BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LABORERS' UNION LOCAL 1440	Case 2 No. 44543 A-4690
and	
C B & K SUPPLY	

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller and Brueggeman, S.C., Attorneys at Law, by Mr. Kurt Kobelt, appearing on behalf of the Union.

Melli, Walker, Pease and Ruhly, S.C., Attorneys at Law, by Mr. James Pease, appearing on behalf of the Company.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the Company or Employer 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 two grievances involving discipline imposed on employe Timothy McKean. A hearing, which was transcribed, was held on December 14, 1990 in Janesville, Wisconsin. The parties filed briefs in the matter which were received by February 6, 1991. Based on the entire record, I issue the following Award.

ISSUES

There was no stipulation of the issue(s) and the parties asked that the undersigned frame it in his Award. From a review of the record, the opening statements at hearing and the briefs, 1/ the undersigned believes that the issues may be fairly stated as follows:

1. Are the grievances arbitrable?

2. Was there good cause for the grievant's written warning dated September 6, 1990? If not, what is the appropriate remedy?

3. Was there good cause for the grievant's discharge on September 7, 1990? If not, what is the appropriate remedy?

1/ The Union states the issue as:

Was the discharge of Timothy McKean for cause? If not, what is the appropriate remedy?

While the Company states the issues as:

1.Are the grievances arbitrable since the events giving rise to them occurred and the grievances themselves were filed during the hiatus between two labor agreements?

2.Did the September 6, 1990 Gibson warning violate any agreement between the parties? If so, what, if any, remedy is appropriate?

3.Did the September 7, 1990 discharge of the grievant violate an agreement between the Employer and the Union? And, if so, what, if any, remedy is appropriate?

PERTINENT CONTRACT PROVISIONS

The parties' 1989-1993 collective bargaining agreement contains the following pertinent provisions:

> ARTICLE IX. DISCHARGE AND SUSPENSION
>
> The Employer may discharge any employee for good cause. An employee charged with an offense justifying immediate discharge, will be informed of such offense in writing at the time of his discharge, and a copy thereof shall be sent to the Union. All discharges must be made in the presence of employee's stewards. The Employer shall give at least one (1) warning notice in writing of a complaint for other offenses (those not involving immediate discharge) against such employee to the employee and the Union. If the offense complained of in the warning letter is not repeated within three (3) months from the date of the warning letter, then such warning will be deemed to have served its purpose and shall no longer be in effect.
>
> Discharge without a warning notice is authorized in cases of:
>
> (1) Dishonesty
> (2) Working under the influence of liquor or drugs
>
> Objection to discharge must be made within ten (10) working days of said discharge. The matter shall then be discussed by the Employer and the Union as to the merits of the case. The employee may be reinstated under other conditions agreed upon by the Employer and the Union. Failure to agree shall be cause for the matter to be submitted to arbitration as provided in Article VIII on Grievance and Arbitration. The arbitrator shall have the authority to order full, partial or no compensation for the time lost. Inability to work because of proven illness and injury shall be no cause for discharge or suspension, and such employee shall be reinstated to his former position at such time as he is physically capable of doing same.
>
> . . .
>
> ARTICLE XXX. TERMINATION
>
> THIS AGREEMENT shall go into effect on July 1, 1989, and continue in force until June 30, 1993, and shall be considered automatically renewed from year to year thereafter, unless at least sixty (60) days prior to the end of the effective period, either party shall serve written notice upon the other that it desires to renegotiate, revise, or modify this agreement. In the event such notice is served, the parties shall operate temporarily under the terms and provisions of this contract until a new contract is entered into at which time, the new contract shall be retroactive as of the last day of termination of this Agreement.
>
> IN WITNESS THEREOF the respective parties have hereunto set their hands and seals this 1st day of July , 1989.
>
> FOR THE EMPLOYER: FOR THE UNION:
>
> /s/ Julius Cohen /s/ George W. Lengjak

BACKGROUND

The previous labor agreement between the parties expired July 1, 1989. From then until November, 1990, there was a contract hiatus. In November, 1990, the parties signed/executed a new labor agreement for the period July 1, 1989 through June 30, 1993. Julius Cohen, who signed the contract for the Company, testified that Union representative George Lengjak told him at the time of signing that the July 1, 1989 date "meant nothing." Lengjak denied telling Cohen that the July 1, 1989 date meant nothing.

FACTS

The Company is a small plumbing wholesaler and steel distributor located in Janesville, Wisconsin. It provides various construction supplies to

customers in southern Wisconsin and northern Illinois. It does not sell any unique products and its costs are essentially the same as its competitors. The only thing that distinguishes it from its competitors is the quality of its service. Some customers of the Company are small businesses who have small orders. Other customers' orders vary from large one time to small the next. It is common for new customers to start with small orders and, if pleased with the service on those small orders, to increase their orders. Correspondingly, if good service is not provided, customers are quick to reduce or eliminate their orders with the Company.

