BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
GENERAL TEAMSTERS UNION, LOCAL 662	:	Case 1 No. 49453 A-5087
and	:	
QUALITY VENDING SERVICES	:	

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Ms. Renata Krawczyk, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by Mr. Stephen Weld, appearing on behalf of the Company.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the Company or Employer, respectively, were 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 September 1, 1993, in Eau Claire, Wisconsin. The parties filed briefs in the matter which were received October 11, 1993. Based on the entire record, I issue the following Award.

ISSUE

The parties stipulated to the following issue:

> Was the grievant terminated for just cause? If not, what shall the remedy be?

PERTINENT CONTRACT PROVISIONS

The parties' 1991-92 collective bargaining agreement contained the following pertinent provisions:

ARTICLE 11

RESIGNATION, DISMISSALS

. . .

> Section 2. The Employer shall not discharge nor suspend any regular employee without just

cause. A regular employee charged with an

offense in writing at the time of the discharge or suspension will be informed of such offense in writing at the time of the discharge or suspension and a copy thereof shall be sent to the Union. Objection to any discharge or suspension must be made within five (5) working days of said discharge or suspension. 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 conditions agreed on by the Employer and the Union. Failure to agree shall be cause for the matter to be submitted to arbitration as hereinafter provided.

The parties recognize the principle of corrective discipline. The following shall be the sequence of disciplinary action:

1. Vocal warning;
2. Written reprimand;
3. Suspension;
4. Discharge.

The Company may repeat disciplinary action. The above sequence of disciplinary action need not apply in cases where the infraction is considered grounds for immediate discharge.

. . .

ARTICLE 15

GENERAL MISCELLANEOUS PROVISIONS

. . .

Section 7. Financial Responsibility. Because of the nature of the vending business, all of the employees are responsible for the handling of Company monies, inventories, and equipment, on a day-to-day basis. Employees shall not be held responsible for inventory spoilage returned, or explained shortages due to breaking, theft, or malfunctioning machines (e.g., free vending).

Any unit employee having problems with financial responsibilities shall be so notified in writing by management. The Union shall also be sent a copy of the notification sent to the employee.

FACTS

The Company operates a canteen-type vending operation, servicing various food, beverage, and cigarette vending machines throughout the Eau Claire area. The Union is the exclusive bargaining representative for all regular route drivers and maintenance employes employed by the Company. Grievant Donald Hall was hired as a route driver in November, 1989 and was employed in that capacity until his discharge on April 19, 1993. Prior to the discipline which is the subject of this case, Hall had never been previously disciplined for theft.

Route drivers are responsible for stocking and refilling the inventory on 40 to 50 vending machines per day. They are also responsible for the regular collection of monies from these machines, the occasional disbursement of customer refunds, and the reporting of machine malfunctions and other problems. Every time a driver restocks a machine's inventory, he completes a "load ticket." Every time a driver collects monies from a machine, he completes a "collect ticket." The collect ticket contains a tear-off slip that identifies the particular machine. On those days he is to collect the money from a machine, the driver completes the tear-off portion of the collect ticket and places it into the money bag along with the contents of the machine's cash box. Sometimes, a driver pays out customer refunds for damaged product or product which was paid for, but not received, by the customer. For every refund paid out, the driver completes a refund slip, retrieves the appropriate amount of refund monies from the money bag, and places the refund slip into the money bag so that the amount of refunds can be tracked and the ending cash total tallied out. At the end of the day, the money bags for each machine are taken to Company headquarters where the money is counted by machine and the totals are entered into the computer by the office staff. Information from load tickets, refund tickets, and collect tickets is entered in the computer so that sales totals and other information can be tracked.

In the spring of 1992, Company management began analyzing its vending machine routes to track each route's sales. The sales data that was compiled was used to generate reports which showed route cash overages and shortages. After these over/short reports were tracked over a period of time, it showed that Hall's route was experiencing cash shortages.

In mid-November, 1992, Hall was directed to explain, in writing, a money shortage of $800 on his route. Hall's written response dated November 18 was: "I don't know!"

Between late November and mid-December, 1992, Hall received four memos from Company owner Roy Brummer concerning his (Hall's) over/short reports. The first memo indicated Hall had a shortage

of $800 on his route, which Brummer characterized as "alarming", "unacceptable", and "must be corrected at once." The second memo indicated Hall had a shortage of $339 on his route, which Brummer again characterized as "alarming", "unacceptable", and "must be corrected". The third memo indicated Hall's shortages had improved; Brummer characterized Hall's shortage of $77.50 as "getting closer to where it should be." The fourth memo also indicated Hall's shortages had improved; Brummer characterized Hall's shortage of $46.60 as again "getting closer to where it should be."

