Mr. Nannery. He said he was required to endure unwarranted criticism from the Grievant. He felt the Grievant treated

him differently from the work group, in that he was sworn at, excluded and socially isolated, shouted at and humiliated, and was the butt of practical jokes. The Grievant created a bad working environment. He gave an example in which he said the Grievant tried to put him in a bad light for some work which was done on a cable at Vashon Island. The Grievant made a complaint against the witness for falsifying records, which he denied doing. After the Grievant was removed as the foreman in the carpenter shop, the working environment changed dramatically. The mood of the shop got better, and overall morale has improved.

Robert Orr is a general foreman at Eagle Harbor. He was formerly a pipe fitter and is still a Union member. He was the carpenter foreman well prior to 2009. Today he supervises the carpenter shop. Before the Grievant was demoted, he had to deal with him on a regular basis. He said people did not like the Grievant. The Grievant was not a pleasant person. He was not an upbeat person. His crew did not like him. They complained about the Grievant to him. He would say they could not do anything right. He would call employees stupid. He never took responsibility when something went wrong, and he frequently yelled at the employees. He said his other supervisors were more pleasant. Earlier that year there was a meeting with an electrical contractor. The Grievant simply ignored much of what was going

on, and on one occasion during this meeting he “blew up,” and one of the outside contractor personnel told him if the Grievant did not behave himself, he was going to leave the meeting. Orr said he reported this to his supervisor. He said the Grievant had a very short temper. He was always late to foreman’s meetings.

Mr. Orr said Mr. Nannery was the lead man under the Grievant. A whistleblower reported to state officials that Mr. Nannery was coaching a baseball team when he was supposed to be working. There was an investigation about falsifying payroll records. He said Mr. Nannery was taking sick leave to go to baseball games. Orr said he met with Vern Day, and Mr. Day told him to check it out. Day is the superintendent at Eagle Harbor. Mr. Day gave Mr. Orr a schedule of the games. He told Mr. Orr to check on Mr. Nannery, and he did. Mr. Orr went to some games, but the Grievant was not there. He decided to keep Mr. Nannery “in the yard” until quitting time. He said he never did catch him cheating on his records.

Orr said the Grievant and Mr. Nannery did not get along. If he asked the Grievant where Mr. Nannery was, he would say, “You call him.” The Grievant was supposed to know where he was. The Grievant complained to Mr. Orr about Mr. Nannery not being around. He said, “I told him to do his job and do something about it.” Mr. Orr said the conflict between the Grievant

and Mr. Nannery affected morale throughout the shop. Everyone was on pins and needles. The Grievant would make derogatory, demeaning remarks and be verbally abusive to his employees. He talked down to everyone. Mr. Orr said he agreed with the decision to demote the Grievant. He said morale in the carpenter shop has improved greatly since the Grievant is no longer around. Mr. Orr said the Employer has a bullying policy which the Grievant violated.

Dana Tatten testified for the Employer. He has been a carpenter for 16 years. He has also been in the lock shop. He has been a lead man for about a year. He worked under Nannery in 1997 and again in 2006. He worked for Mr. Nannery until he left. He was aware of the investigation of Mr. Nannery using sick leave to coach a baseball team. He said he worked with the Grievant a short period of time. He said it was difficult working with the Grievant. He said supervisors should know where the employees are. He said the Grievant is overbearing, intimidates, bullies, calls people names and calls others "fucking idiots" all of the time. The Grievant and Mr. Nannery did not get along. This created tension in the shop. Morale was bad whenever the Grievant was around. Morale has improved since the Grievant left.