The Company's truck drivers are assigned prescribed routes which are serviced on a daily basis. On the Employer's larger routes the truck is loaded the day before the delivery is made. The Company encourages customers to get their orders in by 12:30 p.m. so the drivers, who are responsible for loading their own trucks, can arrange their routes and load their truck in the reverse order in which they make deliveries, i.e. the last item loaded onto the truck would be the first item to be delivered the following day. However, on occasion, customers call with orders after 12:30 p.m. When this happens the Company regularly makes exceptions to the deadline for orders and drivers load and deliver items that were ordered after the deadline. This results in drivers having to reload their truck or work around an item which was placed on top of the load but wasn't delivered until well into the route. Drivers are also required on occasion to pick up material from customers that are being returned for one reason or another.

The grievant, Tim McKean, was employed by the Company as a driver for two years before he was terminated on September 7, 1990. 2/ He drove the Beloit route for one and one-half years before he was assigned to the west route in March, 1990. After assuming that route, McKean worked with LaVaughn Eiseman, the salesman and manager of that route. Eiseman quickly became dissatisfied with McKean's attitude and work performance. He spoke with McKean numerous times about work deficiencies he wanted McKean to correct. Lumped together, Eiseman admonished McKean for: not making scheduled deliveries; not taking material on his route that he did not want to take; not making deliveries he considered inconvenient; not delivering small orders; not delivering material of an inconvenient size (such as a pallet of plastic pipe or steel) because it took up too much room or would require reloading of the truck; unnecessarily delaying the pick up of returned material from customers; not getting delivery slips signed for each delivery pursuant to standard operating procedure; not putting material inside the customer's building when it was delivered, particularly where the customer requested him to do so; not making collections on C.O.D. orders; and yelling and being rude to customers. When these admonitions occurred, McKean usually had a defensive response. Examples of these responses were: someone else should make that particular delivery; he wasn't going to do that particular work; he didn't have time for that delivery or procedure; he didn't have room on the truck for the material; he would make the delivery or pick up when he got around to it; he didn't collect C.O.D.'s; or that the customer involved could "fuck off" or "get fucked".

Some of the incidents referred to above resulted in disgruntled customers who reduced their business with the Company. As a result, other management officials besides Eiseman were aware of deficiencies with McKean's work and customer complaints about him.

On May 21, McKean delivered some material to one of the Employer's oldest and biggest customers, Jack Libby Heating and Cooling. Libby asked McKean to move some previously delivered sinks but McKean resisted on the grounds that he hadn't specifically been told to pick up the sinks he was replacing. A verbal altercation then ensued between the two men. Afterwards, Libby called Company representative Rodney Katz and informed him that if he ever sent McKean to deliver there again, he would never buy another piece of material from C.B. and K. After Katz received Libby's angry phone call he asked McKean what had happened, whereupon McKean did not give Katz a civil reply. McKean was given a written warning that day for "poor customer relations with . . .Jack Libby Heating and Cooling." This warning provided that if there were "no further company violations assessed" for "a period of 60 days", the warning would be removed from his personnel file.

On May 24, an order came in for the west route that Katz considered urgent. Katz asked McKean to load that order onto his truck. McKean, who had almost completed loading his truck for delivery the next day, refused to comply with Katz's directive. Katz then ordered another employe to load the material onto the truck, whereupon McKean countermanded Katz's order. Katz then ordered McKean out of the truck so Katz could load the material himself, which he did. McKean responded by telling Katz that he couldn't drive the truck to which Katz, who is part owner of the Company, replied that he could drive any equipment he wanted. McKean testified that Katz then pushed him and told him he was going to run him over. Afterwards, McKean filed a complaint with the Janesville Police Department concerning Katz's conduct.

2/ All dates hereinafter refer to 1990.

In late August, Eiseman talked with McKean again about his work performance after receiving several more customer complaints about McKean's deliveries. Eiseman asked McKean why he treated people the way he did. This statement prompted a heated discussion between the two which ended when McKean responded that he didn't kiss anybody's ass. Several management officials heard this verbal exchange. Afterwards, management representative Larry Cohen told McKean that he had to go that extra mile with his customers because the Company was a service organization that didn't have anything unique that fifty other competitors had except for service to customers. McKean responded again that he didn't kiss anybody's ass, whereupon Cohen responded: "Tim, we have to kiss ass every single day." During the exchange, McKean offered to solicit customers who would sign a document indicating they were satisfied with his work performance. Cohen responded emphatically that he did not want McKean to do that because such a confrontation with customers could have an adverse effect on business.