In late December, 1992, Company owners Brummer and Dennis Johnson decided that an investigation was needed to determine the cause of the cash shortages on Hall's route. They assigned this task to route supervisor Ken Frank, who is not in the union's bargaining unit. Frank then enlisted Martin Viken to help him in the investigation. Viken is a maintenance worker who is in the union's bargaining unit.

Frank and Viken determined at the outset that since the cash box in a vending machine is the "end of the line" for monies deposited, it was the place to investigate possible theft. A vending machine's cash box is entirely separate from the machine's electrical and product disbursement mechanism. The coin box does not have a separate lock. Anyone who opens a machine has access to the coin box. Once money is in the cash box, it is not affected by inventory counting error (where the driver incorrectly tallies the inventory), or machine malfunctions such as "free vending" (when a machine dispenses a product without the customer depositing the necessary monies) or "jackpotting" (where a machine incorrectly dispenses too much money as change from the monies stored in the machine's coin changer mechanism.) The only way for monies to be removed from the cash box is for someone to reach in (when the machine is open), and take it out of the cash box.

Frank and Viken then formulated the following investigation procedure. They decided to spotcheck those machines on Hall's route which were registering cash shortages. They decided they would visit the machines shortly before Hall was scheduled to service them. Then, they would count the inventory in each machine and the monies in its cash box. After both men had verified the amounts, they would record the amounts and leave the site. Then, shortly after Hall had completed his duties and left the site, they (Frank and Viken) would return and again count the inventory and monies in the cash box and tally the results. Frank and Viken felt that by timing their visits in this manner, they would limit the possibility that someone else with a key could take money out of the machines. They did not tell Hall of their planned investigation.

On Saturday afternoon, January 9, 1993, 1/ Frank visited the Carnation facility, one of the stops on Hall's route. Frank was by himself when he did so. (Apparently Viken was not working that day.) Frank removed the monies from one particular pop machine's cash box and put it in a bag. He then changed the lock on that same pop machine to a high security lock for which he (Frank) had the only key. The reason Frank put this special lock on the machine was to ensure that no one had access to that particular machine over the weekend. Switching the locks in this manner eliminated the possibility of route drivers or other Company personnel gaining access to the machine with their Company keys, and also eliminated the possibility of outside, unauthorized persons gaining access to the machine with unauthorized keys. After changing the lock, Frank left Carnation and returned to the Company's headquarters with the monies from the machine. Sometime over the weekend, the monies he brought with him from this pop machine at Carnation were counted by machine at the Company's headquarters.

On Monday, January 11, Frank returned to the Carnation facility at 6 a.m. This was shortly before the grievant was scheduled to arrive at Carnation to service their vending machines. He switched the lock on the pop machine from the special lock (i.e., the one for which he had the only key) back to the regular lock so that Hall could get into the machine to service it. He (Frank) then performed an inventory count so that he knew how much product was in the machine. He also returned the money he had taken from the same machine on January 9 (i.e., the money which had been machine counted over the weekend) to the machine's cash box, and recorded the total amount he placed in the cash box. The total was $225.40. As was his custom, he also "parred" the coin changer mechanism, and marked the level at which it was filled. This process involves filling the coin mechanism as full of nickels, dimes and quarters as it would go. The reason Frank did this was to eliminate the possibility that the grievant would have to replenish the coin supply with monies from the cash box. Since Frank left $225.40 in the cash box after his visit, he expected Hall to turn in at least that same amount at the end of the day. Frank then left the Carnation facility.

An hour or so later, Hall arrived at the Carnation facility to service the vending machines, which he did. This work took about an hour and a half to complete. One of the pop machines which he serviced and collected monies from was the same machine which had the high security lock on it over the weekend. He paid out $2.00 in refunds on this pop machine. No one saw Hall take any money out of this machine's cash box for himself.

At 9:05 a.m. that same day, Frank and Viken returned to the

1/ All dates hereinafter refer to 1993.

Carnation facility to spotcheck the machine in question. They changed the lock on the machine back to the high security lock, counted and recorded the inventory of product in the machine, and verified that the coin changer mechanism was still full.

At the end of the day, Hall turned in the cash bag and corresponding paperwork for the pop machine in question from Carnation. The cash bag contained $221.90. 2/

Frank and Viken reported the foregoing to co-owners Brummer and Johnson. Their joint conclusion was that there was an unexplained cash shortage on that machine and that Hall was responsible for it.

While Company officials believed Hall had stolen money from the machine at Carnation, they decided to not discipline him at that time. Brummer testified the reason he did not discipline Hall at that time was that he wanted to give Hall the benefit of the doubt. Brummer then reported the Company's findings to the police department.