Randy Kelly also testified for the Employer. He is the port engineer. He handles personnel and purchasing. He also said he handles jurisdictional disputes among the various crafts. The Grievant was a foreman when he came

to the Agency. Mr. Nannery was a terminal leadman. After the state auditor's report, the Employer did an internal audit and evaluation. Mr. Day handled the audit of Nannery's activities. Mr. Kelly was not in charge of the internal audit. Paul Brodeur handles most employee discipline. Foreman and lead men can do verbal warnings and letters of concern. More severe discipline goes to Mr. Day and Mr. Brodeur. Kelly said he tracked the Grievant's work. He monitors all foremen. Employer Exhibit 26 is his list of the Grievant's various problems. He said he has a form like Employer Exhibit 26 on all the foremen. He went into the Grievant's record in great detail. The state audit said Mr. Nannery used his computer improperly and that he falsified time sheets. He said the Grievant told management about Mr. Nannery's activities prior to the publication of the state audit report. The Grievant outlined his concerns with Mr. Nannery, who was his lead man. He said he could not keep track of Mr. Nannery. Mr. Kelly told the Grievant it was his duty to know where Mr. Nannery is at all times.

Joint Exhibit 5 is the Grievant's job description. Page 2 of that document states he was responsible for the time records of his employees and for knowing where his employees are. Mr. Kelly said he reminded the Grievant that it was his job to do that. All foremen have this duty. He said the Grievant told them more than one time about Mr. Nannery's coaching

activities. The Grievant could have disciplined Mr. Nannery but he never did.

After investigating the matter, the Employer decided to demote the Grievant two levels. Mr. Brodeur made the demotion decision after a meeting with Mr. Kelly and Mr. Day. Mr. Kelly said that given the seriousness of what Mr. Nannery did, disciplining him for stealing time would have been more severe discipline than the Grievant's authority

On cross-examination he said that Mr. Day told Mr. Orr to go out and check on Mr. Nannery and that no one told the Grievant to go out and see where Mr. Nannery was. He also said the Grievant should have talked to Mr. Nannery first and expressed his concern or have had a private discussion with Mr. Nannery about cheating on his time records.

Vernon Day also testified. He was the port engineer at Eagle Harbor. The Grievant and Don Gillespie came to his office saying that Mr. Nannery was coaching baseball and falsifying his time. Mr. Day had questions about the Grievant's motives in reporting Mr. Nannery. He knew the Grievant and Mr. Nannery did not get along. However, he said he was going to have the matter investigated. Mr. Day testified, "And I told them I had the money and resources to check on that and I did. I took action the next day. I asked my terminal general foreman to go out there and see what is going on out there, document it. If you need the overtime, it's there for you to use. He went up

three different times and never saw Jack at all.” He said he told the Grievant to solve his problem with Mr. Nannery and with Mr. Orr.

The state auditor’s investigation took nearly a year. The Employer decided to do an investigation of Mr. Nannery following receipt of the state auditor’s report. It pulled his timecards. Mr. Nannery admitted coaching baseball while on the clock. He was demoted for both computer fraud and time card fraud. Mr. Day interviewed everyone, including the Grievant. The Grievant knew about Mr. Nannery’s fraud. Tab 23. When questioned, Grievant said he did not care. Once he said, “I don’t give a shit.”

Paul Brodeur is the director of vessel maintenance. He appointed Mr. Day to his job. He learned about Mr. Nannery after the state audit began. He said Day called him and said the auditor was taking Mr. Nannery’s computer. The Employer’s internal investigation began after the Employer got the audit from the state. The Employer’s investigation focused on the Grievant. He said the Grievant showed a lack of supervisory skill and inappropriate auditing. Employees had expressed concern about this. Mr. Nannery was disciplined. He received a suspension and a demotion. What triggered the investigation of the Grievant was not monitoring Mr. Nannery’s time records. Mr. Day and Mr. Kelly were not on the ground checking on specific employees cheating, they were doing other things. Mr. Day and Mr. Kelly only audited the time cards.

Mr. Brodeur's discipline of the Grievant began with a pre-disciplinary meeting. Everyone involved was interviewed, including Day and the Grievant. The Grievant gave Mr. Brodeur a written statement. The Union representative was there. The Grievant did affirm what he told the Employer about Mr. Nannery, and that the Employer told him to do his duties. Joint Exhibit 6 is the Grievant's responses to Mr. Brodeur's questions.