Several days later, McKean delivered an order to another very good customer of the Employer, Gibson Plumbing. Instead of going to the customer's office to gain access to the customer's building and instead of storing the material inside as Eiseman had previously told him, McKean left the material and the delivery slip in the rain outside the customer's garage. Mr. Gibson's mother, who was on duty in the customer's office, heard the noise made by McKean trying to enter the back door and went to investigate. By the time she arrived though McKean had already left and she could see him driving away. Mr. Gibson then called Rodney Katz and told him that if he ever sent that man (referring to McKean) again, C B and K would never see another nickel's worth of business from his company. Eiseman and Katz talked with McKean separately about Gibson's complaint. McKean essentially told Eiseman that he didn't have time to go to the front door of the Gibson facility and get the delivery sheet signed. Eiseman testified McKean's exact words were: "I don't have fucking time for that bullshit. They either unlock the goddamn door or otherwise they don't get their goddamn material. I don't have all day to wait for these materials." When Katz asked McKean what had happened at Gibson Plumbing, McKean responded that he didn't cater to anybody. Katz, who has a heart condition, testified he didn't pursue the issue further because he felt it would make him too upset to do so. At Eiseman's solicitation, Gibson followed up his complaint call to Katz with a complaint letter.

After receiving Gibson's complaint letter, Company owner Julius Cohen decided to give McKean a written warning for the Gibson incident. He directed bookkeeper Jean Splinter to prepare the warning notice, which she did. This warning for "poor service to customers while making deliveries" was dated September 6 and typed on a form supplied by Union representative Lengjak. It further provided that it was employe warning number one and was the first of three warnings that would be given to the employe for violations before the employe was terminated. Cohen directed Splinter to attach the warning to McKean's time card pursuant to standard procedure. McKean clocked out at the end of the work day.

A dispute exists concerning when McKean received this written warning. Splinter testified she attached this warning to McKean's Thursday, September 6 time card, pursuant to Cohen's directive. McKean testified that nothing was attached to his time card in the evening of September 6 or the morning of Friday, September 7. He further testified he received the Gibson warning at noon on September 7 when he received his paycheck. Splinter testified she did not put the warning in McKean's paycheck.

McKean was scheduled to report to work at 7:00 a.m. on September 7. At approximately 6:40 a.m. though, McKean's babysitter called and said she would be a few hours late. McKean immediately called the Company and informed a clerical named Peggy that he was going to be late for work, which he was. McKean reported to work at approximately 8:30 a.m. Upon reporting to work, Rodney Katz told him to make his deliveries.

As McKean was preparing to leave on his delivery route he discovered that his truck had a flat tire. Pursuant to standard operating procedure, he contacted the Lein Oil Company to come fix the tire, whereupon he was told that it would be a while before a repair truck would be dispatched because they were running late. McKean loaded bundles of steel into a bin while he waited for the repair truck to come and then the repair to be made. He never told anyone from management what he was doing that morning. After the tire was fixed about 11:45 a.m., he decided on his own without consulting with anyone from management to not make any deliveries that afternoon. He instead stacked steel for the remainder of the day.

That afternoon McKean called Union representative Lengjak about the written warning he had received. Lengjak told McKean he would call Julius Cohen about it, which he did. Cohen told Lengjak during their phone call that he intended to fire McKean that day. When McKean clocked out at the end of the day a discharge notice was attached to his time card. This "Final Termination Notice" which was signed by Julius Cohen stated: "You will no longer be needed for work here at C B and K Supply. We have received too many complaints from customers who did not get deliveries." The Company did not receive any new customer complaints about McKean's deliveries from the time it

issued the September 6 warning notice until it decided to terminate him (i.e. September 7).

McKean filed separate grievances challenging both his September 6 written warning and his September 7 discharge which were processed to arbitration.

Following his discharge and prior to the instant arbitration hearing, McKean visited some of the Company's customers on the west route. He presented them with a petition he had drafted which asked the following question: "Do you feel that I, Tim McKean, was doing a fair and reasonable job making deliveries with and for C B and K Supply?" The petition contained "yes" and "no" response categories. All 65 individuals who signed the petition checked the "yes" category, with some writing favorable comments about McKean's deliveries. Some customers though refused to sign the petition; their responses were not included on the petition. The Company received reports that McKean pressured customers into signing the petition and was making misrepresentations in order to get customers to sign.

Additional facts, as necessary, will be set forth below.