About this same time, Hall was tipped off that he was being investigated by Company officials for theft. This happened when Frank told Tom Albrecht, another route driver and friend of Hall's, that Hall should be careful because he (Frank) was checking on him (Hall). Additionally, Hall learned from someone at Dadco Pizza, one of the stops on his route, that two people from Quality Vending had been counting money in the vending machines at Dadco. Afterwards, Hall went to Brummer and complained to him about Frank checking on him at Dadco.

On March 18, Frank and Viken visited the Tiger's Den, another location on Hall's route. The Tiger's Den is the student lounge area at the Eau Claire Technical College. They arrived there at 9 a.m. Frank first parred and marked the coin mechanisms on two pop machines: one Pepsi and one Coke. Then they counted the product inventory in each machine. Next they emptied the contents of each machine's cash box onto a table, sat down at the table, and counted the money by hand. Each man counted the money in each machine's cash box separately. This hand counting of nickels, dimes and quarters took a half-hour to complete. After counting the monies, both men came out with the same totals. They then verified each other's count to ensure that their individual totals matched, and it did. Then they filled out a tracking form for each machine. They counted $127.55 in the Pepsi machine cash box, and $106.70 in the Coke machine cash box. While they were counting, another $2.55 in sales was made on the Coke machine,

2/ It is not clear whether the $221.90 figure includes or excludes the $2.00 in refunds which the grievant paid out for this machine.

bringing the total money for the Coke machine to $109.25. Next they put the money they had counted back into the machines' cash boxes. They put $127.55 into the Pepsi machine cash box and $109.25 into the Coke machine cash box. They expected Hall to turn in at least this same amount from each machine at the end of the day. Frank and Viken then left about 9:30 a.m. They did not return to the Tiger's Den a second time that day.

Later that morning, 3/ the grievant arrived at the Tiger's Den to service the vending machines, which he did. Two of the machines which the grievant serviced and collected monies from were the Coke and Pepsi machines which had been spotchecked by Frank and Viken. While Hall was there, he paid out $2.05 in refunds on the Pepsi machine. No one saw Hall take any money out of the Coke or Pepsi machines' cash boxes for himself.

At the end of the day, the grievant turned in the cash bags and corresponding paperwork for the Coke and Pepsi machines from the Tiger's Den. The cash bag from the Coke machine contained $107.65 and the cash bag from the Pepsi machine contained $119.40. 4/

Frank and Viken reported the foregoing to Company owners Brummer and Johnson. Their joint conclusion was that there was an unexplained cash shortage on those machines and that Hall was responsible for it.

Brummer then reported the foregoing incident to the police department. Due to other pressing matters though, the police department did not follow-up for a month. On April 19, Hall was interviewed at Company headquarters by a police detective. Company officials did not participate or sit in on this interview.

3/ The exact time is disputed. The grievant testified he arrived at the Tiger's Den between "10 and noon or sometime after lunch". Frank and Viken speculated that Hall arrived at the Tiger's Den "shortly after" they left at 9:30 a.m. Their speculation is based upon the following: the inventory tickets which Hall filled out for these machines showed an inventory count which varied little from the inventory count which they (Frank and Viken) recorded before they left the Tiger's Den that morning. Viken testified that the Coke and Pepsi machines at the Tiger's Den register frequent sales. Since few product sales occurred in the period between Frank and Viken leaving and Hall arriving, they contend the time frame between their leaving and Hall arriving could not have been long.

4/ It is not clear whether the $119.40 figure includes or excludes the $2.05 in refunds which the grievant paid out for this machine.

Hall testified the detective told him he (Hall) was being investigated for the alleged theft of $5600 from vending machines on his route. Hall told the detective he had not stolen any money and that the $5600 was a computer error. Insofar as the record shows, this interview completed the police department's investigation into the matter.

After the interview with the detective ended, Company representatives met with Hall. During their meeting, Company representatives accused Hall of theft, specifically stealing money from vending machine cash boxes. It is unclear whether Hall was told during this meeting that he had allegedly stolen money from a pop machine at Carnation on January 11 and two pop machines at the Tiger's Den on March 18. Hall testified he was not told of these specific instances. Brummer testified he showed Hall "all the paperwork" the Company had from its investigation. At the end of the meeting, Hall was given the choice of resignation or termination; he chose not to resign, saying he had done nothing wrong. He was discharged effective that same date for theft. The next day, April 20, Company owners Brummer and Johnson sent the following letter to Union Business Agent Mike Thoms:

> We have been concerned of shortages on DON HALL'S route since we took over the company. As a result we have investigated the shortages and in the course of the investigation we documented four different occasions where money was stolen by Don Hall.
>
> We reviewed this with the Eau Claire Police department and they interviewed Don Hall on April 19, 1993. They have referred all of our findings to the District Attorney's office.
>
> We gave Don Hall the option of quitting or we would have to dismiss him because of the money shortages. We dismissed him on April 19, 1993.