Initially the Employer issued the Grievant a two step demotion. As part of a step 2 meeting, the Employer agreed to a one-step demotion. He said he looked at the Grievant's prior disciplinary record and decided the penalty was appropriate. He also disciplined Mr. Nannery. The demotion was appropriate given the bad relationship between the Grievant and Mr. Nannery. Putting Grievant in the lock shop worked. Morale in the carpenter shop improved.

The Grievant testified in his own defense. He said he had been an employee for 25 years and the carpenter foreman for about 13 years. He monitors employees and leadmen and directs crews. Leadmen would report to him where employees were working. He said both lead men and the foremen are responsible for accuracy of time records. Mr. Nannery was a terminal maintenance lead man. He did not work in the shop all the time. Supervisors visit all the terminals and work odd hours. Mr. Nannery would generally work at the terminals, not in the shop. He did not have to return to the shop to clock

out each day. He simply entered his starting and quitting times into the computer. He would also enter employees' names and times into the computer. He said he would not know if Mr. Nannery left work early. In essence, it was an honor system. He said he first became suspicious because of the "rumor mill" in the shop. Mr. Orr once called the Grievant about a window that had not been repaired in a toll booth, and he thought Mr. Nannery had done it. He had not. He said Mr. Orr did not want to discuss it in any further detail. He admitted he did not have a good way of checking on Mr. Nannery. He reported this to Mr. Orr, Mr. Day and Mr. Kelly. They said they would look into it. He said he stepped down when they became involved. He said he never heard any more about it.

Position of the Employer

The Employer initially states that the Grievant "was demoted from his employment with the WSF as a Carpenter Shop Foreman at its Eagle Harbor repair facility due to his repeated failure to adequately manage and supervise his workers, and to adequately verify the accuracy of their time cards." The Employer states the Grievant was disciplined under Rule 19 of its work rules for poor performance. There, poor performance is defined as "repeated failure to perform duties at the level or standard of your assigned position."

The Employer contends the factual background of this case arises out of the 2008 whistleblower investigation of Mr. Nannery's claiming to be at work while he was coaching a baseball team. The state auditor's report established that Mr. Nannery was at baseball games when he represented to the Employer that he was at work. The state auditor's report is dated May 11, 2009. At that time, Mr. Nannery was being supervised by the Grievant. As a result of the audit report, the Employer began its own investigation into the matter. The investigation was conducted by Mr. Day. Mr. Day reported his findings to Mr. Brodeur, the director of vessel maintenance. That document was provided to the Grievant.

One question asked all interviewees was whether the Grievant was a good foreman. The investigation of Mr. Nannery "morphed" into an investigation of the Grievant's supervisory skills and oversight of Mr. Nannery's conduct. The Grievant's performance was evaluated because of Mr. Nannery's improper actions. Everyone in the carpenter shop was interviewed. The Grievant was interviewed about Mr. Nannery's behavior and responded with such comments as, "I don't care anymore," and "I don't give a shit."

A pre-disciplinary meeting was held with the Grievant on August 11, 2009. On September 1, 2009, Mr. Brodeur demoted the Grievant two levels

from Carpenter Shop Foreman to Carpenter Shop Journeyman. The investigation showed the Grievant was aware that he knowingly signed Mr. Nannery's incorrect timesheets. It was the Grievant's responsibility to audit them for accuracy. Mr. Brodeur also believed the Grievant failed to appropriately supervise and communicate with his staff. In imposing discipline, Mr. Brodeur considered everything involved in the Mr. Nannery incident together with the Grievant's complete work history and personnel file. He felt a suspension would not improve the acrimonious atmosphere in the carpenter shop, so he demoted the Grievant.