POSITIONS OF THE PARTIES

It is the Union's initial position that the grievances are arbitrable. In support thereof, it asserts that while there was no contract in effect between the parties when the instant grievances arose, the parties later signed a contract which was explicitly retroactive back to July 1, 1989. According to the Union, the retroactivity to that date makes the instant grievances arbitrable even though they arose during the hiatus period. Next, the Union raises several procedural due process considerations which, in its view, taint the Employer's decision to discharge the grievant and require the discipline to be set aside. First, the Union notes that although the contract requires the Company to give only one warning notice prior to discharge, it contends the Company followed a policy of imposing three warning notices prior to discharge. The Union submits that did not happen here. It notes in this regard that although the grievant received a written warning in May, 1990 for poor customer relations, that warning had evaporated prior to the grievant's discharge. Since the next written warning the grievant received was the one dated September 6, the Union argues that the grievant was never given the opportunity to correct the behavior which the Employer found offensive. Second, the Union raises the defense of double jeopardy by contending that the grievant was disciplined on both September 6 and 7 for the same offense of poor customer relations. In support thereof, it notes that the language used by the Employer in both the September 6 and 7 documents is "essentially the same". Next, with regard to the merits, the Union contends that the grievant did not engage in misconduct warranting discharge. The Union argues that the Company failed to satisfy its stringent burden of proof that the grievant committed the offenses for which he was discharged. It notes in this regard that the Company did not produce customers to testify regarding the grievant's deliveries but instead relied upon second-hand information (i.e. Eiseman's testimony). According to the Union, the grievant refuted the Employer's case through his own testimony and through the document which he secured directly from the customers. Thus, it is the Union's position that the Company did not have just cause to discharge the grievant. The Union therefore requests that the grievant be reinstated with back pay and other lost fringe benefits.

It is the Company's initial position that the grievances are not arbitrable. In support thereof, it relies on the fact that there was no agreement in effect between the parties when the grievances occurred or when they were filed. According to the Company, the Union should be estopped from relying on the retroactive date or the retroactivity provision in the contract because Julius Cohen signed the contract based on the false representation of Union representative Lengjak that the July 1, 1989 effective date "wouldn't mean anything." Next, the Company responds to the Union's due process arguments as follows. First, with regard to the number of warnings required, the Company contends that the form of the notices used for the Libby and Gibson warnings should not be a basis for concluding that the Employer intended to bestow greater than required (warning) rights on employes. Second, with regard to the argument that a steward wasn't present when the grievant was discharged, the Company notes that it had not been notified who the steward was at the time and, in the event it was the same steward as before the contract hiatus period, he was out on a delivery when the grievant received his discharge notice. The Company also contends that no harm was done by not having a steward present since it did not question or otherwise speak to the grievant regarding his termination. Next, with regard to the merits, the Company contends that the grievant engaged in misconduct warranting both his written warning on September 6 and his discharge on September 7. In support of the warning, the Company notes that the grievant willfully failed to follow both Eiseman's and the customer's instructions, and his defiant response to management when confronted about the incident justified the discipline. In support of the discharge, the Company notes that the grievant called in late that day and decided on his own to not take out the truck for deliveries. In the Company's view, the grievant's conduct that day was an act of defiance in retaliation for the (Gibson) warning notice of the previous day. The Company contends that since the grievant had been previously warned and admonished to correct his

defiant and uncooperative attitude toward both customers and management to no avail, and since the grievant's conduct was hurting the Employer's business, it had just cause to terminate him. The Company therefore contends that the grievances should be denied and the discharge upheld. In the Company's view, a great injustice would be done if the arbitrator failed to uphold his discharge. In this regard, the Company calls the arbitrator's attention to the fact that the grievant's solicitation of the Employer's customers to sign his petition following his discharge created customer confrontations and further damaged the Employer's business.

DISCUSSION

Arbitrability

The arbitration of grievances is a voluntary process that rests entirely on a contractual basis. As a result, the Employer's obligation to arbitrate grievances flows from the arbitration provision of the labor contract. Here, though, there was no labor agreement in effect between the parties when the grievances arose (September 6 and 7, 1990) or when they were filed (September 10, 1990). This is because there was a contract hiatus from July, 1989 until November, 1990. So far as the record shows, there was no agreement by the parties to arbitrate grievances which arose during this contract hiatus. This fact is important because private sector employers are only required to arbitrate those post-contract expiration events which "arise under" the contract within the meaning of Nolde Brothers 3/ and it has been held that the right to be discharged for cause does not "arise under" the expired agreement. 4/

Application of this principle here should end consideration of these grievances. However, that is not the case because the new labor agreement which employer representative Julius Cohen subsequently signed in November, 1990 provided in the first paragraph of Article XXX that the duration of the instant contract was from July 1, 1989 to June 30, 1993 (emphasis added). This of course meant that the entire contract was retroactive to the previous contract's expiration date (July 1, 1989) rather than being prospective from November, 1990 forward. The second paragraph of Article XXX makes this explicitly clear since the parties backdated the signing of the contract from November, 1990 to "the 1st day of July, 1989". Finally, lest there be any question about the contract's application during a hiatus period, it is noted that the latter part of Article XXX contains a retroactivity clause that provides that after June 30, 1993, "the parties shall operate temporarily under the terms and provisions of this contract until a new contract is entered into at which time the new contract shall be retroactive as of the last date of termination of this Agreement." Union representative Lengjak testified without contradiction that the prior contract contained the same exact retroactivity language. Application of that language here means that the parties operated from July 1, 1989 to November, 1990 under the terms of the expired agreement; once a successor agreement was entered into it was retroactive to July 1, 1989. It therefore follows that the Employer was contractually required to arbitrate the instant grievances even though they arose during the contract hiatus period.