Brummer testified that when he referred to "four different occasions" in this letter, he was referring to the pop machine at Carnation on January 11 and the two pop machines at the Tiger's Den on March 18. Brummer did not identify a fourth occasion.

Following his discharge, Hall filed for unemployment compensation. A hearing on his claim was held in late May. At that time, Hall was told of the alleged cash shortages that occurred at Carnation on January 11 and at the Tiger's Den on March 18.

Hall also grieved his discharge. Sometime in June, a step 3

grievance meeting was held on the grievance. At this meeting, the Company provided the Union and Hall with specific information concerning what Hall had allegedly stolen and when and where this had happened. Hall was then given the opportunity to respond to the Company's charges, but he chose not to offer any explanation or defense to the charges.

Criminal theft charges were never filed against Hall. The District Attorney's office informed the Company's labor counsel that the District Attorney did not want to get involved in what he perceived as an employer-employe dispute.

Hall testified at the hearing that someone with a key had opened the pop machines at the Tiger's Den on several occasions and taken the entire contents of the cash box. Brummer, Frank and Viken testified they were not aware of any such robberies at the Tiger's Den.

The record indicates that when Hall was fired, he was on the Union's bargaining team which was negotiating with the Company for a successor to the parties' 1991-92 contract.

Additional facts are included in the DISCUSSION section below.

POSITIONS OF THE PARTIES

The Union's position is that the Company did not have just cause to discharge the grievant. To begin with, the Union raises several procedural due process considerations which, in its view, taint the Company's decision to discharge the grievant and require the discipline to be set aside. First, the Union contends that the Company's investigation was defective. Second, it notes that while the Company investigated the grievant for several months, it never told him he was suspected of theft. Third, the Union notes that the Company waited months before it took disciplinary action against the grievant. In its view, the Company waited too long before doing so. It also notes in this regard that even if the Company waited for criminal charges to be filed, it waited for naught because criminal charges were never brought against the grievant. Finally, it asserts that when the grievant was discharged, he was not given the specifics as to what, when and where he allegedly stole. The Union contends that although it was informed of these specifics two months later, this delay nevertheless hindered the grievant and the Union in conducting their own investigation. The Union believes this delay explains why the grievant was unable to recall many significant details of the dates in question. With regard to the merits, the Union argues that the Company failed to prove that the grievant did what he is charged with doing, namely skimming money from three vending machines that he serviced. In the Union's view, the evidence does not substantiate that charge. It notes in this regard that no one

saw the grievant take any money from the machines, so this means the Company's evidence against him is purely circumstantial. According to the Union, the standard of proof in this (theft) case is the stringent standard applicable to criminal cases, namely, the "beyond-a-reasonable-doubt" standard. The Union submits that there are a number of reasonable explanations why the monies could have been missing from the machines. To begin with, the Union notes that numerous individuals other than the grievant, specifically persons not employed by the Company, have a key that would allow them to get into the machines which the Company claims were short of money on January 11 and March 18, 1993. According to the Union, any of these people who have access to the key could have gotten into the Carnation and Tiger's Den machines on January 11 and March 18, 1993. Next, the Union submits that on the dates in question, the grievant could have taken money out of the machine's coin box and placed it in the coin mechanism. Finally, the Union submits that Frank and Viken could have miscounted the money. Given the foregoing, the Union argues there are credible explanations for the missing monies other than that posed by the Company. The Union therefore requests that the grievant be reinstated with a make-whole remedy.

The Company's position is that it had just cause to discharge the grievant. According to the Company, it has proven by the preponderance of the evidence that the grievant stole money from three machines that he serviced. As background, the Company notes that there had been cash shortages with the machines that the grievant serviced. It therefore designed an investigation to determine the cause of the cash shortages. The Company focused its investigation on the cash box because while there are many things that can go wrong with a vending machine which result in an inventory shortage, the one thing that cannot change is the money in a cash box. The Company notes that its' representatives counted the money in the cash boxes of three machines shortly before the grievant serviced them. Afterwards, the money was counted again, and there was money missing from the cash boxes of all three machines. The Company contends that the only plausible explanation was that the grievant took the missing monies. The Company believes its investigation procedure eliminated every other plausible explanation for the cash shortages. According to the Company, the cash shortage could not have been caused by either free vending, jackpotting, or driver inventory counting error because none of these problems affect the money in a machine's cash box. Next, the Company contends that the missing cash box monies could not have been used to refill the coin change mechanism because the grievant's own testimony was that it was not his practice to do so. Next, the Company asserts that the missing money was not used to make customer refunds because refunds from the machines in question were properly accounted for. Next, the Company submits that another driver or Company employe did not take the missing money. It notes in this regard that Frank and Viken timed their spotcheck visits so that the money was counted