The Employer agrees that the issue is whether it had just cause to demote the Grievant on September 1, 2009. It contends in determining whether it had just cause, the Arbitrator should consider the following: "(1) did the Employer follow appropriate procedures? (2) did the Employer prove its charges against the employee? and (3) is the penalty of demotion reasonably related to the seriousness of the proven charges, the employee's disciplinary record and any mitigating or extenuating circumstances?" The Employer concedes it has the burden of proving the Grievant committed offenses which justified discipline and the appropriateness of the penalty by a preponderance of the evidence. It argues the facts on which the demotion letter was based satisfy the requirement for just cause.

The Employer contends each element of just cause was met here. First, the procedure followed was appropriate. The Grievant had notice of the Employer's work rules and the consequences of non-compliance. The Grievant had received a previous warning regarding the Employer's job expectations in July, 2008. He had had some performance issues since at least April, 2007. The letter of warning (Joint Exhibit 9) also warned the Grievant that failure to meet the Employer's expectations would lead to further discipline, up to and including termination.

Joint Exhibit 5 specifies the Grievant's responsibilities in detail. It addresses his supervision of employees and the checking of timesheets for their accuracy and completeness. Foremen are expected to review in detail each employee's time sheet for accuracy. The Grievant had the responsibility of reviewing and verifying the accuracy of the timesheets of the employees he supervised. The Grievant was given training in how to do this. Moreover, the Grievant agreed to abide by the Employer's code of conduct when he became an employee. Violation of the first six rules of the code may result in immediate discharge. Violation of the next fourteen rules may lead to discipline up to discharge, and progressive discipline is provided for as well.

The Employer also argues the action taken against the Grievant was timely. On May 6, 2008, the state auditor's office initiated a whistleblower

investigation. Its whistleblower report is dated May 11, 2009. The Employer's investigation came after the conclusion of the audit. This is when Mr. Brodeur directed Mr. Day and Mr. Beddo to corroborate the findings contained in the SAO report. The Grievant was the first employee interviewed. He was interviewed on May 14, 2009. All of the remaining employees in the Eagle Harbor carpenter shop were also interviewed. The Grievant submitted a response and appeared at a pre-discipline meeting on August 11, 2009. Discipline was issued on September 1, 2009.

Next, the Employer contends the investigation was fair and that the Grievant was given a fair opportunity to explain his conduct. The investigative report of the Employer was thorough and fair. Mr. Day was familiar with the steps he and Mr. Beddo took during the investigation. The Grievant was given ample opportunity to respond to each of the allegations against him.

The Employer argues it has amply proved that the Grievant failed to perform the duties of his position. The Grievant admitted it was common knowledge in the carpenter shop that Mr. Nannery was not putting in full days because he was coaching baseball. He said he reported this to Mr. Day and Mr. Kelley and that they snickered at him. However, they testified he told the Grievant he had the money and the resources to investigate Mr. Nannery, and

he did. The next day he told Mr. Orr to document Mr. Nannery's activities. However, Mr. Orr was unable to corroborate the Grievant's claims. Mr. Orr testified when the Grievant asked him about Mr. Nannery not being at work as he should have been, Mr. Orr told him, "You're his foreman. You do something about it." Mr. Kelley testified he told the Grievant it was his responsibility to keep track of Mr. Nannery and to make sure he was working the proper number of hours. Mr. Kelley also said the Grievant was expected to make spot checks of Mr. Nannery's time keeping work.

Mr. Day summarized his reasons for disciplining the Grievant for failing to properly audit Mr. Nannery's time records:

Basically that the system down there was broken. The time sheet audit was broken. It wasn't done correctly. It needed to be fixed. An important function of each shop is to submit correct time. We needed to fix that problem and what do we need to do to fix it. [sic]