The Company implicitly acknowledges the foregoing but argues that the Union should nevertheless be estopped from relying on same because Union representative Lengjak supposedly represented to Cohen at the time of signing that the retroactivity "meant nothing". According to the Company, Cohen objected to making the contract retroactive back to July 1, 1989 but withdrew his objection after Lengjak made this purported statement. If Lengjak made such a statement it was just plain wrong because the backdating of a labor contract has both practical and legal significance. Be that as it may, what Lengjak did or did not say that day regarding the significance of retroactivity does not control here. Instead, what controls here is the written agreement itself. That being so, the undersigned will not explore Cohen's intent or reason for signing the instant contract. Given this finding, the Employer's attempt to escape the application of the retroactive date and the retroactivity provision here is not successful. It is therefore held that although there was no contract in effect when the instant grievances arose, they are nevertheless arbitrable due to the retroactivity of the current agreement back to July 1, 1989.

Procedural Due Process Considerations

Several procedural due process considerations have been raised (either explicitly or implicitly) by the Union. Each will be addressed below.

Attention is focused first on the disciplinary sequence required here, specifically the number of written warnings to be issued prior to discharge.

3/ Nolde Brothers v. Bakery Workers Local 358, 430 U.S. 243 (1977).

4/ Teamsters v. C.R.S.T., 795 F 2nd 1400, 1403 (8th Cir., 1986), 122 LRRM 2993, 2995, cert. denied, 123 LRRM 3192 (1986).

This is because a conflict exists in this regard between the contract language and the language that appeared on the grievant's September 6 warning. The contract language (Article IX) provides in pertinent part that the Company will give "at least one warning notice in writing" to an employe prior to discharge except under certain circumstances not applicable here. Thus, according to the contract the Company can discharge an employe after one written warning. This differs though with what was written on the grievant's September 6 written warning notice. It indicated the employe would receive three warnings prior to termination. Obviously, these two statements conflict and cannot be reconciled. Be that as it may, it is the contract language that will be applied here; not the language on the September 6 warning notice. In so finding, the undersigned notes the following statement of Arbitrator Marlatt from an Award quoted in the Union's brief:

> The contract is the contract. . . It is the Arbitrator's responsibility to read the contract and tell the parties how it applies to the dispute at hand, this is the limit of his jurisdiction. 5/

Inasmuch as the progressive disciplinary sequence found in Article IX provides that only a single written warning need be issued prior to discharge, that is all that is contractually required here.

Having so held, the next question is whether the Libby warning (i.e. the written warning issued May 21) was still viable at the time of the grievant's discharge. The Company argues that it was while the Union disputes this and contends that it had evaporated by the time of the grievant's discharge. Article IX provides in pertinent part that a (written) warning will evaporate after three months if an expressed precondition is met (the precondition will be addressed later.) This time period (i.e. three months) differs though with what was written on the grievant's May 21 written warning notice. It indicated in pertinent part that the warning would be removed after 60 days. Obviously, these two time periods conflict and cannot be reconciled. Consistent with the finding made above, it is the contract language that will be applied here with regard to when a warning evaporates; not the language on the May 21 warning notice.

The focus now turns to the contractual precondition for a warning to evaporate, namely that "the offense complained of in the warning letter" not be repeated within three months. The offense complained of in the Libby warning was "poor customer relations" with a named customer (i.e. Libby). The Company contends that the grievant did not meet this expressed precondition because he repeated this and other misconduct after receiving the May 21 warning, citing the refusal-to-load incident with Katz on May 24 as an example. The undersigned is satisfied from the record evidence that the grievant was verbally warned by management representatives about the topic of customer relations in the three months that followed the May 21 written warning. Be that as it may, none of these warnings were reduced to writing. Additionally, the Company never advised the grievant that these infractions were sufficient to prevent the May 21 notice from evaporating. As a result, it is held that the May 21 notice evaporated pursuant to the contract three months after it was issued. This finding means that the Libby warning was not in effect when the grievant was discharged.

Attention is now turned to the Union's double jeopardy argument. The double jeopardy principle, which arose in the criminal law context and has been carried over into the arbitration of disciplinary grievances, holds that it is not "just" for a grievant to be disciplined twice for the same offense. It follows then that a critical element in this defense is that two punishments must be imposed for the same act of wrongdoing. 6/ That being so, in order for this defense to be applied here the Union must prove that the two punishments which the grievant received (namely the written warning dated September 6 and the discharge notice of September 7) were for the same misconduct. The Union attempts to prove same by noting that the language used by the Employer in the September 6 and 7 documents is "essentially the same". In the Union's view, this proves that the grievant's discharge on September 7 was for the exact same misconduct he had been issued a written warning for on the previous day, namely poor customer relations.