immediately before the grievant arrived to service the machine. According to the Company, this left only a small window of opportunity for other drivers to access the machines' cash boxes. Next, the Company believes it adequately addressed the possibility that someone else, with or without a key, took the money. In its view, it is too coincidental that a third party took money without detection from three separate machines which just happened to be on the grievant's route. The Company notes that even if a third party took the money, it asks (rhetorically) why they did not take all of it instead of just a couple of dollars. Next, the Company believes it adequately addressed the possibility that the money in the cash box was miscounted. It asserts that the missing monies cannot be attributed to a money counting error. Finally, the Company submits that there is no evidence that Frank, Viken or either of the Company owners took the money. Given all of the foregoing, the Company believes that none of these explanations can account for the missing monies and that the grievant was the one responsible. The Company therefore asserts that since the grievant took the missing monies, he was properly terminated for same. The Company further argues that the grievant's discharge had nothing to do with his status as the Union's local steward. With regard to the level of discipline imposed, the Company believes termination is supported by the record. In its view, the grievant's actions constitute grounds for discharge. It argues that under these circumstances, progressive discipline is not applicable. The Company urges the arbitrator to defer to the Company's judgment for the penalty for the grievant's misconduct. The Company therefore contends that the grievance should be denied and the discharge upheld.

DISCUSSION

Procedural Due Process Considerations

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

Attention is focused first on the Company's investigation. It is apparent from the record that the Company had suspected for some time that the grievant was stealing money from vending machines that he serviced. As was its management right, it decided to investigate whether its suspicions were well-founded. At the hearing, Company representatives Frank and Viken described in great detail the investigation procedure they developed and carried out. Although the Union contends this investigation was defective, the undersigned is not so persuaded. In my view, the investigation has not been shown to be defective or flawed in either its design or its implementation. While the Union correctly notes that Frank and Viken could have stayed at Carnation and the Tiger's Den to actually watch Hall service the vending machines located there, the fact that they did not do so

does not taint the investigation's results. It is therefore held that the investigation itself has not been successfully challenged by the Union.

Next, the Union notes that although the Company investigated the grievant for several months, it did not tell him immediately after either the January 11 incident at Carnation or after the March 18 incident at the Tiger's Den that he was suspected of theft. While the Union implies that the Company was obligated to so inform the grievant, such is not the case. In point of fact, there is no requirement that an employer has to tell an employe suspected of theft that they are under investigation. An employer can keep this information to itself if it so chooses. Here, though, this information leaked out and the grievant learned sometime after the Carnation incident that he was being investigated for theft. As a practical matter then, the grievant did receive notice that he was under investigation for the theft of monies from vending machines.

The Union also notes that although the Company investigated the grievant for three months, it did not take disciplinary action against him until April. In its view, the Company waited too long before it took disciplinary action. I disagree. There is no requirement that an employer who suspects an employe of theft, or any misconduct for that matter, has to take disciplinary action within a certain time frame. While an employer who decides to not discipline an employe immediately for misconduct obviously runs a risk that its evidence will turn stale, suffice it to say that the undersigned believes the Company's evidence here was not stale. The reason the Company waited till April before it took disciplinary action against the grievant was that it was waiting for the police to conduct their own investigation. Once the police finished their investigation, the Company immediately took disciplinary action against the grievant.

The final due process consideration involves the matter of whether the grievant was told at the time he was discharged of the alleged cash shortages at Carnation on January 11 and the Tiger's Den on March 18. There is no question that when he was discharged, Hall was told the reason was theft; specifically, stealing money from pop machines. The grievant's discharge letter confirms this because it states in pertinent part: "we documented four different occasions where money was stolen by Don Hall." This letter satisfied the contract requirement that the "employe be informed of such offense in writing. . ." Having said that though, it is unclear whether Hall was given the specifics concerning the "different occasions" referenced in the letter when he was discharged. By specifics, I'm referring to what was allegedly stolen, when it was allegedly stolen and where it was allegedly stolen from. Hall testified he was not given this information on the day he was discharged. In my view, if he was not given this specific information on the day he was discharged,

as he so testified, then he should have been. However, I find that the Company's apparent failure to provide the aforementioned specifics at that time does not warrant overturning the discharge on that basis alone. The rationale for so finding is that the Company provided this specific information to both the grievant and the Union at later dates, namely the unemployment compensation hearing in May and at the grievance meeting in June. Thus, the grievant and the Union received this information months in advance of the arbitration hearing. While the delay in receiving this information probably hindered the grievant and the Union in conducting their own investigation, as they so allege, I am not convinced this delay totally compromised the grievant or his case.

Merits

The focus now turns to whether the discipline which the Company imposed upon the grievant violated the contract. Article 11, Section 2 of the parties' labor agreement contains what is commonly known as a "just cause" provision. It provides that the Company will not suspend or discharge an employe without just cause. What happened here is that an employe, namely the grievant, was fired by the Company. Given this disciplinary action, the obvious question to be answered here is whether the Company had just cause for doing so.