In addition, the Grievant had been told many times to improve his communication skills with employees in the carpenter shop and to work to improve the atmosphere there. He simply failed to do that. Based on the facts disclosed by the Employer's investigation, discipline was reasonable and even-handed. Mr. Brodeur was ultimately responsible for the level of discipline. The Employer contends he acted reasonably. The Employer then details seven instances going back to March 7, 2008 in which the Grievant harassed,

intimidated, bullied or belittled his employees, together with the Employer's actions taken with respect to each incident. Mr. Brodeur testified that he reviewed all of this information before deciding upon the level of discipline. The Employer also contends the Grievant never acknowledged any wrongdoing, nor did he accept any responsibility for his actions. He blamed Mr. Kelley and Mr. Day for his own decision not to follow up on his concerns about Nannery. Given the Grievant's unwillingness to perform his duties, Mr. Brodeur had no choice other than to demote him. The Grievant has had many years of experience as a Carpenter Shop Foreman and should be held to a high standard of conduct and accountability. The Employer relies on Stockham Pipe Fitting Co., 1 LA 160 (1945). Because the Employer did not violate the just cause standard, the demotion should be upheld.

Position of the Union

The Union's brief opens with the following assertion: "It would not be an overstatement to say that this case involves a cover-up to protect the Employer's senior management at Eagle Harbor." The Union notes that in early 2008, someone made a whistleblower complaint to the state auditor's office that Mr. Nannery was coaching baseball during working hours. When interviewed by the investigator for the state auditor's office, Mr. Day, the

senior port engineer, failed to inform the investigator that in 2008, the Grievant had told him that Mr. Nannery may have been coaching baseball during working hours. Neither did Mr. Day tell the state auditors when told of Mr. Nannery's activities that he had the money and the resources and could take care of the problem.

In May, 2009, the whistleblower report was issued confirming that Mr. Nannery had improperly accounted for his time several times in 2008. Then the Employer began its own "so-called investigation, ignored its own wrongdoing and negligence and blamed [the Grievant] for not preventing Jack Mr. Nannery from improperly accounted for his time." The Union notes the Employer spent most of its time during the hearing attempting to prove the Grievant was "not a very nice guy." All of this is in conflict with Mr. Day's July, 2008 assessment that he believed "does a great job as foreman in the carpenter shop." All of the evidence about the Grievant's personality would only be relevant to determine whether the level of discipline is appropriate. However, the Employer completely failed to establish that it had just cause to discipline him in the first place. The Union also argues what it calls a "huge hole" in the Employer's case, which is that the state auditor's office found Mr. Nannery had improperly accounted for his time in the spring of 2008, and the Employer disciplined the Grievant for failing to monitor Mr. Nannery's

timesheets in 2009. The Employer presented absolutely no evidence that Mr. Nannery did anything wrong in 2009.

The Union argues the Grievant was responsible for monitoring the time worked by employees in the carpenter shop. The Grievant reasonably relied on his lead men to tell him where the carpenters were actually working. The lead man in the carpenter shop was Mr. Nannery. He did not spend much time in the carpenter shop. He generally worked at the various ferry terminals around Puget Sound. This is substantially undisputed. Mr. Nannery was not required to report back to the carpenter shop at quitting time. He was permitted to enter his hours onto his computer. The Grievant would then check these hours to see if they were correct. The Grievant would have no way of knowing if the Grievant left work an hour or two early. That the employees worked on an honor system was substantially undisputed. Mr. Orr confirmed that even though a lead carpenter might be scheduled on a certain job, things could change during the day requiring him to leave the scheduled job.

It is undisputed that in early 2008 the Grievant told Mr. Day he suspected Nannery may have been coaching baseball while he was supposed to be at work. Mr. Day admitted the Grievant did so inform him. According to the Grievant, he also stated he would take care of the matter. There is no

dispute that Mr. Day had Mr. Nannery followed during 2008. The Union also notes Mr. Day was aware of Mr. Nannery's activities well before he initially admitted he knew about them. The Union argues in approximately May, 2008, Mr. Day was aware of the whistleblower investigation, yet he did virtually nothing. It was not until approximately April, 2009 that the Grievant was given a 2009 high school baseball schedule. Evidence that the Employer gave the Grievant instructions on monitoring Mr. Nannery's time cards is completely lacking.