5/ Wolf Baking Company, Inc., 83 LA 24, 26 (Marlatt, 1984).

6/ Fairweather's Practice and Procedure in Labor Arbitration, Third Edition, BNA Books, p. 301.

Certainly the language used in the aforementioned two documents is similar. The September 6 written warning was for "poor service to customers while making deliveries" while the September 7 discharge notice indicated that the Company had "received too many complaints from customers who did not get deliveries." However, the fact that this language is similar does not mean that the misconduct complained of in each is identical. Clearly it was not. The September 6 warning referenced the grievant's service when he made deliveries while the September 7 notice referenced the grievant not making certain deliveries at all. Although the misconduct complained of in each notice can be characterized as involving customer relations, each involved an entirely different aspect of that topic and arose from a separate event. For example, the September 6 warning arose out of a written complaint that the Company received from one of its customers (i.e. Gibson Plumbing). In contrast though, the September 7 notice arose from the grievant's deciding on his own motion to not make any deliveries whatsoever on the afternoon of September 7. Given the foregoing, it is apparent that the Employer responded on September 6 and 7 to multiple acts of misconduct rather than a single act. As a result, the Union's double jeopardy claim has no application herein.

The final procedural due process consideration involves the portion of Article IX which provides: "All discharges must be made in the presence of (the) employee's steward." Simply put, that did not happen here. No steward was present when the grievant got his discharge notice which was attached to his time card. That being so, it is clear the Employer failed to comply with this procedural requirement.

Having so found, attention is turned to the impact of this procedural defect. Specifically, should the Company's failure to comply with the above-noted contractual procedure result in an automatic reversal of its actions? I conclude it should not for the following reasons. First, some question existed during the lengthy hiatus period as to who, if anyone, was the Union steward because the Company was never notified who the steward was. Second, assuming that the employe who was Union steward prior to the contract hiatus remained steward during the hiatus, the record indicates he was making a delivery at the time of the grievant's discharge and was therefore unavailable. Third and most important, there was no evidence presented that the grievant was prejudiced by the Company's failure to have a steward present when he received his discharge notice.

Merits

The focus now turns to whether the discipline imposed upon the grievant violated the contract. The contractual standard to be utilized by the arbitrator for reviewing same is found in Article IX wherein it provides that: "The Employer may discharge any employee for good cause." The undersigned reads the phrase "good cause" as being synonymous with the phrase "just cause". The just cause standard for employer disciplinary action involves two elements. The first is that the Company demonstrate the misconduct of the grievant and the second, assuming this showing is made, is that the Company establish that the penalty imposed was justified under all the relevant facts and mitigating circumstances.

As previously noted, the Company gave the grievant a written warning dated September 6, 1990 for "poor service to customers while making deliveries." The Company's service to its customers is obviously of crucial importance. The Company must provide good service in order to protect its business and reputation. Failure to do so by the Company would be to the detriment of all persons connected with its operation. That being so, the Company has a justifiable concern with, as well as a direct interest in, how employes perform their work duties and treat customers. The first element of the just cause determination turns, then, not on the Employer's interest in preventing poor service to customers, but instead on whether the grievant provided poor service as charged.

This call obviously turns on the facts involved. Although this warning was for poor service to customers, the Employer focused its attention on a single customer - Gibson Plumbing. That being the case, the discussion here will likewise be limited to just that single customer.

The record indicates that Eiseman gave the grievant detailed instructions for the delivery procedure at Gibson Plumbing. Specifically, Eiseman told McKean that the rear door of the Gibson facility was always kept locked to prevent theft, so he was to go to the front of the building where the office was located; there he could get his delivery sheet signed and get the rear door unlocked so he could place his material inside the building. However, when the grievant made several deliveries to this customer he failed to follow these instructions. Specifically, he never went to the office in the front of the building and got the delivery sheet signed. In addition he left the material he was delivering outside rather than putting it inside the building. In the specific instance complained of, he left the material he was delivering as well as the delivery slip outside in the rain. This particular delivery so upset Gibson that he called the Company and threatened to stop doing business with them.

The grievant offers several defenses for his delivery to Gibson which, in his opinion, excuse his actions. The first is that Eiseman went on vacation without telling Gibson to unlock the back door and the second is that Rodney Katz said he did not have to deliver to Brodhead anymore (where Gibson Plumbing is located). Neither of these assertions though is supported by the record evidence. Moreover, even if they were, neither assertion excuses the grievant's conduct here. The grievant was given specific instructions by Eiseman concerning the delivery of material to Gibson which he failed to follow. It is a cardinal rule in the workplace that employes are to obey work orders and do what they are told regardless of whether or not they agree with it. That certainly did not happen here. The grievant's failure to follow Eiseman's specific delivery instructions for this customer resulted in a very disgruntled customer. That being the case, it follows that the grievant's delivery to Gibson Plumbing was substandard.

Having concluded that the grievant engaged in the misconduct complained of (i.e. poor customer service to Gibson Plumbing), the question remains whether this misconduct warranted discipline. I conclude that it did since poor customer service is one of the elementary grounds for discipline. Additionally, the record indicates that the grievant had notice of the potential consequences of his conduct because he had been previously warned and admonished by management to change his attitude toward customers and become more cooperative with them. However, when he was confronted by management officials about his delivery to Gibson, the grievant responded to them in a defiant fashion indicating that he, and not management, would determine how deliveries were made. Under these circumstances I conclude that a written warning was warranted.

Attention is now turned to the question of when the grievant received this written warning. Company bookkeeper Splinter testified she attached this warning to McKean's Thursday, September 6 time card pursuant to Julius Cohen's directive. McKean testified he did not get it (the written warning) until the following day, Friday, September 7, when he opened his paycheck. Splinter testified she did not put the warning in McKean's paycheck. Obviously this question turns on credibility.

After weighing the conflicting testimony, the undersigned concludes that Splinter's testimony that she attached the warning to the grievant's September 6 time card should be credited for the following reasons. First, no evidence was offered why Splinter would make up this charge against the grievant and testify falsely against him. There was no showing of any animosity between Splinter and the grievant. Thus, there is no apparent reason for Splinter to lie or fabricate her account of this matter. In contrast though, the grievant is trying to save his job. Second, Splinter's testimony regarding the matter was direct, precise and confident. The grievant did not challenge Splinter's veracity but instead simply denied her account of the matter. Given the foregoing then, the undersigned credits Splinter's testimony on this matter. This finding means that the grievant received the warning dated September 6 on that day because he clocked out at the end of the work day and must have seen the warning letter attached to his time card.

The focus now turns to the facts underlying the grievant's discharge. On Friday, September 7, the grievant was one and one-half hours late getting to work because of babysitter problems. After arriving at 8:30 a.m. he did not begin his daily delivery route as he normally would because his truck had a flat tire. He then contacted a company to come fix the flat tire. Upon learning that it would be a while before this happened, the grievant unilaterally decided to stack steel until the tire was fixed, which he did. When the tire was fixed shortly before noon, the grievant unilaterally decided to not make any deliveries that afternoon but to instead stay at the Employer's facility and continue stacking steel for the remainder of the day, which he did. The grievant never advised anyone from management that he was not going to make deliveries that afternoon.

The Employer determined that the above-noted behavior constituted unacceptable work conduct. In particular, it viewed the grievant's failure to deliver anything that afternoon as an act of defiance arising from his receipt of the Gibson warning notice. The Union though contends the grievant did not engage in any misconduct that day warranting his discharge. Given these conflicting views of the grievant's conduct on September 7 it is necessary to review same.

The fact that the grievant was one and one-half hours late on September 7 was not, in and of itself, misconduct. This is because the grievant advised a Company secretary he was going to be late that day before his shift started. Thus, he gave notice of his absence in a timely fashion. Moreover, while the Company noted that the grievant did not talk to any member of management during this phone call, there is nothing in the record to indicate he needed to. In short then, the Company has not shown that the grievant failed to follow normal procedure for reporting late to work on September 7.

Next, when the grievant reported to work late, it is understandable why he could not begin his route right away, namely because of his truck's flat

tire. It appears from the record that the grievant followed standard operating procedure by calling the Lien Company to come fix the flat tire. While it apparently took longer than usual to complete this repair job, this delay was not attributable to the grievant and therefore was not his fault. That being so, a reasonable basis exists for the grievant's not immediately starting his route after he came to work. Consequently, this part of the grievant's behavior on September 7 is not considered misconduct either.

In making this finding, the undersigned has ignored one part of the grievant's behavior that morning which could constitute misconduct, namely the fact that the grievant unilaterally decided what to do for three hours while he waited for the flat tire on his truck to be fixed. Specifically, he decided to stack steel and did so without telling anyone from management what he was doing. Certainly a strong argument could be made that this call was not for the grievant to make since it is management, and not the employe, that decides what work is done. Nevertheless, the Employer did not expressly challenge the grievant's right to make this particular call so the undersigned will not either.

The grievant's failure to go out after the tire was fixed is a different matter though because the Employer did expressly challenge his right to make this particular call. As previously noted, the grievant decided on his own motion to not make any deliveries that afternoon after his truck tire was fixed. The problem with this is that it was not his call to make; it was management's. Said another way, the grievant was not empowered to make this decision. By doing so though he usurped this management authority. Moreover, by not telling any management representative what he was planning (i.e. to not make any deliveries that afternoon) before he did it, he deprived management of the opportunity to agree and/or disagree with his decision to not make deliveries that afternoon. As a result, he alone bears responsibility for a decision which, it turns out, was the wrong decision.

The grievant's defense for not making deliveries that afternoon is that he was simply complying with a Company policy of not making partial deliveries. However, contrary to the Union's contention, there is no clear-cut Company policy on making partial deliveries or starting deliveries after a certain time. This is evident from the conflicting testimony of Company representatives Julius Cohen and Katz; Cohen testified he wanted the grievant to go out on his route after the flat tire was fixed while Katz testified he did not want drivers to perform only part of a route. Given the conflicting viewpoints of these two Company representatives concerning whether partial deliveries should be made, it is apparent that there is no clear-cut Company policy concerning same. That being so, the grievant cannot now rely on a policy that has not been shown to exist to justify his conduct.

Finally, it is noted that if the grievant had spoken with a management representative that day concerning making deliveries and the management representative had told the grievant to not make any deliveries, that certainly would have excused the grievant from doing so. However, that did not happen here. In fact, just the opposite was true because Katz expressly told the grievant (albeit at 8:30 a.m.) to make his deliveries. Given the existence of that order, it was incumbent upon McKean to check with Katz after the tire was fixed to see if he (Katz) still wanted McKean to make his deliveries. Since that never happened, the grievant has no justifiable excuse for not making deliveries that day. It is therefore held that since the grievant failed to perform the work which the Company employed him to do (i.e. make deliveries) on the afternoon of September 7, 1990 he engaged in 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 penalty of discharge was warranted. In the opinion of the undersigned, this particular misconduct does not constitute a so-called "cardinal" offense. In other words, if the grievant's misconduct on September 7, 1990 was 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 misconduct in conjunction with the grievant's overall work record.

By the Union's own admission, Company officials had long had problems with the way the grievant performed his work duties. The record indicates that management representatives had repeatedly counseled and warned the grievant to change his uncooperative and defiant attitude with management in making deliveries as well as his uncooperative attitude with the customers themselves. After the most recent such admonition to change his attitude, the grievant responded that he was not going to "kiss anybody's ass".

At the hearing, Eiseman gave detailed examples of the delivery problems encountered by the Company at two dozen businesses where the grievant made deliveries. The grievant, in turn, reviewed each instance of alleged poor customer service cited by Eiseman and attempted to refute it. In the opinion of the undersigned, it would serve little purpose to recite each and every difference between the testimony of the two men concerning the disputed deliveries and resolve them. Suffice it to say that the grievant did not come close to rebutting all of Eiseman's testimony concerning delivery problems with

the two dozen customers. This of course means that the great majority of Eiseman's criticisms of the grievant's work withstood challenge. That being so, the undersigned is persuaded by Eiseman's testimony, which corroborates similar testimony by management representatives Katz, Larry Cohen and Julius Cohen, that the following problems existed with the grievant's work performance. First, the grievant was uncooperative and defiant with management concerning deliveries. For example, on occasion he would not take items for delivery although management wanted him to, he would claim that he did not have time to make certain deliveries or did not have room on his truck for certain material when management thought he did and he often failed to get delivery sheets signed by customers in accordance with the Company's standard operating procedure. In short then, the grievant made deliveries his way as opposed to the way management wanted it done. Second, the grievant was also uncooperative with the customers themselves in making deliveries. For example, on occasion he would not make a delivery that the customer wanted, he sometimes delayed picking up return items although customers wanted them picked up and he sometimes failed to comply with specific customer requests to put material inside the customer's building rather than leaving it outside. These problems, particularly those in the latter category, resulted in some disgruntled customers who complained to management about the grievant's deliveries and, in some instances, reduced their amount of business with the Company.

While the Union notes that none of the above-noted problems were supported by customer testimony, and argues that this is significant, there is no requirement evident from the record that customers must verify such problems. Instead, these problems were verified by management representatives Eiseman, Katz and Cohen who obviously are empowered to make such calls for the Company.

Viewing the grievant's overall work history, the Company concluded that the grievant's record of offenses was sufficiently extensive that prior corrective measures had failed. Under the circumstances, the undersigned is hard-pressed to disagree. The grievant's failure to make deliveries on the afternoon of September 7 was simply the proverbial "last straw" because it was part of a pattern where the grievant did what he wanted to do rather than what the Company wanted him to do. The Company was not obligated to allow this situation to continue, especially since customer complaints about the grievant had resulted in lost business and future economic injury to the Company was foreseeable as long as the grievant continued to make deliveries. Finally, the fact that some customers on the grievant's route signed his post-discharge petition indicating they were satisfied with his deliveries does not change the outcome here because it may well be, as noted by the Union, that people simply signed the document in order to avoid a confrontation with the grievant. It is therefore concluded that the Company had a reasonable basis, as well as just cause, for discharging the grievant.

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

AWARD

1. That the grievances are arbitrable;

2. That there was good cause for the grievant's written warning dated September 6, 1990;

3. That there was good cause for the grievant's discharge on September 7, 1990. Therefore, both grievances are denied.

Dated at Madison, Wisconsin this 18th day of March, 1991.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator