BEFORE
JOSEPH V. SIMERI
ARBITRATOR

THE ARBITRATION	)	
	)	**FMCS Case No. 13-50421-3**
Between	)	
	)	
INDIANA MICHIGAN POWER COMPANY, SOUTH BEND DISTRICT,	)	
	)	**M_____, Grievant**
And	)	
	)	
LOCAL UNION 1392, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS.	)	

ARBITRATION AWARD

This dispute was arbitrated on March 20, 2013 in South Bend, Indiana. M_____ ("the Grievant"), and Local Union 1392, International Brotherhood of Electrical Workers ("the Union") were represented by Joseph D. Davis. Indiana Michigan Power Company ("the Company") was represented by Thomas H. Dawson. The Company and the Union presented witnesses and introduced evidence. Post-Hearing Briefs were submitted to the Arbitrator on May 24, 2013. This Award is issued within 30 days from the submission of the Post-Hearing Briefs.

RELEVANT CONTRACT PROVISIONS

The Company and the Union are parties to a Collective Bargaining Agreement called a "Local Agreement" which stems from a Master Agreement between American Electric Power, the parent of the Company, and a number of local unions, including Local Union 1392. The applicable provisions of the Master Agreement are:

ARTICLE II
MANAGEMENT AND UNION RELATIONSHIP

(a) Except as otherwise specifically limited in this Agreement, the company has the right to exercise the regular and customary functions of management, subject, however, to the employee's privilege of bringing a grievance as provided for in this Agreement.

(b) The rights, powers, and authorities mentioned in (a) above shall include but shall not be confined to the following:

> (3) The authority to hire, promote, demote or transfer, assign to shifts, maintain discipline and efficiency; and the right to warn, suspend, discharge or otherwise discipline employees for justifiable reasons.

ARTICLE XI
ADJUSTMENT OF DIFFERENCES

Section 3. Arbitration Procedure

(a) In the event of failure to satisfactorily settle or adjust any grievance

involving an allegation of a violation of a provision or provisions of the Agreements according to the foregoing grievance procedure, then within thirty (30) calendar days after the answer has been given in the Third Step, such arbitrable grievance may be submitted to arbitration in the following manner:

1. The Local Union shall within said thirty (30) calendar day period give written notice to the Company of its desire to arbitrate the grievance. Such written notice shall include, at a minimum, a statement of the remedy to be sought in arbitration, and the specific term(s) or provision(s) of this Agreement alleged to have been violated.

2. The Company shall then request a panel of seven arbitrators from the FMCS.

3. The Company and the Local Union then shall select an arbitrator from the panel or panels submitted by FMCS. Both the Union and the Company have the right to reject one entire panel.

4. The arbitrator shall hold a hearing on a date satisfactory to the Company and the Local Union, for the purpose of receiving such evidence as the Parties may have to present with respect to the grievance.

5. If a stenographic recording of the hearing is requested by either party, the cost or the original transcript shall be borne by the requesting party and a copy of the transcript shall be made available to the Arbitrator for his sole use. If the other party wants a copy of the transcript, it shall make such desire known before the close of the hearing and shall equally share the cost of the original transcript. No other electronic recording of the hearing other than the above shall be permitted.

6. Within sixty (60) calendar days after the receipt by the arbitrator of all arguments, documents and records pertaining to the grievance, he shall render in writing a statement of findings and a decision. Such decision shall be final and binding on both Parties.

(b) The arbitrator shall have no authority to:

1. add to, detract from, or in any way modify the terms of the Agreements, or

6. pass upon questions which do not involve interpretation or applications of a specific term or terms of the Agreements; or

(c) The Company and the Union shall each bear their own expenses and shall equally bear all compensation and expenses of the arbitration.

The Local Agreement contains the following applicable article:

ARTICLE II
SENIORITY

Section 3. Regardless of length of service, a complete loss of seniority shall be suffered by an employee who:

(b) Is discharged for good and sufficient reason;

The Company also published an "Employee Handbook," containing the following applicable provisions:

CORRECTIVE DISCIPLINE POLICY AND PROCEDURES

Rules of Conduct

…Any one of the following offenses or any self-evident breach of discipline not forbidden by any published policy or rule, but which is clearly harmful to the orderly conduct of the business, to the safety of employees or equipment, or which is against generally accepted standards of moral conduct, will be grounds for disciplinary action varying from written warning to discharge, depending upon management's judgment as to the seriousness of the offense:

19. Failure to report injuries and/or accidents immediately according to prescribed procedures.

American Electric Power also issued a document titled "Safety & Health Manual," effective May 2012. It provides, in part:

4. Employees at all levels of the organization are expected to be personally involved in the safety and health aspects of their work. Therefore, employees are responsible and accountable for:

Immediately reporting an injury/illness/accident, unsafe event, or unhealthful conditions.

ISSUE

The issue is whether in the language of the Local Agreement, the Grievant was "discharged for good and sufficient reason," or, in the language of the Master Agreement, whether the Grievant was discharged for "justifiable reasons." Whether

under the Local Agreement or the Master Agreement, the issue is essentially whether the Grievant was discharged for just cause and, if not, what is the appropriate remedy?

FACTS

The Company is an electrical utility. It is a wholly owned subsidiary of American Electric Power. The Union represents linemen, mechanics, production, and maintenance employees in Northern Indiana and Southwestern Michigan. The Grievant has been a lineman for the Company since April 2001.

On July 17, 2012, the Grievant was dispatched to perform service work at a home in South Bend, Indiana. An electrical-service pole was located in the backyard of the home. The Grievant noticed there was a burned-up connection at the pole. He then spoke with Mrs. H_____, the homeowner, and explained the problem. He also told her that the electrical pole was unsafe to climb, so it would be necessary to drive his service truck into her backyard to perform the repair work. Someone else from the Company would have to return later to replace the electrical pole. Mounted on the truck bed of the service truck is a telescopic aerial device or bucket, which allows an individual to elevate 30-40 feet in the air to perform work on electrical lines and poles. The truck is 94 inches wide, almost 8 feet. The Grievant and Mrs. H_____ discussed that the Grievant might have to trim a portion of her favorite tree on the corner of the house to be able to drive into the backyard. The backyard is fenced with a gate

providing entrance and exit. According to the Grievant, the backyard-fence gate was loose when the Grievant arrived at the home. There was a cement block next to the gate and benches in front of the gate. The benches had to be moved to enable the gate to be opened. It was agreed he would trim only that portion of the tree necessary to enable him to perform the electrical work. Mrs. H_____ went inside. The Grievant then drove his truck into the backyard, did his work, and prepared to leave. He tried to back the truck out, but the tree blocked his vision. So, he pulled forward, turned his truck around, and drove out. As he did so, his truck hit a tree branch, breaking it. The Grievant stopped his truck and used a chainsaw to trim that part of the tree where the limb had broken. The Grievant then placed the branches in the back of the truck with the other branches he had trimmed and drove off.

After the Grievant completed his work, Mrs. H_____, at first, saw the Grievant's truck leaving her property, but because of the configuration of the house and windows, lost sight of the truck. She then heard a very loud thud and "…actually kind of felt it shudder my house a little bit."

July 17, 2012 was a Tuesday. Mrs. H_____ made no complaint to the Company about any damage done to her property by the Grievant that day. She made no complaint of any damage done to her property by the Grievant on Wednesday, July 18, 2012. She made no complaint of any damage on Thursday, July 19, 2012.

Then, on Friday, July 20, 2012, about 1:30 a.m., in the early morning darkness, there was a loud knocking and pounding on Mrs. H_____'s door. She and her husband awakened from their slumber, and, naturally startled, looked out their bedroom window to see a Company employee standing on their front porch. Her husband, presumably in pajamas, opened the door, and even though the front porch light was on, was asked by the Company employee whether Mr. H_____ had power. Mr. H_____ responded, "You are standing under my front porch light." After some mumbling and grumbling, the Company employee left. The morning dawned. Mrs. H_____ made no complaint of damage to her fence or backyard that day. Mrs. H_____ made no complaint of any damage to her fence or backyard on July 21, 2012. Mrs. H_____ made no complaint of any damage to her fence or backyard on July 22, 2012. Mrs. H_____ made no complaint of any damage to her fence or backyard on July 23, 2012. Mrs. H_____ made no complaint of any damage to her fence or backyard on July 24, 2012. Then, on July 25, 2012, the Company's Complaint Log shows the Company received a telephone call from Mrs. H_____ stating that she was still having an outage problem that needed to be corrected. Further, she stated, three Company workers were there within days, and that "…2 guys were very nice, but a guy named Mike was very rude after he showed up at 1:00 a.m." Mrs. H_____ made nary a mention of any damage to her fence post or

backyard.

The Company searched its records to determine the identity of this "Mike" person. The next day the Company was able to identify the crewmember making the shortly after midnight visit to the H_____ home.

The Company gave this information to Bruce Langle. He is the Company supervisor of distribution systems and is "Mike's" supervisor and the Grievant's supervisor. Mr. Langle was directed to contact Mrs. H_____ to address her concerns. He was unable to reach Mrs. H_____ until July 31, 2012, when he spoke to her by phone. In the interim, July 27, 28, 29 and July 30, Mrs. H_____ still had made no complaint of any damage to her fence post or backyard.

Mr. Langle finally spoke to Mrs. H_____ on July 31, 2012 about "Mike," the Company's unwanted nighttime visitor. Mrs. H_____, for the very first time, mentioned in passing that she "didn't appreciate the fact that the first guy who was very nice didn't tell me that he damaged the fence post and rutted up my backyard." Based on this comment, Mr. Langle visited the H_____ property and saw damage to the fence post and ruts in the backyard. Yet, the Company's log entry describing the July 31, 2012 contact between Mr. Langle and Mrs. H_____ makes no mention of any damage to the H_____ property. In fact, the log concludes: "CSR's final follow-up confirmed customer satisfaction that the issues were addressed and appreciated

I&M's follow-through. Customer was informed that the complaint would be updated and closed."

Nevertheless, based on Mr. Langle's visit, the Company began an investigation. Pictures of the fence post and the H_____ backyard were taken. It examined the truck driven by the Grievant, finding a scrape on the side of the truck and concluded that a dab of red paint on the fence post matched red paint on the truck. The Company judged that the Grievant, when exiting the H_____ property, damaged the fence post and rutted her backyard.

The Grievant had made no report to the Company of any incident or damage to Mrs. H_____'s property. Concluding its investigation, the Company discharged the Grievant, effective August 4, 2012. The written reason for its decision set forth in the Discharge Notice was the Grievant's failure to report damage to customer property and Company vehicle.

ANALYSIS

What did the Grievant know, and when did he know it?

The Company fired the Grievant because the Company believes the Grievant failed to report damage to customer property and the Company vehicle. This offense requires proof of knowledge. I must be convinced the Grievant knew he drove his truck into Mrs. H_____'s fence post, knew his truck caused deep

ruts in her backyard, and purposefully kept this knowledge from the Company. The burden of proof rests with the Company. It is not the joy of proof. It is not the luxury of proof. It is the burden of proof. A burden is that which is borne with difficulty.

In most civil cases, the person bringing the lawsuit must prove the claim by a preponderance, or a greater weight, of the evidence. In some special civil cases, the burden may be greater than a preponderance. The burden may be to prove the claim by clear and convincing evidence. And, in a criminal case, the State must prove a violation of penal law beyond a reasonable doubt. But the terms "preponderance," "clear and convincing," and "beyond a reasonable doubt," unless explained, are simply conclusions, not roadmaps. Let me explain by a football analogy. I have carried my burden of a preponderance of the evidence if I carry the ball just over the 50-yard line. I have carried my burden of clear and convincing evidence if I carry the ball down to my opponent's 15 or 20-yard line. Beyond a reasonable doubt is a touchdown. This is a discharge case. There is no business more serious than discharge in the arbitral world. To deny the grievance takes more than a finding of a little more likely than not. The ball has to move further than one yard past mid-field. True, this is not a criminal case, so the Company does not have to score a touchdown. But, the Company must move the

ball to the Union and the Grievant's 10 or 20-yard line. I must be very convinced.

First, let me address the Union's claim that the discharge was motivated in significant part by the Grievant's position as a union officer and his involvement in a labor-management meeting where a Company policy had been challenged. I am not persuaded the Grievant's union activity had anything to do with the price of apple butter. There may or may not be a contentious relationship between the Company and the Union, but nothing presented in evidence persuades me that anti-union animus had anything at all to do with the Company's decision to discharge the Grievant.

Next, I address the question whether the Grievant reported the damage to Mrs. H_____'s fence post. Admittedly, he did not. Thus, if the Grievant knew he damaged the fence post and failed to report it, his failure to report would subject him to discipline.

Resolution of this case, then, turns on two major factual disputes. First, did the Grievant drive his truck into the fence post? And, if so, did he knowingly conceal this from the Company?

This arbitration was held in South Bend, Indiana. Yet, Mrs. H_____, who is a resident of South Bend, did not testify in person. She presented her evidence by telephone. In fact, the Company requested in a subpoena that she appear

telephonically. No explanation was given for her inability or unwillingness to appear in person. While I must give her testimony the same weight as if she did appear in person, it is more difficult to make credibility judgments over a telephone line.

There are significant problems with Mrs. H_____'s testimony. First, she has her days all wrong. The Grievant performed work on Mrs. H_____'s property on July 17, 2012. Yet Mrs. H_____ testified that her first encounter with a Company employee was when she and her husband were startled by the shortly-after-midnight visit from a Company employee. The Company records show that this nighttime encounter occurred three days later, on Friday, July 20, 2012, at about 1:30 in the morning. Mrs. H_____ testified that one day after this night visit, the Grievant arrived to repair the electrical pole in her backyard. It was during this visit that the fence post was allegedly damaged. If the fence post was damaged by the Grievant's truck, according to Mrs. H_____, it happened on July 21, 2012. But this cannot be. The Company's own records prove the Grievant worked at Mrs. H_____'s property on July 17, 2012, a full three days before she had her night visitor.

If the damage to Mrs. H_____'s fence post was caused by the Grievant's truck, it could only have happened on July 17, 2012. Yet, Mrs. H_____ did not

report the damage to her fence post or her yard on that day, or on July 18, or on July 19, or on July 20, or on July 21, or on July 22, or on July 23, or on July 24.

The Company next returned to Mrs. H_____'s property on July 25, 2012. Lineman Brent Schoenleber arrived in response to Mrs. H_____'s complaint that her electrical power was flickering on and off. He walked into her backyard through the gate and noticed the gate was loose. While he and his partner were working on the line, Mrs. H_____ came into the yard. He and Mrs. H_____ had a discussion. She did not mention, much less complain about, any fence post damage or ruts in her backyard lawn. Mr. Schoenleber did see some tire ruts in her backyard, but he described them as not very deep.

On that same day, July 25, 2012, Mrs. H_____ called the Company. The Company records state that Mrs. H_____ complained that she had three workers at her home within days, two of whom were very nice, but a guy named Mike was very rude after he showed up at 1:00 a.m. Mrs. H_____ made no complaint to Company about any damage to her fence or to her backyard. This was a full eight days after Grievant allegedly damaged her fence post. The Company followed up on Mrs. H_____'s complaint about the night visitor, which was still her only complaint. The Company's customer service representative again spoke to Mrs. H_____ by telephone on July 26, 2012. During this phone discussion, Mrs.

H_____ still did not say anything about damage to her fence post or rut damage to her backyard.

The very first time the Company received any notice from Mrs. H_____ that her fence post was damaged and that there were ruts in her backyard, was in a phone conversation between Mrs. H_____ and the Company Supervisor Bruce Langle. This was on July 31, 2012, a full two weeks after the only time the Grievant was on Mrs. H_____'s property. Indeed, I can reasonably infer from her testimony that she never intended to make any complaint. These are her words:

> So the only way that that complaint got put in, the fence post and the yard being tore up, was because the supervisor called me to see if the guy who beat on my door came to apologize when he showed up to fix my lines.
>
> And I said, No, he most certainly did not. Since then I have discovered my fence post was damaged and my yard is tore up.
>
> So that's how that complaint got in. (Tr. P.47)

How am I to reconcile the charge that the Grievant damaged Mrs. H_____'s fence post and rutted her backyard on July 17, 2012 with the fact that Mrs. H_____ did not even mention this significant event to the Company until July 31, 2012 and, then, only in passing? Adding to my bewilderment is Mrs.

H_____'s testimony that she mowed her lawn twice a week, and so she would have mowed her lawn at least two or three or four times between the time that the Grievant allegedly damaged her fence post on July 17, 2012 and the time she decided to "oh by the way" mention it to the Company. Surely you would reasonably think she would have noticed fence-post damage and backyard ruts during the many times she mowed her lawn. Yet she only mentioned it in her conversation with Mr. Langle on July 31, 2012, and then, only barely.

In its belief that the footprints in the snow lead to the Grievant, the Company points to Mrs. H_____'s testimony that on the day the Grievant was on her property and she was inside her home, she heard a very loud thud and actually felt like her home shuddered a bit. The only inference, says the Company, is that the Grievant's truck hit the fence post with such force that the Grievant must have known he had damaged Mrs. H_____'s property. Again, I find Mrs. H_____'s testimony difficult to accept. July 17, 2012 was not the night before Christmas, but with apologies to Clement Moore "…when out on the lawn there arose such a clatter, I sprang from the bed to see what was the matter. Away to the window I flew like a flash. Tore open the shutters and threw up the sash." That is exactly what you might expect someone to do if they hear, or feel, a thud loud enough to cause their home to shudder a bit. Yet, Mrs. H_____ did nothing. She did not

throw up the shutter, or even stick her head out the door. And this was the middle of the day.

Say I begin with the Company's position that the Grievant's truck struck the gatepost with such a force that it caused Mrs. H_____'s house to shudder a bit. But, if that were true, it is more than reasonable to infer that the entire fence, or a significant portion of it, would have been damaged. But the only damage to the fence itself, however and whenever it was caused, was to the gatepost. The post was simply a little loose. Indeed, when Mr. Schoenleber worked on the property on July 25, 2012, a week after the Grievant had been there, Mr. Schoenleber was still able to open the gate.

I give significant weight to the testimony of James Aldridge. Mr. Aldridge went to Mrs. H_____'s property sometime during the day on July 20, 2012. This was three days after the Grievant had been there, and only a few hours after Mrs. H_____ and her husband had been startled by the Company's nighttime visitor. Mr. Aldridge and Mrs. H_____ were in Mrs. H_____'s backyard. Mr. Aldridge saw tire impressions in her backyard. He could tell a truck had been there. But he didn't feel they were really ruts. In that conversation, Mrs. H_____ never complained to Mr. Aldridge about her fence post and the condition of her backyard. Mr. Aldridge walked through the gate. He did not notice anything. He

testified:

> She was real friendly. She never mentioned the fence, the gate, or the ruts. I would call them impressions. That's just me. (Tr. P. 149)

I do believe Mrs. H_____ heard something. But the sound may just have well have other explanations. The Grievant testified that he knocked a branch or two off one of the trees. A branch or two banging against the truck and the bucket could have certainly made a significant noise. But it requires a leap of faith, which I cannot muster, to accept the view that the gatepost and the fence were struck with such velocity that the house shuddered, but the fence and the fence post remained intact.

I must then weigh this evidence with the Grievant's testimony. He went to Mrs. H_____'s residence on a service call on July 17, 2012. He saw the utility pole was rotten and not safe for him to climb. Thus, he had no choice but to drive his truck into Mrs. H_____'s backyard so that he could use the boom on the truck to repair the connection. He did his work, but then found that he could not back the truck out the same way he came because of the tree adjoining the property. The tree made it impossible for him to see to back out. So, he had to drive forward into the backyard, turn around, and then drive out the way he came.

On his drive out, he admittedly broke a limb off of one of the trees, which he testified banged the truck bucket and "made a pretty good sound." After he exited through the fence gate, he had to stop the truck to saw off the limb that he had damaged.

The Grievant testified the fence post supporting the gate was loose when he arrived. There was a cement block propping up the fence gate and benches across the front of the gate. He had to move the benches to gain entry and exit. He closed the gate when he left. Mrs. H_____ was never asked why the cement blocks and the benches were adjacent to and in front of the gate, or when they were placed there. One could easily infer from the testimony that the fence post was loose before the Grievant arrived.

Even if the Grievant's truck did glance against the fence post, the Company must still prove he knew it when it happened and he tried to cover it up or intentionally chose not to report it. What would be the reason he would stay mum and hope for the best? It would be fear of discipline you say. But the evidence given me at the hearing is that the Company understands that some damage to customer property may, from time to time, occur as a natural result of using heavy equipment to perform necessary repairs, traveling, and resting upon residential property. Historically, the Company does not penalize employees for property

damage reasonably occurring from the performance of their duties. Thus, employees have no fear reporting property-damage incidents reasonably arising out of their work. Unless the property damage is caused by a willful or intentional act, there is no reason not to report it. If the Grievant knew he damaged the gatepost and the backyard, he would not have suffered any adverse consequences by reporting this to the Company. His uncontradicted testimony on this point is:

> If you have to do something in the line of your work, damage happens, customer is not happy or whatever just tell the truth. That's part of the job. Sometimes you've got to drive off a road.
>
> So there's no reason I wouldn't tell them what I did. I've damaged trucks and called them. I've left ruts in yards and called them. I've been the crew leader when somebody else damaged a yard on my crew. I called Mary, our damage claims lady. It's not a big deal. (Tr. P. 240)

FINDINGS

I am reasonably convinced and find from the testimony and exhibits submitted that:

1. The Grievant performed electrical repair work on Mrs. H_____'s property on July 17, 2012.

2. In doing that work, he drove the Company's truck into Mrs. H_____'s backyard.

3. When he completed his work, he did not back the truck out the same way he came because a tree obstructed his vision.

4. The Grievant had to drive forward, turn his truck around, and drive out the way he came.

5. When he entered the backyard, he had to open a fence gatepost. The gate was operable, but loose. There was a cement block next to the gate, and there were benches in front of the gate that he had to move to open the gate.

6. In exiting the property, his truck struck some low-hanging tree branches resulting in a thud and a loud noise.

7. In exiting the yard, his truck may have scraped the side of the gatepost and may have caused loosening or additional damage to the gatepost.

8. Even if the Grievant's truck hit or scraped the fence gatepost, he did not know that he had caused damage to the fence gatepost.

9. Any ruts caused by the Grievant in performing his work were minimal and not subject to any reporting requirement.

10. Mrs. H_____ had ample opportunity to observe any damage to her fence gatepost and yard for at least two weeks from July 17, 2012 to July 31, 2012.

11. Despite this, Mrs. H_____ herself never initiated any complaint to the Company alleging damage to her gate fence post or yard.

AWARD

Therefore, I make the following Award:

1. The grievance is sustained. The Company did not have justifiable cause to discharge the Grievant.

2. The Grievant is reinstated to employment with the Company, without loss of any seniority.

3. The Grievant shall be reimbursed for any pay or fringe benefits that he would have earned during the period from the date of his termination to the date of his reinstatement, less all employment earnings during such period from all other sources whatsoever.

4. I retain jurisdiction to determine any dispute concerning the amount of pay and benefits to which the Grievant is entitled under this Award.

5. The Company and the Union must pay the Arbitrator his fee and expenses as provided in the Collective Bargaining Agreements between the parties.

Dated: June 12, 2013

s/Joseph V. Simeri

_____

Joseph V. Simeri, Arbitrator