BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
TEAMSTERS "GENERAL" LOCAL UNION NO. 200	
and	Case 10 No. 43306
GENERAL BEVERAGE SALES COMPANY - OSHKOSH	A-4564

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Mr. John Brennan, appearing on behalf of the Union.
Boardman, Suhr, Curry & Field, Attorneys at Law, by Mr. Paul Hahn, appearing on behalf of the Company.

ARBITRATION AWARD

The above captioned parties, hereinafter the Union and Company respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing, which was not transcribed, was held on February 19, 1990, in Oshkosh, Wisconsin. The parties filed briefs in the matter which were received by March 5, 1990. Based on the entire record, I issue the following Award.

ISSUE

The parties stipulated to the following issue:

> Was the grievant, David Stearns, discharged for just cause within the meaning of the agreement? If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISION

The parties' 1988-90 collective bargaining agreement contains the following pertinent provision:

ARTICLE IX

DISCHARGE OR SUSPENSION

> Section 1. The Employer shall not discharge or suspend any employee without just cause and shall give at least one (1) warning notice of the complaint against such employee to the employee, in writing, and a copy of same to the Union steward, except that no warning notice need be given to an employee before he is discharged if the cause for such discharge is dishonesty, drunkenness, drinking on the job or use of illegal drugs on the job, or recklessness resulting in serious accident while on duty, or the carrying of unauthorized passengers. Copies of warning letters or letters of discharge or suspension shall be sent to the Union as well as employee and steward. The warning notice as herein provided shall not remain in effect for a period more than nine (9) months. Discharge or suspension must be by written notice to the employee and the Union steward. Any employee desiring an investigation of his discharge, suspension or warning notice must file his protest in writing with the Employer and the Union within five (5) days, exclusive of discharge or warning notice. The discharge, suspension or warning notice shall then be discussed by the Employer and the Union as to the merits of the case. Should it be mutually agreed between the Employer and the Union that the employee has been unjustly discharged, or suspended, he shall be reinstated and compensated for all time lost. New employees during the probationary period shall have no appeal in cases of dismissal.
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FACTS

The Company is a wholesale distributor of beer, wine, and liquor. The

grievant, David Stearns, was employed by the Company for 41 years before he was terminated on November 13, 1989. 1/ He was the most senior employe in the bargaining unit. Stearns was formerly a beer truck driver for the Company who became a warehouseman three years ago. In this position he received and stocked shipments of liquor, cleaned the warehouse and helped maintain product inventory. Additionally, Stearns delivered daily bank deposits for the Company. Stearns received a written warning on June 1, 1989 for failing to accurately maintain inventory records.

The Company allows employes to purchase old beer and dented/damaged canned beer for $4.20 a case. The procedure for buying such beer is as follows: employes first advise beer warehouse employe Paul Ulrich or a supervisor that they wish to purchase old or dented/damaged canned beer; then they complete an invoice for the beer and pay for it in the office. Prior to the Fall of 1989, employes could charge beer to their next paycheck, but this policy was changed in October, 1989 so that employes had to pay for it immediately. Under no circumstances is beer to be taken from the warehouse without an invoice showing payment.

Stearns knew that employes had to pay for the beer they took and he was a regular purchaser, usually a case a week. He normally bought beer on Friday, which was the same day he received a weekly gas allotment of a dollar per day for delivering the Employer's daily bank deposits. He sometimes paid for the beer with his gas money. In doing so, Stearns would tell Jody Dreier, the office person who handles employe beer purchases, how much beer he wanted to buy and then he would pay cash for it immediately; he never charged his beer purchase to his next paycheck. Oftentimes Stearns placed the beer that he intended to take home by the warehouse door. On some occasions his supervisor (Ed Christenson) inquired whether the beer Stearns placed by the door had been paid for, but prior to the incident involved here Christenson never checked on whether Stearns actually paid for the beer he took. At the hearing, Stearns admitted he had "probably" taken beer before without paying for it.

At 7:00 a.m. on Friday, November 10, the grievant asked Paul Ulrich whether there was any dented beer available for purchase and was told there was not. Stearns then went to the room in the warehouse where old beer is apparently always available and took a case. He carried this old beer through the warehouse, past a group of beer truck drivers, out the warehouse door and to his car in the parking lot. As Stearns was walking to his car, Christenson happened to pull into the parking lot and see him carrying the beer. Christenson testified that what attracted his attention to Stearns in the first place was that Stearns did not take a direct path to his car but instead took an indirect path which included walking around a truck. Stearns testified he took a direct path to his car and did not see Christenson in the parking lot.

After seeing Stearns put the beer in his car, Christenson went into the warehouse and asked two employes, Paul Ulrich and Mark Otto, if they knew anything about the beer Stearns had just taken. Ulrich replied in the negative and said that Stearns had not asked him about taking any beer.

Christenson then went to the Company office and asked Jody Dreier if Stearns had paid for or completed an invoice for a case of beer. Dreier replied in the negative. Christenson checked back with Dreier several times during the course of the day asking her each time if Stearns had paid for a case of beer and was told each time he had not.

Later that morning Christenson asked Dave Kopina, the Company's general sales manager, to be a witness and go out with him into the parking lot and look in Stearns' car for the beer, which they did. Upon doing so, both observed two twelve packs of Miller Genuine Draft beer in the front seat of Stearns' car.

At lunch time, Stearns went home for lunch as was his usual practice. There he dropped off the beer and ate lunch. Afterwards he went to the bank and dropped off the daily bank deposit and then returned to work.

That afternoon, Christenson checked Stearns' car again and discovered that the beer was no longer there. He then called the Company's Madison office and advised Richard Karls and Joel Minkoff, both Company vice-presidents, of the unfolding events with Stearns. Christenson was told to wait until Monday before taking any action in order to give Stearns every opportunity to pay for the beer.

Late in the day Christenson signed Stearns' weekly gas slip. Stearns took the signed gas slip to Jean Miller, the office person who handles this responsibility, but she was unable to pay him the $4.00 involved for his weekly gas allotment due to a lack of petty cash. Miller told Stearns she would pay him the gas money the following Monday. Stearns could have asked at that time to have his gas allotment used as credit toward the case of beer but he did not. Stearns never paid for the beer that day or completed an invoice for it.

1/ All dates hereinafter refer to 1989.

Stearns testified at the hearing that he did not think he needed to pay for his beer that day because he would do it on Monday, November 13. He further testified that another reason he did not pay for the beer that day (Friday) was that he only had $2.00 on him. Stearns received his pay check that afternoon.

On Monday morning, November 13, Stearns picked up his $4.00 gas allotment from Jean Miller about 7:30 a.m. During the course of that day Christenson asked Dreier and Miller several times whether Stearns had paid for the beer or completed an invoice and was told each time that he had not. That afternoon Christenson sent Stearns home to get the $300 he had agreed to pay a rental company for damage to a shop vac that arose in an unrelated incident. Stearns returned to work with the $300 in cash.

As of 4:00 p.m that day, the end of his shift, Stearns had not paid for the case of beer or completed an invoice for it. Christenson called Stearns into his office and told him he wanted to talk about two things: 1) Stearns' use of bar syrup (a sweetener used in making mixed drinks) and 2) the case of beer. At this meeting Christenson confronted Stearns with a half empty bottle of bar syrup from the Employer's inventory that Christenson had found hidden in the warehouse. Stearns admitted that he opened the bottle of bar syrup in question (which has a value of about $1.50) and used it to sweeten his coffee. He further acknowledged that he had done so even though Christenson had previously advised him not to do so. Stearns indicated to Christenson that he did not think his using the bar syrup in his coffee was that big a deal. Next, Christenson asked Stearns if he had taken a case of beer home the previous Friday and Stearns admitted that he had and that he had not completed an invoice for it. Then Stearns said: "oh, I forgot to pay for it", whereupon he got out his wallet and gave Christenson $4.20 for the beer which Christenson accepted. Christenson then told Stearns it was too late in that he did not believe that Stearns simply forgot to pay for the beer, but rather that he intentionally took it without paying. Christenson told Stearns he was fired effective that day for theft and that he could come into the office the next day to pick up his discharge letter. On Tuesday, November 14, Christenson wrote the following discharge letter:

> This letter is a follow-up to our conversation yesterday. During that meeting you admitted to taking a case of beer home on Friday November 10th without paying for it. You also admitted taking bottles of bar syrup from our inventory after you were told very explicitly not to do so.
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> For these reasons you are being discharged from employment with General Beverage effective November 13, 1989.

There is nothing in the record to indicate management knew of any other theft of the Employer's product, other than the case of a bargaining unit employe named Ed Weiler who was discharged several years ago for taking a bottle of liquor from the Company's premises without paying for it. At the time he was discharged, Weiler was number two in seniority with two years less service than Stearns and had over 36 years with the Employer. There are no other instances in the record where an employe was fired for theft.

POSITIONS OF THE PARTIES

It is the Union's position that the Company did not have just cause to discharge the grievant. According to the Union, the Company bears the burden of proving beyond a reasonable doubt that the grievant is guilty of the theft of the beer. In the Union's view, the evidence herein does not substantiate that charge. In the event the arbitrator is unwilling to embrace the "beyond a reasonable doubt" standard the Union contends the Employer failed to prove the grievant's intent (specifically that the grievant intended to take the beer without paying). The Union contends the record supports the grievant's claim that he simply forgot to pay for the beer. In this regard the Union cites the fact that the grievant was not secretive about taking the beer because he did so in full view of other employes, admitted taking both the beer and the bar syrup and made immediate restitution once he was reminded. Thus, the Union argues there is no evidence of a willful theft of the beer. Next, the Union contends that the procedure by which employes were allowed to purchase beer was very lax - at least prior to the grievant's discharge - despite Christenson's claim to the contrary. In the Union's view, Christenson's contrary testimony reflects poorly on his credibility so the grievant's testimony should be credited over Christenson's. Finally, the Union submits that the grievant's past record does not warrant discharge. It characterizes the grievant as a "good and honest" employe with a "clean" work record. In its opinion, the penalty assessed here does not fit the crime. It distinguishes the Ed Weiler discharge from the situation involved here. The Union cites numerous arbitrators who have voided discharges of employes found guilty of stealing based on their long length of service with the employer and requests this arbitrator to follow their lead. According to the Union, it would be unjust, illogical and punitive to sustain the discharge of an employe of 41 years of service based on a foolish momentary lapse which caused little or no harm to the Employer. The Union therefore requests that the grievant be reinstated

with a make-whole remedy.

It is the position of the Employer that it did not violate the parties' collective bargaining agreement by discharging the grievant. According to the Employer, it has proven by clear and convincing evidence that the grievant took a case of beer without paying for it and also took bar syrup after he had been specifically warned not to do so. In the Employer's view, the grievant never intended to pay for the beer. In support thereof it notes that the grievant was given ample opportunity (4 days) to prove the Employer wrong and pay for the beer, but he did not. While he did pay after he was caught, payment after the fact should not excuse theft. The Employer further believes that the grievant did not simply forget to pay for the beer as he asserts. Instead, the Employer contends that the grievant's own testimony expressed an attitude of an employe who really did not care and who felt taking beer and bar syrup was due him, perhaps because of his 41 years of service. The Company submits that the grievant knew the procedure for obtaining beer because he did so on a regular basis (i.e. get a voucher for the beer and pay for it in the office), yet he failed to do so here. The Company expressly disputes the Union's assertion that employes could take beer on some type of honor system or pay for the beer when they got around to it. The Company further argues that no real case was made to the arbitrator to get the grievant's job back. In this regard the Employer notes that the Union did not offer any testimony in support of the grievant, nor did it offer any testimony concerning mitigating circumstances as to the grievant's personal or financial situation. In its view, the lack of such mitigating factors offers no support for modifying the Employer's action (i.e. discharge). Finally, the Employer submits that the grievant's theft should not be excused simply on his length of service. Instead, it argues the grievant's length of service does not matter because he was on notice from the Ed Weiler discharge several years ago that the Employer considers theft to be theft, no matter what the amount involved or the employe's length of service. The Company therefore contends that the grievance should be denied and the discharge upheld. In its view to hold otherwise would weaken a consistent resolve by the Employer to weed out theft and insure that the demoralizing problem of theft would not be present.

DISCUSSION

The stipulated issue requires a determination whether the Company had just cause to discharge the grievant. Two separate, although inter-related, considerations are involved in such a determination. The first is that the Company demonstrate that the grievant committed acts in which the Company has a disciplinary interest and the second is that the Company show that the discipline imposed reasonably reflected its disciplinary interest in the grievant's conduct.

The Employer discharged the grievant for alleged on-duty theft (namely taking a case of beer and using bar syrup). 2/ Unquestionably the most serious of these charges is that dealing with the beer; the bar syrup matter was simply lumped together with the beer incident for purposes of imposing discipline herein. There is no question that theft can constitute dishonesty and the parties' collective bargaining agreement provides that an employe may be discharged for dishonesty without a prior warning notice. The Company also has an express work rule prohibiting theft. Even if there were no explicit work rule prohibiting theft, it is implicit that employes are not to steal from their employer. Theft is of such a nature that the mere occurrence of the act gives rise to a presumption that the Employer's business is adversely affected. Certainly the Company has a legitimate and justifiable concern with, as well as a direct interest in, preventing employe theft. The issue here regarding the first element of the just cause determination turns, then, not on the Company's interest in preventing theft by its employes, but instead on whether the grievant in fact committed theft.

The grievant admits to taking a case of beer without paying for it and also using bar syrup after having been expressly told not to do so. Given the foregoing then, there is no question that the grievant took the beer and used the bar syrup as charged. Although the Union contends that the procedure by which employes bought beer was lax, the undersigned does not consider this point, even if true, to be of overriding importance herein. Instead, in my view the critical issue with regard to the beer concerns the grievant's intent when he took it, specifically whether he intended to pay for it. The grievant contends that he did while the Company disputes this assertion.

In resolving this critical question, it is noted that the following aspects of the grievant's conduct on Friday, November 10 and Monday, November 13 are not consistent with his contention that he was going to pay for

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2/ In its opening statement at the hearing, the Union inferred that these reasons were simply a pretext for the grievant's discharge. It asserted that the Company wanted the grievant to retire because he was slowing down, so it took this opportunity to get rid of him. No evidence concerning this contention was produced though. That being the case, this contention simply has not been substantiated.

the beer but simply forgot.

First, the grievant oftentimes placed the beer he intended to purchase by the warehouse door until he left. Here, though, he did not do that but instead took it directly to his car at the start of his shift. The grievant never offered any explanation why he did not leave the beer by the door to take later or what the rush was in getting the beer to his car so early in the shift. It would be understandable to claim dented beer first thing in the morning and not leave it by the door where others could get it inasmuch as dented beer is considered preferable to old beer and apparently is available on a first come, first serve basis. However, no dented beer was available on the morning in question so the grievant took old beer, which apparently is readily available at all times. That being so, there was no need that the undersigned can see for the grievant to be in a rush to take old beer to his car.

Next is the way Stearns walked to his car that Friday morning with the beer. The grievant testified he walked directly to his car with the beer but this testimony was disputed by Christenson who testified that Stearns took an indirect path to his car which included walking around a truck. While the way a person walks to their car in a parking lot is not normally important, it is significant here because it caused Christenson to conclude that Stearns did not want to cross paths with him in the parking lot or be observed carrying the beer. After weighing this conflicting testimony, the undersigned credits Christenson's testimony on this point since his self interest in this matter is not as great as the grievant's. Moreover, this was the initial incident that aroused Christenson's suspicions in the first place that Stearns did not want to be seen taking the beer to his car.

Third, it is noted that the grievant had several opportunities on Friday, November 10 and Monday, November 13 to pay for the beer if he intended to do so. On Friday afternoon he requested his gas money from Jean Miller in the office and this mention of exchanging money could have jogged his memory that he owed the Company money for the beer. Likewise, his receipt of $4.00 in gas money on Monday morning could again have reminded him that he owed the Company a like amount ($4.20) for the case of beer, especially since he sometimes paid for beer with his gas money. Finally, even if the grievant did only have $2.00 on him on that Friday as he testified, he brought $300 in cash with him on Monday afternoon to pay for the damaged shop vac. That transaction (specifically paying the Company a sum of money) could also have reminded him that he owed additional money to the Company for the beer.

Although the parties disagree over whether the standard used in deciding the question of the grievant's intent (with regard to the beer) is "beyond a reasonable doubt" (as proposed by the Union) or "clear and convincing evidence" (as proposed by the Company), the result herein is the same under either standard. This is because the above noted factors convince me that the grievant never intended to pay for the beer. Foremost in reaching this conclusion is that I have credited Christenson's testimony that Stearns attempted to avoid being seen by Christenson in the parking lot by taking an indirect path to his car. This testimony leads to the inescapable inference that Stearns was attempting to hide something from Christenson (namely the beer) as he walked to his car. If Stearns had paid for the beer he would have had no reason to hide it. However, the fact that he attempted to be secretive about carrying the beer to his car leads me to conclude that the grievant knew what he was doing was wrong and he was simply trying to avoid getting caught. Therefore, it is held that when the grievant took the beer that Friday morning he never intended to pay for it. That being so, the grievant committed theft from the Company by taking the beer without payment.

Having concluded that the grievant engaged in the conduct complained of (theft), the undersigned turns to the question of whether this conduct warranted discipline. The grievant was aware of the Company's work rule prohibiting theft and further knew he was not to take beer without paying for it, yet he did so anyway. The fact that the grievant paid for the beer just before he was fired does not excuse his conduct. This is because payment after being caught does not excuse theft. As a result, it is held that the grievant's theft of a case of beer constitutes misconduct warranting discipline.

In light of this conclusion that cause existed for disciplining the grievant for the above noted misconduct, the question remains whether the punishment of discharge was proper. As noted by the parties in their briefs, arbitrators have differed greatly over the discipline imposed for theft. Obviously, discharge for the theft of of a case of beer costing $4.20 and bar syrup of minimal value is an extremely harsh penalty, especially for an employe with 41 years of service. Employer representatives indicated they took a hard line here, as they had in a previous instance involving employe theft (the Weiler situation) because theft and pilferage in the liquor distribution business is a critical problem. With regard to the Weiler situation, the record indicates that he was discharged several years ago for the theft of a bottle of liquor. Although the Union distinguishes that case from this one, I am not persuaded that the Weiler situation is distinguishable. In my view, it is directly on point both in terms of the crime itself and the punishment imposed. Other than the Weiler incident, there is nothing in the record

indicating that the Employer ever knew, or had been advised of, any other theft of the Employer's beer or product. That being so, it does not appear that the grievant herein was subjected to any disparate treatment in terms of the punishment imposed.

The final and admittedly most difficult factor in reviewing the penalty imposed herein concerns the grievant's length of service. In reaching my decision herein it is expressly noted that I have considered the grievant's 41 years of service with the Company as a mitigating factor. This factor though has not been deemed sufficient to overturn the Employer's action for the following reasons. First, the Weiler discharge is applicable on this point as well because it established that the Company was taking a strong stance on employe theft irrespective of the employe's length of service. In that case the Company determined that Weiler's lengthy service (36 years) was not sufficient to save his job. That being the case, the Company's decision to reach the same conclusion here for a 41 year employe was not capricious or without precedent. Second, although the Union contends that the grievant's past record does not warrant a discharge, the grievant's total employment history with the Company is not part of the instant record. As a result, there is no basis in the record for the undersigned to objectively assess the Union's characterizations of the grievant. However, even if the grievant was a good employe with a clean work record as asserted by the Union, nowhere in the labor contract does it state that theft will be excused based on length of service or overall good work record. To the contrary, the contract expressly provides for summary discharge for dishonesty. Finally, it cannot be overlooked that the grievant testified at the hearing that he had "probably" taken beer before this incident without paying for it. In other words, this was simply the first time the grievant was caught taking beer without paying for it. Given these factors, the undersigned declines to reduce the penalty imposed. Accordingly, it is held that the severity of discipline imposed here (i.e. discharge) was reasonably related to the seriousness of the grievant's proven misconduct.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the grievant, David Stearns, was discharged for just cause within the meaning of the agreement. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 2nd day of May, 1990.

By _____
Raleigh Jones, Arbitrator