The whistleblower report was issued on May 11, 2009. The whistleblower report did not deal with the 2009 baseball season. The Employer argued the investigation into Mr. Nannery led to an investigation of the Grievant. However, the Employer knew about Mr. Nannery's activities long before the whistleblower report was produced. Even though management acknowledged that Mr. Day is "ultimately responsible for everything that goes on at the facility," Mr. Brodeur accepted Mr. Day's recommendation that the problem with Mr. Nannery was the fault of the Grievant. It is apparent from Joint Exhibit 23 that Mr. Day never admitted to Mr. Brodeur that the Grievant was the one who initially reported that Mr. Nannery was coaching baseball during work hours. Mr. Day never told Mr. Brodeur that he never directly told the Grievant to investigate Mr. Nannery or to carefully check his time cards.

Mr. Day's primary motive in conducting his "investigation" was to protect himself. This was accomplished by shifting the blame to the Grievant.

The Union contends just cause is lacking for this discipline. The disciplinary letter of September 1, 2009 states in part:

Based on the investigation by SAO and the information I gained through out meetings I conclude that you were aware of Mr. Nannery's baseball schedule and you knowingly signed his incorrect timesheets as seen in Attachment 4—spreadsheet. Mr. Nannery took leave for thirteen (13) of forty-five (45) game days, leaving thirty-two (32) days where Mr. Nannery may have flexed his time but did not account for it on his timesheet. Mr. Nannery's baseball schedule was given to you in the beginning of the season in mid to late March, 2009.

It is undisputed that Mr. Nannery improperly reported his time in 2008. There is no evidence that Mr. Nannery ever improperly accounted for his time in 2009. Moreover, it is unlikely he would have since he knew about the state auditor's activities. Nevertheless, the Grievant was disciplined in connection with activities that Mr. Nannery probably never did in 2009. During the 2009 baseball season, Mr. Nannery provided Mr. Day with email accounts of his baseball schedule and vacation time. (Union Exhibit 4). This shows Mr. Nannery knew the Employer was watching his activities. Given the scrutiny from the Employer, it is doubtful Mr. Nannery would have improperly accounted for his time in 2009. Because the Employer failed to show that Mr.

Nannery did anything wrong in 2009, it could not discipline the Grievant for not performing his job in 2009.

Although the Employer disciplined the Grievant because he did not perform his required duties, the evidence is clear that he fulfilled his job duties when he reported Mr. Nannery's activities to Mr. Day. The Grievant's job description does state that he is to complete time cards, "checking for accuracy, clarity and completeness." The Grievant said he checked Mr. Nannery's time cards every time he turned them in. The problem was that Mr. Nannery was turning in false time cards. Moreover, the Grievant did not have authority to discipline Mr. Nannery for the kind of activity in which he was engaged. His job description states that "if offense is serious or repeated, report to management immediately."

The Employer's position that after the Grievant reported Mr. Nannery to Mr. Day it was the Grievant's problem to handle is factually incorrect and poor management. It is factually incorrect because Mr. Day said he would take care of it. Thus, it was not the Grievant's problem. Moreover, Mr. Day told the state auditor's office that he was going to follow Mr. Nannery and see if he did leave work early and that he was arranging for another manager to come over so he could leave the facility to follow Mr. Nannery. (Union Exhibit 3). Mr. Day never told the auditors he told the Grievant that following

Mr. Nannery was the Grievant's job.

The Union also argues that it does not appear that Mr. Day told the SAO investigator that Mr. Nannery had a direct foreman. Had the SAO investigator known this, he would have interviewed the Grievant. The Grievant, of course, would have told the investigator that he suspected Nannery was coaching baseball during working hours. This would have led the SAO investigator to inquire why Mr. Day had not taken care of the matter as he stated he would. Mr. Orr testified that Mr. Day told him to go to the ball field and check on Mr. Nannery. However, if the Grievant had been told by Mr. Kelley in the presence of Mr. Day that it was the Grievant's problem, Mr. Day would not have directed Bob Orr to visit the baseball field to check on Mr. Nannery. Mr. Kelley was aware of the fact that Mr. Day told Mr. Orr to go to the ball field and check on Mr. Nannery. Mr. Kelley never told the Grievant to go to the baseball park and check on Mr. Nannery.

Mr. Kelley testified that the Grievant reported the incident to "us." Mr. Day followed up by dispatching Mr. Orr to go to the ballpark and see if Mr. Nannery was there. (Tr. 154, ll. 8-10). Despite this testimony, Mr. Day testified that if the Grievant was having problems with Nannery, his next step would have been the general foreman's office to solve the problem at that level. Mr. Day denied that the Grievant brought the matter to Mr. Orr. This

statement is contradicted by the Mr. Nannery factfinding report by Mr. Day and Jackie Beddo. (Union Exhibit 1). That report states: "Last baseball season, Bob Orr, terminal general foreman, states that he was urged by [the Grievant] and lock shop leadman Gillespie to go to the baseball field on game days . . . and witness Nannery coaching during working hours." Mr. Kelley's testimony of what Mr. Day said and did is absolutely contrary to Mr. Kelley telling the Grievant that it was his problem. The Union also notes Mr. Kelley never documented that the Grievant told him of his suspicion that Mr. Nannery was falsifying time records. Neither did Mr. Kelley document the supposed instruction that it was the Grievant's responsibility to resolve the problem with Mr. Nannery. This is odd because Mr. Kelley took detailed notes about the Grievant being rude to his crew, yet Mr. Kelley wants the Arbitrator to believe he was not concerned enough about an employee committing time card fraud to make a single note about that.

Mr. Kelley testified the Grievant should have disciplined Mr. Nannery. He testified that foremen have the authority to issue oral or written warnings to employees. Clearly, an oral or written warning is not the proper discipline for time card fraud. The proper action was for the Grievant to report Mr. Nannery to higher management. This is what he did. That is what is required in his job description. Because the Grievant did exactly what his job description

requires, the Employer did not have just cause to discipline him.

Next, the Union argues it would have been impossible for the Grievant to confirm whether Mr. Nannery's time cards were accurate. Timekeeping is very difficult at this operation because of the physical location of the employees. It has historically been done on an honor system. It would be impossible for the supervisor in the carpenter shop to tell whether an employee working at another location left work early. If a leadman leaves early, it is especially difficult for a foreman to know. Even Mr. Day told the state auditor's investigator that carpenters have to estimate time for each day. Mr. Cleland testified that carpenters are required to predict the time a job will take, sometimes as much as two days in advance. He described timekeeping in this environment as a "challenge." The Grievant gave specific testimony about the difficulties of calculating the time it takes to do a job. Mr. Orr conceded that even though a person is scheduled to be on a certain job for a certain period, things change, and the employee is required to leave the scheduled job. The only way the foreman would know is if the leadman called the foreman or the foreman happened to call the leadman. Mr. Kelley also admitted to the difficulties in keeping specific track of the whereabouts of employees. The fact that Mr. Nannery carried a cell phone would really not help the Grievant in keeping up with where he was. At the end of the day, the Grievant had no way

of insuring that Mr. Nannery's time cards were accurate. When he suspected that Mr. Nannery was committing time card fraud, he reported this to management. There is nothing else short of actual surveillance he could have done to assure that Mr. Nannery's time cards were accurate.

Next, the Union contends the Grievant's style of management is irrelevant. Several Employer witnesses testified that the Grievant is not a very nice person. However, in an evaluation, Mr. Day said the Grievant was doing a great job as foreman, despite not being the nicest person in the world. The bargaining unit employees who testified against the Grievant had a motive to do so. Mr. Cleland was a friend of Mr. Nannery. However, their testimony is irrelevant to the question of whether the Employer had just cause for discipline. For these reasons, the Union requests that the grievance be denied.

DISCUSSION

Based on the provisions of the contract, the testimony given at the hearing, and the arguments of the representatives of the parties, the Arbitrator has concluded that the Employer lacked just cause to demote the Grievant from the position of carpenter foreman to carpenter leadman. Insofar as the case is related to the demotion, the grievance is sustained.

At the outset it should be noted that the Arbitrator makes no decision

with respect to the Employer's position regarding the Grievant's interpersonal supervisory skills. This matter was not specifically mentioned in the disciplinary letter to the Grievant dated September 1, 2009. There is no evidence from which the Arbitrator can infer that the parties by either a specific agreement or by their conduct agreed to include that matter within the purview of the grievance as filed. The Union's post-hearing brief characterized all of this evidence as irrelevant. The Arbitrator is also not making any decision on the issue of whether the Grievant should or may be transferred from the carpenter shop to the lock shop. Neither party introduced evidence regarding the Employer's authority to make such a transfer, and the Arbitrator expresses no opinion on that issue.

The September 1, 2009 notice of discipline charges the Grievant with poor work performance in that the Grievant failed to verify the accuracy of Mr. Nannery's time records. During the hearing, it became apparent that the Grievant did tell Mr. Day that he thought the Grievant was submitting falsified time cards. The weight of the evidence establishes that Mr. Day responded that he would take care of the matter. Without more, Mr. Day's assurance to the Grievant that he would take care of Mr. Nannery's misconduct would seem to provide the Grievant with a defense. However, there is much more to the story than this. The weight of the evidence established that the Grievant spent

most of his time in the carpenter shop and that Mr. Nannery spent a substantial amount of his time outside the carpenter shop and that he was not required to come to the carpenter shop every day to punch out on a time clock. It appears Mr. Nannery entered his time on a computer from wherever he happened to be when he left work. The Arbitrator thinks Mr. Day was fully aware of the general nature of the work schedules of both Mr. Nannery and the Grievant, and had he wanted the Grievant to go to the baseball field and check on Mr. Nannery, he would have given him specific instructions to do so, just as he did to Mr. Orr. Thus, the fact that the Grievant did not catch Mr. Nannery cheating on his time records is of no consequence.

The Union strongly asserted that management, by disciplining the Grievant, was attempting to cover up its own misdeeds. The Arbitrator is not convinced that this is the case. The state auditor's report did not seem to the Arbitrator to severely criticize the Employer's action in failing to uncover Mr. Nannery's misdeeds earlier than it did. Furthermore, it seems to the Arbitrator that disciplining the Grievant only provides the Union with a new forum in which to disclose management's shortcomings, if any. Thus, the Arbitrator does not accept the Union's argument that management punished the Grievant because the state auditor criticized it.

The Arbitrator also thinks that the Employer waited much too long to

impose discipline for its action to be consistent with just cause. Mr. Nannery's misconduct came to light in the spring of 2008. At some time in late 2008, the Arbitrator thinks Mr. Nannery probably learned he was under investigation. The Employer subsequently gave the Grievant a 2009 baseball schedule. However, no one introduced any evidence that Mr. Nannery was coaching baseball during business hours in 2009. Thus, the Employer knew about Mr. Nannery's misconduct in mid-2008 and waited to discipline the Grievant until September, 2009. This is inconsistent with the notion that an Employer should discipline employees in a timely manner.

During the hearing, the Union introduced some evidence about inconsistencies in the various statements of Messrs. Day, Orr and Kelley. The Arbitrator thinks the Union correctly analyzed those statements and testimony, a circumstance which also mitigates against there being just cause for the demotion.

The Employer contended that the Grievant should have disciplined Mr. Nannery. What Mr. Nannery did was a clear violation of Item 5 of the Rules of Conduct of the Employer. The Grievant's job description plainly states he is only authorized to issue oral and written warnings. Mr. Nannery's offense called for discharge. Under the Grievant's job description, the Grievant was required to report Mr. Nannery's misconduct to higher management and let

higher management discipline him. This is exactly what the Grievant did.

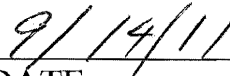
Within the limits noted above, the grievance is sustained.

AWARD

The grievance is sustained.



EDWIN R. RENDER
ARBITRATOR



DATE