As is normally the case, the term "just cause" is not defined in the parties' labor agreement. While the term is undefined, a widely-understood and applied analytical framework has been developed over the years through the so-called common law of labor arbitration. That analytical framework consists of two basic questions: the first is whether the Company demonstrated the misconduct of the employe and the second, assuming this showing of wrongdoing is made, is whether the Company established that the discipline imposed was contractually appropriate.

The Company discharged the grievant for theft. The Company asserts that there were cash shortages at three vending machines serviced by the grievant. The Company further asserts that it was the grievant who took the (alleged) missing monies. These allegations are addressed in detail below.

My analysis begins with the premise that an employer is entitled to expect honesty on the part of its employes, and employes have a basic responsibility not to steal from their employer. Theft is of such a nature that the mere occurrence of it gives rise to a general presumption that an employer's business is adversely affected. This presumption is certainly applicable here. Route drivers service over 200 machines a week, and they have access to the coin box on every machine. As a result, the opportunity exists to take money out of each machine. This money belongs to the Company though, so it has a justifiable interest in ensuring that employes not take any of this money for themselves.

With this interest in mind, the first element of a just cause determination turns upon whether the grievant did what he was charged with doing, namely skimming money from three vending machines that he serviced. As noted above, this first component of a just cause analysis requires a demonstration of the grievant's wrongdoing.

In their respective briefs, each side addresses at great length what degree of proof is needed to make this call. The Union contends that the standard of proof in this (theft) case is guilt beyond a reasonable doubt, as in criminal cases. Not surprisingly, the Employer takes the view that a less stringent standard of proof is needed. The undersigned agrees with the Company on this point. Although the charge against the grievant (i.e. theft) can certainly be characterized as a crime, this is not a criminal case. The undersigned is not empowered to decide, and in point of fact will not decide, whether a crime was committed here. That being so, I believe that the standard of proof applied in criminal cases (i.e., beyond a reasonable doubt) is not necessary. Having said that, there is no question that the Company nevertheless has the burden of proof. The question here is what level or standard it has to meet. The undersigned believes that the degree of proof the Company has to meet is to persuade the arbitrator. In other words, the Employer has to convince me that the grievant did what he is charged with doing, namely skimming money from three vending machines that he serviced. Obviously, the Company bears the risk of non-persuasion.

Attention is now turned to making that call. The Union questioned at the outset whether money was actually missing as alleged by the Company from a vending machine at Carnation on January 11 and two machines at the Tiger's Den on March 18. That being the case, it follows that this is the threshold question. The record indicates that the money in each machine's cash box was counted before the machine was serviced. In the first instance at Carnation, the money was taken back to the Company's headquarters and was counted by machine. In the second instance at the Tiger's Den, the money was counted by Frank and Viken by hand. The Union questions whether Frank and Viken counted correctly at the Tiger's Den when they did so by hand. It notes in this regard that they counted over $235 in change in a half-hour period and came up with the same figures. According to the Union, it does not seem possible that both men would come up with the same exact totals when they counted this enormous amount of change. However, there is nothing in the record which would cause the undersigned to question either the counting ability of the two men or the final figure which they tabulated. Consequently, there has been no showing that Frank and Viken miscounted the money in the cash boxes at the Tiger's Den on March 18. What happened next at each location (i.e., both at Carnation and at the Tiger's Den) was that

the grievant serviced the machines and brought the money from the machine's cash boxes back to Company headquarters. The amount of money which the grievant turned into headquarters from the cash boxes of the three above-noted machines was less than the amount which had been left in them by Frank and/or Viken. Since money was missing, it is held that there was, in fact, an unexplained cash shortage with a vending machine at Carnation on January 11, and with two vending machines at the Tiger's Den on March 18.

According to the Company, its investigation into the missing monies eliminated every possibility except one, namely that someone had taken the money. The Company concluded that the guilty party was the grievant. At the hearing, the grievant expressly denied taking any money. Additionally, he put forth a number of explanations for the missing monies which do not involve him. Each of the possibilities which was raised at the hearing and in the Union's brief will be addressed below.

To begin with, the grievant contended at the hearing that the cash box shortages could have been caused by the machines "free vending". As previously noted, free vending is when a machine dispenses a product without the customer paying the requisite amount. If free vending occurs, it can obviously cause a shortage in product inventory. However, it cannot cause monies which are already in the cash box from prior sales to disappear or be reduced. Here, though, money was taken from the cash boxes, so free vending cannot possibly account for the monies missing from the cash boxes.

