BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
TEAMSTERS LOCAL UNION NO. 662	
and	Case 41 No. 43585 A-4595
COCA COLA BOTTLING COMPANY	

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Mr. William Kowalski, appearing on behalf of the Union.
Carroll, Parroni, Postlewaite, Graham, Pack & Bertling, S.C., Attorneys at Law, by Mr. Jack Postlewaite, 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 April 9, 1990 in Wausau, Wisconsin. The parties filed briefs in the matter which were received by May 7, 1990. Based on the entire record, I issue the following Award.

ISSUE

The parties were unable to agree upon the issue and requested the Arbitrator to frame it in his Award. The Arbitrator frames the issue as follows:

> Did the grievant's discharge violate the parties' collective bargaining agreement? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1989-91 collective bargaining agreement contains the following pertinent provisions:

> ARTICLE I
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> DEFINITION AND RELATIONSHIPS
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> 1.5 Employment Relationship. The employment relation-ship as between the Company and each individual Employee shall be at the will of the Company and of said Employee and shall not be for any fixed term, but shall otherwise be governed by the provisions of this contract. Copies of this contract will be furnished all present and future Employees in said Bargaining Unit and all such Employees, whether members of the Union or not, will be deemed to have applied for an (sic) accepted employment under and will be bound by the provisions of this contract.
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> . . .
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> ARTICLE X
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> SUSPENSION DISCHARGE - UNION ACTIVITIES AND AUTHORITIES
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> 10.1 House Rules - Warning - Discharge. It is recognized that to operate safely and efficiently, the Employer shall enact house rules and working rules and shall provide penalties for violation thereof. No regular Employee shall be discharged without at least one (1) written warning notices (sic) from the Employer, a copy to the Union, except in cases of dishonesty, intoxication, drinking on the job, willful neglect, destruction of Company property, or for refusal to perform his duties, in which case the Employer shall have the right to discharge an Employee summarily.
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> When a warning notice is given against any Employee, said notice shall be in effect for a period not to exceed six (6) months after date of issue.
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> All discharge (sic) shall be discussed in advance with the Steward and Business Representative of the Union,

except those specified hereinabove.

The Company further agrees that when an Employee shall be discharged for any cause other than those enumerated above as a result of the receipt of two (2) notices within a six (6) month period, the Company will, at its election, either (1) give said Employee at least one week's notice in advance of the discharge, or (2) pay such an Employee an amount equal to 40 times his regular straight time hourly rate, it being understood and agreed that the Company may elect to give notice or to make payment as above provided and that the sole right of the Employee if the cause for discharge assigned by the Company shall not be sustained, shall be to collect and recover the above provided for sum equal to 40 times his regular straight time hourly rate.

FACTS

The grievant, Lee LaVake, was employed by the Company for 23 years before he was terminated on January 22, 1990. At the time of his discharge, the grievant was working as a driver/deliveryman. His job involved delivering presold products to locations such as grocery and liquor stores, convenience markets, etc. He did not sell the product but rather simply delivered it and maintained the product display at each location. LaVake was discharged for unsatisfactory work performance, specifically taking excessive time in making deliveries.

The Company has established a delivery schedule, also known as an itinerary sheet, which is given to drivers each morning advising them of the stops to be made that day. This schedule tells the driver how many cases of product are to be delivered to each stop on his route, as well as the anticipated time to be spent at each stop. The time standard contained on the itinerary sheet is not a hard and fast rule so some leeway is allowed. The itinerary sheet includes spaces for each driver to record the time spent servicing a particular location. Drivers are paid on an hourly basis. If a route is not completed after eight hours, overtime is paid.

In August, 1989, 1/ Warehouse Supervisor Robert Brzezinski, a newly promoted supervisor who was formerly a driver/deliveryman, spoke with LaVake regarding his (LaVake's) job performance. Brzezinski's criticism of LaVake's work performance centered on the length of time it took LaVake to perform his work. Brzezinski advised LaVake that he consistently spent more time performing his work than other employes doing similar work and, as a result, his hours were substantially in excess of the other drivers in the bargaining unit. Brzezinski also advised LaVake that he consistently failed to meet the time standard established on the daily itinerary sheet although other drivers performing the same work were able to meet it. LaVake responded that he was working hard and, in his opinion, was not taking an inordinant amount of time to make deliveries. Brzezinski responded that in the Company's view, LaVake was consistently taking an inordinant amount of time to make deliveries.

On August 22 and 25, Brzezinski verbally warned LaVake about talking and visiting with other drivers at the end of a shift when the drivers were completing their paper work. LaVake received a written warning for identical conduct on August 30 which was not grieved.

On September 27, LaVake received a written warning for defective work, specifically taking excessive time to make a particular delivery. This warning, which was not grieved, provided in part: "The reason for the written warning is Lee's daily times are usually excessive. They are the norm instead of the exception."

In October, Brzezinski met informally several times with LaVake and Union Steward Brian Wilke to discuss ways to improve LaVake's job performance. On November 1, Brzezinski met formally with LaVake, Wilke, Union Representative Gerald Allain and Company Representative Michael Jenkins wherein LaVake's job performance was again discussed. At that meeting it was decided to have Wilke accompany LaVake on delivery routes to assist him in completing his rounds more timely and efficiently.

Wilke accompanied LaVake on his delivery route six or seven times during November. It was management's view that after these ride-alongs, LaVake's job performance would improve for several days but thereafter would lapse back to his previous pace.

On December 1, a second formal meeting was held to discuss ways to improve LaVake's job performance. No resolution was reached at this meeting as to how that could be accomplished.

1/ All dates hereinafter refer to 1989 unless noted otherwise.

On December 12, LaVake received a written warning for taking a long lunch break while making deliveries. This warning, which was not grieved, referred to his "poor work performance" and provided in part: "This is a final warning. The next time there is a disciplinary problem with Lee it will lead to his termination." A reference in this warning letter to "the days off without pay" implies that a suspension accompanied this written warning.

In mid-January, 1990, Brzezinski designed a delivery route especially for LaVake that consisted of what Brzezinski considered to be "easy accounts" for deliveries and service (i.e. no grocery stores). The purpose of this special route was to verify whether LaVake's deliveries were meeting the Company's expectations. After reviewing the time LaVake took to perform the route on January 16, the Company determined that LaVake took excessive time to make deliveries to four accounts on that route, to wit: Sidney Rosenberg Liquor, Citgo Food Mart, Self Service Oil Company and Riisen Oil Company. Although the itinerary sheet for that day is not part of the record, LaVake does not dispute that he took longer at each of these stops than the itinerary sheet called for. The longest stop of the four was at Rosenberg Liquor where LaVake spent 37 minutes while the time standard on the itinerary sheet was 15 minutes. LaVake testified that in his opinion, the time spent at Rosenberg Liquor, as well as the other three stops in question, was not excessive. After personally visiting the four accounts in question and talking with store personnel concerning LaVake's delivery (to their store), Brzezinski suspended LaVake. LaVake was subsequently terminated on January 22, 1990. His discharge letter provided as follows:

> On January 16, 1990 Lee LaVake took excessive time at four stops. They were at Sidney Rosenberg Liquor, Citgo Food Mart, Self Service Oil Co., and Riiser Oil Co. #9. The reason I feel the time was excessive at these stops is because of the low number of cases going into the accounts and the minimal amount of work required to put the product away.
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> Upon questioning Lee on his work, he told me that he didn't know what took him so long but that he was working hard. I know that was not possible because of the amount of time he took to do the stops. I also went to the stops to look at the work Lee performed. After viewing the work he had performed and the discussions I had with the personal (sic) at the accounts I firmly believe that Lee was not working as hard as he said he was.
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> Lee's continual problem with performance on the job is at the point now where he is terminated from employment. We have tried everything we possibly could to make Lee LaVake a successful employee. But his continual lack of performance cannot be tolerated.

The instant grievance has arisen from his termination.

POSITIONS OF THE PARTIES

It is the Union's initial position that although the parties' labor contract does not contain a just cause standard for discharges, one should be inferred by the Arbitrator. Assuming that the Arbitrator does infer such a standard, the Union contends that the Company did not have just cause to discharge the grievant. The Union argues that the Employer bears the burden of proving that the grievant engaged in wrongdoing. In the Union's view, the record evidence falls short of establishing that the grievant took excessive time at four stops as alleged by the Employer. According to the Union, there is nothing in the record to prove that an excessive amount of time was taken at the stops other than the Employer's conclusory and subjective allegations. The Union believes that under these circumstances, it was incumbent upon the Company to establish some objective method of measuring the grievant's performance. Inasmuch as the Company failed to do so here, the Union contends that the subjective allegations made by the Employer are an insufficient basis upon which to discipline and discharge the grievant. Next, the Union submits that even if the grievant took slightly more time than necessary to make the deliveries in question, it was not such a blatantly excessive length of time as to warrant his termination. Finally, the Union notes that at the hearing, the Company took the position that not only was the grievant discharged for taking excessive time, but also for not performing his job in a satisfactory manner. The Union argues this assertion was not mentioned in the discharge letter so it should be ignored by the Arbitrator. The Union therefore requests that the grievant be reinstated with full backpay. According to the Union, Article 10.1 should not be interpreted to deny a reinstated employe full backpay.

The Company initially questions whether the labor contract contains a just cause standard for reviewing disciplinary action. Whatever the applicable standard is, it is the Company's position that it did not violate the parties' collective bargaining agreement by discharging the grievant. According to the

Company, the grievant was properly discharged for work performance that was not up to the standards set by the Company. The Company contends that the performance and standard the grievant was asked to obtain was no greater or less than that being asked of all other employes in the same work category. However, in the Company's view, the grievant performed his work at a pace that was not acceptable. The Company asserts it was not required under either the union contract or general business principles to accept such substandard work performance. The Company further argues it had more than complied with the intent and terms of the contract because it had not only issued written warnings to the grievant but had also expended additional time and cost in attempting to advise the grievant of the problem and assist him in alleviating same. However, in the opinion of the Company, this was to no avail. The Company therefore contends that the grievance should be denied and the discharge upheld. In the event the discharge is overturned though, the Company notes that in its view, Article 10.1 restricts the monetary remedy which may be given to a reinstated employe to 40 times his regular pay.

DISCUSSION

Inasmuch as the parties dispute what standard is to be utilized by the Arbitrator to review the grievant's discharge, it follows that this, by necessity, is the threshold issue. Usually the standard set forth in labor contracts is that the discipline or discharge be "for cause", "proper cause", "just cause" or words to that effect. However, the instant contract does not contain any of the phrases just noted. Although the Union proposes that the Arbitrator should infer a just cause standard into the parties' contract, I decline to do so for the following reasons. The parties are fully capable of including an explicit just cause standard in their agreement if they are so inclined. Here though, for whatever reasons, they have chosen not to do so. Moreover, it appears from the bargaining history contained in the record that this has been the case since the parties negotiated their first labor agreement almost 20 years ago. Given these circumstances then, the undersigned declines to infer something into the contract, specifically a just cause standard, that has not existed for that length of time. In so finding, the undersigned is fully aware that many arbitrators have inferred just cause standards when none existed. Upon reviewing many of those awards though, it was noted that the contracts involved were silent on the subject of discipline and discharge. That is not the case here however. Instead, Article 10.1 specifically addresses same and sets forth the following protection for discharged employes. First, it establishes certain procedural restrictions on the Company's right to discharge employes, namely that there will be a written warning prior to discharge in some situations. Next, it provides that "if the cause for discharge assigned by the Company shall not be sustained" by the arbitrator, the employe is entitled to certain specified relief. This provision does not indicate though how such a decision is to be made. Although the word "cause" is found in the phrase just noted, it is not used therein as a synonym for "just cause" (as is often the case). Instead, given the context, the undersigned believes the word "cause" is used therein as a synonym for the word "reason." Thus, the phrase can also be read as follows: "if the [reason] for discharge assigned by the Company shall not be sustained, ..." In the opinion of the undersigned, it is implicit from this phrase that a reasonableness standard applies to discharges. In the absence then of a just cause standard and the decision of the undersigned to not infer one, the standard that will be utilized here in reviewing the grievant's discharge is whether the Company had a reasonable basis in fact for discharging the grievant and whether the Company complied with the procedural requirements set forth in Article 10.1. This standard admittedly affords less protection to discharged employes than does a just cause standard, but as noted above is all that is contractually required herein.

The Company discharged the grievant for unsatisfactory work performance, specifically taking excessive time in making deliveries. 2/ Certainly the

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2/ The Union does not dispute that the grievant was discharged for taking excessive time to make deliveries, but does dispute that he was discharged for substandard work performance. In its view, this latter reason was not communicated to the grievant at the time of his discharge but instead was simply a new reason added at the arbitration hearing. It is a fundamental arbitral principle that a discharge must stand or fall upon the reason given at the time of the discharge, not the reason given at the arbitration hearing. Here though, contrary to the Union's contention, the grievant's work performance was mentioned in each written warning he received except for the first one dated August 30. Although these warnings did not use the phrase "substandard" or "unsatisfactory," various synonyms for those words were used, to wit: the second written warning dated September 27 listed "defective work" and the third written warning dated December 12 referred to "poor work performance." Finally, the grievant's discharge letter referred to a "continual problem with performance" and "lack of performance." In light of these references, it is held that the grievant had been put on notice that his work performance was of great concern to the Company. Therefore, the Company's reference at hearing and in its brief to the grievant's work performance was not a new allegation.

Company has a legitimate and justifiable concern with, as well as direct interest in, the speed and efficiency at which drivers make their deliveries. As is therefore its right, the Company has determined what output is expected of its drivers. This output can be enforced through discipline. 3/ The delivery/ time standards involved here, which are listed on each itinerary sheet, were determined through a time study. Once an employer has adopted or implemented a particular time standard, it constitutes the amount of work required or expected to be done in a given time by the average operator under normal conditions. 4/ Such is the case here. Although the specifics of the formulation of the time study used here are not contained in the record, this does not matter because the Union does not challenge the Company's delivery/time standards in general, nor does it challenge the delivery/time standards for the four stops in question on January 16. In addition, there was no testimony to the effect that the delivery/time standards involved are unreasonable, excessive or unmeetable. Consequently, there is no basis in the record upon which to conclude that the time standards for deliveries involved herein are unreasonable. Said another way, the Company's expectation that the grievant would meet the applicable time standards was reasonable.

The grievant admits that on January 16, he spent more time at each of the four stops in question than the delivery schedule/itinerary sheet called for. The record indicates in this regard that he spent 37 minutes instead of 15 minutes at Rosenberg Liquor, but does not indicate how much extra time he spent at the other three stops (namely Citgo Food Mart, Self Service Oil and Riiser Oil Company). The time spent at Rosenberg Liquor was the longest of the four stops.

Attention is now turned to the critical question of whether the time spent by the grievant at these stops was excessive. In the grievant's view, the extra time was not unduly lengthy or excessive whereas the Company contends that it was. No explanation was offered by the Company to show how it determined that the extra time spent at the four stops qualified as excessive. For example, was it 15 minutes over the time standard, 10 minutes, etc? Be that as it may, once the Company determined that the time spent at the four stops qualified as excessive in relation to the applicable time standards, it was incumbent upon the Union to rebut it. Had the Union shown evidence of disparate treatment (such as the grievant's delivery times for the four stops not varying from other drivers making those same stops), the Employer would have then been pressed to show how the time involved here qualified as excessive in relation to the applicable time standards. However, in the opinion of the undersigned it was not enough, as happened here, for the grievant to simply offer his subjective opinion that the extra time spent at each stop was not unduly lengthy or excessive. This is because it is the Company that makes this determination; not the employe. Here, the Company determined that spending over twice as much time as the delivery schedule called for (as happened at Rosenberg Liquor) qualified as excessive, and the undersigned is hard pressed to say otherwise. That being the case, there is no objective basis in the record for overturning the Company's conclusion that the grievant took excessive time at the stops in question. While the Union notes that none of the proprietors of the four stops in question felt that the grievant was wasting time when he made his deliveries to their stores, there is no requirement evident from the record that customers must verify such allegations. Instead, this call was for Company officials alone to make. Inasmuch as they concluded that the grievant took excessive time to make the deliveries in question and this conclusion has not been overturned, it follows that the grievant engaged in the conduct complained of (i.e. taking too long to make deliveries on January 16).

Having so found, attention is turned to the discipline which was imposed (i.e. discharge). If the grievant's actions on January 16 were looked at standing alone, it would not constitute grounds for summary discharge. However, the Company did not look at that incident standing alone. Instead, it viewed that incident as part of a pattern wherein the grievant chronically failed to make deliveries in a timely fashion. The Company felt this situation would continue indefinitely and it considered this possibility to be intolerable. The record indicates that the Company made numerous efforts to provide the grievant with both the opportunity and incentives to alter his work habits and performance so that he could better fulfill his employment responsibility to make deliveries in a timely fashion. Brzezinski did this by counseling LaVake about his poor work performance, advising him what changes the Company expected of him and how he could change his work habits in order to met those expectations. When these efforts proved unsuccessful, the Company imposed progressive discipline upon him (specifically three written warnings and possibly a suspension), none of which were grieved. These three written warnings in a five month period put him on notice that his job was in jeopardy unless he made his deliveries at the pace expected by the Company. In addition, these warnings more than satisfied the contractual due process requirement found in Article 10.1. Thus, corrective discipline was tried and failed so the Company had a reasonable basis for concluding that the grievant's ability to make timely deliveries would not improve. Under these circumstances

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3/ Elkouri & Elkouri, How Arbitration Works, 3rd Ed., p. 444.

4/ Ibid.

then, the grievant's protracted deliveries on January 16 on a specially designed route of easy accounts was simply the proverbial last straw. Since an employer is not required, over its objection, to employ someone who cannot fulfill their job
duties in a timely fashion, and such has been found to be the case here, the Company was not required to continue to employ the grievant. The undersigned therefore concludes that the Company had a reasonable basis in fact for discharging the grievant (namely his failure to make deliveries at the pace expected by the Company) and further that the Company complied with the procedural requirement set forth in Article 10.1. That being so, the undersigned finds no basis for overturning the Company's actions in this matter.

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

AWARD

That the grievant's discharge did not violate the parties' collective bargaining agreement. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 20th day of June, 1990.

By _____
Raleigh Jones, Arbitrator