Next, the grievant contended at the hearing that the cash box shortages could have been caused by the machines "jackpotting". As previously noted, jackpotting is when a machine's coin change mechanism dispenses the incorrect change. If jackpotting occurs, this causes a shortage in the money in the machine's coin mechanism. However, jackpotting has no impact whatsoever on the money in a cash box. Since cash box monies are unaffected by jackpotting, it stands to reason that jackpotting could not possibly account for the missing cash box monies either.

Next, the grievant contended at the hearing that an inventory counting error could have caused the cash box shortages. He noted in this regard that he and Frank had different ways to count inventory. While certainly an inventory counting error could result in sales appearing to be higher or lower than they actually are, it (i.e., an inventory counting error) will not affect the amount of money in the machine's cash box. That being so, the method used to count inventory cannot possibly account for the missing monies.

Next, the grievant raised the possibility that he might have used monies from the cash boxes on the days in question to refill the machines' coin changer mechanisms. Had this, in fact,

happened, it would indeed account for some or all of the missing cash box monies. However, there is a problem with relying on this possibility to explain away the missing monies. The problem is that it simply does not coincide with the grievant's own testimony. The grievant testified in this regard that although he had been told by Frank to fill the coin mechanisms each time he serviced a machine, it was not his practice to do so because he (the grievant) considered it too time-consuming. Given this acknowledgement, the undersigned has no basis for concluding that the missing monies were caused by the grievant using monies from the cash boxes to refill the machines' coin changer mechanisms. Furthermore, it cannot be overlooked that Frank "parred" the coin changer mechanism on each machine prior to the grievant's arrival. Thus, the coin mechanisms were filled to capacity. Frank's doing so eliminated any need for the grievant to use monies from the cash boxes to refill the coin mechanisms.

The grievant also submitted that the missing cash box monies might have been used to make customer refunds. Since customer refunds are made directly from money in the cash box, it is indeed possible that such customer refund payments could account for monies missing from a cash box. However, when a driver pays a refund, he fills out a refund slip and returns that slip to the Company headquarters by putting it in the money bag from which the refund was paid. Thus, a record is kept of all refunds. That is exactly what the grievant did here. On January 11, he paid out $2.00 in refunds at the Carnation site, and on March 18 he paid out $2.05 in refunds at the Tiger's Den Pepsi machine. He followed the proper procedure in both instances. Consequently, customer refunds cannot account for the missing cash box monies.

Finally, the Union submitted that someone other than the grievant could have taken the cash box monies. It raised three possibilities in support of this premise. First, the Union notes that Coke and Pepsi route drivers (who do not work for Quality Vending, but rather Coke and Pepsi, respectively) have keys to the Coke and Pepsi machines operated by Quality Vending. That being so, it is theoretically possible that an unidentified Coke or Pepsi driver could have gone to the Carnation facility after Frank changed the lock on the machine from a high-security lock to the regular lock, opened the machine, and taken a small amount of money out of the cash box. Of course, this would have had to occur within a one and one-half hour time frame because Frank was there at both 6 and 9 a.m. and the grievant was there for one and one-half hours in between that three-hour period stocking the machines. While the same thing could have also theoretically happened at the Tiger's Den, both a Coke driver and a Pepsi driver would have to be in on the scheme. This is because Coke drivers do not have keys to the Pepsi machines and the Pepsi drivers do not have keys to the Coke machines. This point is important here because monies were taken on March 18 from the cash boxes of both Coke and Pepsi machines at the Tiger's Den. Since monies were

taken from both machines at that location, and not simply one machine, I am satisfied that the missing monies at the Tiger's Den on March 18 cannot be attributed to two unidentified Coke and Pepsi drivers.

Second, the Union relied on the testimony of a former Company route driver, Tom Albrecht, who now works for a vending company in Minnesota. Albrecht testified that the keys he uses in his current job are numbered NV-400, the same as the keys he used when he worked for Quality Vending. While it may be that all NV-400 keys are identical, that is not the only conclusion that could be drawn from this testimony. For example, it is also possible that this series of letters and numbers could simply identify the type of key that it is or refer to the manufacturer of the key. Given these differing possibilities, it is unclear from the record whether all keys marked NV-400 are identical. This of course means that even if an unidentified person had an NV-400 key, such as Albrecht does, the Union has not established that this key opens the pop machines at Carnation and the Tiger's Den. Consequently, the undersigned is not persuaded that the cash shortages in question can be attributed to an unidentified person with an NV-400 key.

Third, the Union raised the possibility that someone else with a key that would open the machines at Carnation and the Tiger's Den could have taken the missing monies. There is no question that people other than the grievant have access to keys that could do just that (i.e., open the machines at Carnation and the Tiger's Den). That being so, it is indeed possible that someone with such a key could account for the missing monies. The question here is whether that scenario is likely to have occurred. Based on the following rationale, the undersigned concludes it is more unlikely than likely to have occurred. To begin with, since Frank and Viken timed their spotcheck visits at Carnation and the Tiger's Den so that the money was counted shortly before the grievant arrived to service the machines, there was only a small window of opportunity for anyone else with a key to gain access to the machines' cash boxes. Specifically, there was only about an hour or so during which anyone else could have gained access to the machines at either location. Had they done so, this unknown person would have had to unlock the machine, open it, take money from the cash box, and close and relock it. All this would have had to been done without raising the suspicions of those people who were in the vending machine area at the time. Next, only a couple of dollars were taken from each machine. Why would a person breaking into a machine, albeit with a key, take just a couple of dollars from the cash box? Having gone to the risk, wouldn't the person take all the money from the cash box? After all, the grievant himself testified that someone with a key had gotten into the machines at the Tiger's Den previously, and when they did so, the entire contents of the cash box were taken. In the opinion of the undersigned, the only plausible reason to take

just a small amount of money from the cash box, as opposed to all the money in the cash box, is to avoid detection. This is because taking a little bit here and there is much less likely to arouse attention than taking a large amount all at once. Finally, there is no basis whatsoever in the record for the undersigned to infer that it was Frank, Viken, or any other Company representatives that took the missing monies. Consequently, none of them are considered viable suspects. It is therefore concluded that although it is indeed possible that someone other than the grievant with a key to the machines at Carnation and the Tiger's Den could account for the missing monies, that scenario is unlikely to have occurred.

Having reviewed all the explanations and possibilities offered by both the grievant and the Union as to what happened to the missing monies, it has been found that none of them can account for the missing monies. The Company established that the missing monies were taken directly from the machines' cash boxes. It proved this because the money in each machines' cash box was counted before it was serviced; afterwards, the amount of money which the route driver turned in for each machine was less than had been left in the machine's cash box by Frank and/or Viken. It follows from this that someone had to have taken the money out of the machines' cash boxes. The critical question, of course, is who. I find, just as the Company did, that the person who took the money out of the cash boxes at Carnation on January 11 and the Tiger's Den on March 18 was the grievant. Admittedly, the evidence against him is purely circumstantial since no one saw him do it. Be that as it may, I am persuaded that all other logical explanations have been explored and eliminated. The grievant was a constant in both the Carnation and Tiger's Den incidents. All three of the machines involved were on his route, and he was the driver who serviced them. In my view, this was more than just a coincidence.

It is therefore held that the grievant did what he was accused of doing -- namely, taking money from a pop machine at Carnation on January 11 and two pop machines at the Tiger's Den on March 18. This theft constituted misconduct warranting discipline.

At the hearing, the grievant alleged that the real reason he was fired was that he served on the Union's bargaining team which was negotiating with the Employer at the time for a successor to the parties' 1991-92 contract. Hall implies that the Company discharged him in order to end his involvement in negotiations. The problem with this claim though is that no evidence was produced to support it. Insofar as the record shows, the grievant's discharge was not due to his serving on the Union's bargaining team. That being the case, this contention simply has not been substantiated.

The second part of a just cause analysis requires that the Company establish that the penalty imposed be contractually appropriate. As noted by the parties in their briefs, arbitrators have differed greatly over the discipline imposed for theft. Obviously, discharge for the theft of about $10 is an extremely harsh penalty for an employe who had never been previously disciplined. Nonetheless, I conclude it was proper under the circumstances. First, while the normal progressive disciplinary sequence is for employes to receive warnings and suspensions prior to discharge, that does not mean that all discipline must follow

this sequence. Some offenses are so serious that they are grounds for summary discharge even if the employe has not been previously disciplined. Such is the case here because the parties have contractually agreed in Article 11, Section 2 that progressive discipline "need not apply in cases where the infraction is considered grounds for immediate discharge." In other words, progressive discipline need not be followed where the infraction is sufficiently serious. Theft is one of the so-called cardinal offenses of employe misconduct that is grounds for immediate discharge. This means that when an employe engages in theft, the Employer does not have to impose progressive discipline prior to discharge; instead, it can discharge immediately. Next, there is nothing in the record indicating that the Company knew of, or had tolerated, similar instances of employe theft. Prior to the instances involved here, no other cash box monies were even found to be missing from anyone else's route. That being so, it does not appear that the grievant herein was subjected to any disparate treatment in terms of the punishment imposed for theft. Finally, the grievant's misconduct is indicative of what could happen again if he continued to work for the Employer. The Company considers that prospect unappealing and the undersigned is hard-pressed to disagree. Accordingly, then, it is held that the severity of the discipline imposed here (i.e., discharge) was neither disproportionate to the offense nor an abuse of management discretion, but was reasonably related to the seriousness of the grievant's proven misconduct. The Company therefore had just cause to discharge the grievant.

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

AWARD

That the grievant was terminated for just cause. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 30th day of December, 1993.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator