BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**LOCAL UNION NO. 695,
AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

and

**SILGAN CONTAINERS CORPORATION
FOR ITS MENOMONEE FALLS, WISCONSIN, CAN PLANT**

Case 7
No. 56468
A-5681

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Frederick Perillo**, 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Local No. 695, affiliated with the International Brotherhood of Teamsters, referred to below as the Union.

Foley & Lardner, by **Attorney Thomas C. Pence**, Firstar Center, Suite 3800, 777 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-5367, appearing on behalf of Silgan Containers Corporation for its Menomonee Falls, Wisconsin, Can Plant, referred to below as the Company.

ARBITRATION AWARD

The Union and the Company are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of James Lortie, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on August 20, 1998, in Germantown, Wisconsin. The hearing was not transcribed. The parties filed briefs by September 16, 1998.

ISSUES

The parties stipulated the following issues for decision:

Was there just cause for the discharge of the Grievant?

If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 6 DISCHARGE PROCEDURE

6.1 No employee shall be discharged or suspended except for dishonesty, drunkenness, being under the influence of or in possession of illegal drugs, or the illegal use of dangerous drugs, or other just cause. At least one (1) warning notice shall be given in writing to the Union and to the employee before discharge or suspension can be made except in cases of dishonesty, drunkenness, being under the influence of or in possession of illegal drugs, or the illegal use of dangerous drugs, or other serious offenses as calling for no advance notice of discharge. . . .

6.2 . . . Should it be found that the employee has been unjustly discharged or suspended, he shall be reinstated and compensated for the time lost at his regular rate of pay.

BACKGROUND

The grievance questions the Grievant's termination. Roger Gato, the Company's Plant Manager, issued the Grievant a letter of termination dated March 11, 1998 (references to dates are to 1998 unless otherwise specified), which states:

> On the afternoon of 3/8/98, you were observed placing Company property in your vehicle. You closed the vehicle and proceeded to return to you (sic) work area. Your supervisor, Mr. Howard Waite, asked you to go back to your vehicle and return the property to the Company. This is a direct violation of Article 6.1 of the Bargaining Agreement. It is also a violation of the Major Rules of Conduct that are posted at the employee entrance. Your employment . . . is hereby terminated, for theft of Company property, effective 3/11/98.

The "Major Rules of Conduct" referred to in Gato's letter read thus:

> (The following list identifies major categories of unacceptable behavior which is prohibited at the work place and violations generally warrant a written warning, suspension or immediate discharge.)
>
> . . .
>
> - Theft, willful abuse or destruction of Company property, tools or equipment or that of other employees.
>
> . . .

These major rules are part of a document headed "PLANT WORK RULES AND RULES OF CONDUCT." Among the explanatory paragraphs of that document is the following:

> On a case by case basis and with regards to specific circumstances, serious acts of misconduct may be cause for a written warning notice, immediate suspension or discharge on the first offense. However, for violations of general rules under normal circumstances progressive discipline will be applied. . . .

The grievance form alleges the discharge is unjust and cites Section 6.2 as the basis for "reinstatement and compensation."

The Company's Menomonee Falls plant fabricates coiled steel into coated or uncoated sheets that can then be fabricated into cans and can ends by food processors. The Grievant worked in the Coating Department, where epoxy or enamel coatings are applied to sheets of metal plate. That portion of the Coating Department relevant to the events of March 8 includes four separate coating lines at which sheets of steel are fed through machines that apply, then cure the coatings. The Grievant, on March 8, worked as a feeder on one end of one of these four lines. The Grievant's machine was known as Coater Line 1. Immediately south of that machine was Coater Line 2. The Grievant's wife worked as the feeder for that line on March 8. Immediately south of her line was Coater Line 3, which was operated on March 8 by Ken Lindner. Immediately south of his line was Coater Line 4, which was operated on March 8 by Bob Dembiec. To the east of Coater Lines 3 and 4 is a number of offices, including the Coating Department Office. The Supervisor of the Coating Department on March 8 was Howard Waite. South of Waite's office are a series of loading docks. To the east of the loading docks is a large, enclosed truck unloading area. The first three of the loading docks, viewed from Waite's office, are roughly four and one-half feet above the paved floor of the truck unloading area. The furthest

loading dock from Waite’s

office extends into the truck unloading area. Adjacent to that platform is a dumpster used by the operators of lines 1 through 4. To the south of that platform is a stairway leading down into an area known as the Compressor Area. Each of the loading docks has a doorway between the Coating Department and the truck unloading area. On the east edge of the truck unloading area are six large doorways that can be used to shut the truck unloading area off from the outside.

To the south of Coater Lines 1 – 4 is an open area used to store sheets of steel. Aisles separate the stored rows of steel plate, which in March, were ten to twelve feet high. Beyond those sheets of steel, to the south and west of the Coating Department, is an employee break room, the Press Department and the Machine Shop. There is a dumpster located near the Machine Shop. The Company assembles air hoses necessary to its manufacturing processes in the Machine Shop.

March was not a busy time for the Company, but it had decided to implement continuous operation on twelve hour shifts to build inventory for the then upcoming canning season. The day shift ran from 6:00 a.m. until 6:00 p.m. On March 8, all four coater lines were running. Each Coater Feeder was given four breaks during their twelve hour shift. A Utility Operator was used to spell each Coater Feeder to permit them to take their four breaks. Breaks were thus staggered throughout the shift to permit the Utility Operator to cover each coater line.

As the day shift progressed on March 8, the weather worsened and the Company opened the east bay doors to permit employes to move their vehicles inside the plant within the truck unloading area. At least Lindner, Waite and the Grievant took advantage of this opportunity. The vehicles relevant here were all parked to the east of the loading dock closest to Waite's office.

Sometime toward the end of the day shift, probably around 4:30 p.m., Waite stood between Coater Lines 3 and 4, speaking with Dembiec and Lindner. The Grievant, who had been on break, returned from the break room carrying at least his lunch box, a box of paper towels and a short coil of either air hose or electrical conduit.

Air hose is of a smaller diameter than conduit and is more flexible. Each end of a complete coil of air hose has a bright silver colored coupling. The conduit used by the Company is stiffer than air hose and ribbed. Conduit can also have couplings on each end. The couplings are, however, shorter and wider than air hose couplings. The two are somewhat similar in appearance, but visually distinguishable if clearly seen. The paper towels used by the Company come in boxes of one hundred towels. The boxes are roughly five by five by twelve inches. A box of towels is worth roughly $10. A four to six foot coil of air hose is worth perhaps $30. The Company assembles air hoses as necessary for its manufacturing processes, but cannot keep a current inventory of them, due to their constant use and replacement. The Grievant and some other Coater Feeders use the paper towels to clean themselves, their equipment and steel plate during the coating process. Certain foremen permit employes to take material thrown into dumpsters in the plant. Some foremen expect employes to seek permission before salvaging thrown away material, others

do not. The Company will also permit employes to buy non-waste material or tools. The Grievant, for example, has purchased a mallet from the Company. Employes who wish to use non-waste material or tools seek permission to personally use or to buy such items.

As the Grievant came into the Coating Department from the break room, he headed northerly, toward Waite, Dembiec and Lindner. Waite perceived the Grievant to deviate from this course and to shift what he saw as air hose and a box of towels. The Grievant then proceeded east toward the farthest loading dock from Waite. He walked through the door to the loading dock, then down the stairway to the south, into the Compressor Area. Waite was convinced the Grievant was avoiding him, and walked down the loading dock area to keep the Grievant in view. Waite paralleled the Grievant's path as the Grievant walked east across the Compressor Area, then north past the furthest loading dock and into the truck unloading area.

The Grievant walked to his truck, pausing at the rear of the truck. Waite ultimately hailed him, telling him to bring the paper towels to his office. The Grievant did so, then returned to Coater Line 1. While at Coater Line 1, Waite approached the Grievant, mentioned the incident, then returned to his duties. The Grievant remained on duty for the balance of his shift. Waite did not ask the Grievant to return the air hose or conduit, and did not inspect the Grievant's truck.

At the end of his shift, Waite prepared a memorandum for the review of his supervisors. That memorandum states:

. . .

1. This afternoon, I personally observed you walk to your Dodge Truck and place the following contents into the rear truck bed area of your vehicle and then close the glass door of your truck cap. The items were:

QUANTITY	**CONTENTS/DESCRIPTION**	**BRAND**
1 BOX, 100 count	Multi-purpose wipers, 1-ply, 153 SQ. IN.,	Multi Master
1	gray colored air hose with fittings . . .	N/A

2. At that moment, I confronted you with the following witnesses to my conversation and physical actions:

R. Dembiec, Coater Feeder, Coater Line 4.
K. Lindner, Coater Feeder, Coater Line 3.

I watched you place the items in the back of your truck and then you closed the glass door of your truck cap. You walked away from your vehicle. I advised you to go back to the truck, remove the items from your vehicle, and return them to the rightful owner (SILGAN). You responded with a gesture of shrugging your

> shoulders and saying "What?". As I stood in the dock doorway and looked at you, I pointed to the back of your vehicle and motioned you back to your vehicle. Only then did you return to your truck and open your truck cap door. I watched you remove the unopened box of wipes from the vehicle and carry it back into the building. You carried the box to my office and left it behind.
>
> There is no disputing this action as both of the above mentioned witnesses and I, as well as others throughout the Coating Department office area observed you. You then walked to your Coater Feeder Position at Coater Line 1 and continued to work through the rest of your shift. I promptly walked over to you and told you privately, that against your better judgment, the use of company property for personal gain is wrong. I did this in hopes of you returning the air line that you still had possession of in your vehicle. I never saw you return the second item and it was never placed in my office.

Waite took a draft of this memo home with him to put into final form for his supervisors.

Waite was not scheduled to work on Monday, March 9, but came in at roughly 5:30 a.m. to report the incident to his immediate supervisor, Tim Dearth. Dearth determined the incident should be reported to Gato. After a thirty to forty minute meeting, Gato determined that the following two paragraphs should be added to Waite's memo:

> 3. As a result of your illegal acts, I advised my superiors of your theft of company property. In accordance with your current Union Agreement, ARTICLE 6.1: No employee shall be discharged or suspended except for dishonesty, drunkenness, being under the influence of or in possession of illegal drugs, or the illegal use of dangerous drugs or other just cause. At least one (1) warning notice shall be given in writing to the Union and to the employee before discharge or suspension can be made **except** in cases of dishonesty, drunkenness, being under the influence or in the possession of illegal drugs, or the illegal use of dangerous drugs, or other serious offenses as calling for no advance notice of discharge., et all. (sic)
>
> 4. I believe your removal of company property to be a dishonest act in violation with Article 6 of your Union Agreement. Therefor, (sic) I will forward this matter to Tim Dearth for immediate disciplinary action and review.

Gato then discussed the matter with the Company's Plant Superintendent, David McCarren, and advised the Union's Chief Steward of the incident. Gato and McCarren decided the Grievant should be suspended while the matter could be investigated. The Grievant was not scheduled to

work on March 9 or March 10. He was offered, but declined the opportunity to work overtime on March 9. Gato called him some time on March 9 and asked him to report for an interview on March 10.

At 9:30 a.m. on March 10, the Grievant, a Union Steward, Gato, McCarren and Waite met to review the incident. Waite read his written summary of the incident. The Grievant denied taking towels and denied that he had taken an air hose. The Grievant denied he had towels, indicated he put the towels in his truck, then indicated he could not remember doing so, then indicated he put them on the ground next to his truck. He consistently denied stealing anything. He did not mention seeing or speaking with his wife while he walked to his truck carrying the towels and the air hose or conduit.

After the meeting, Gato, McCarren and David Rubardt, the Company's Human Resources Director, discussed the incident and the meeting. At this discussion, the Company determined to discharge the Grievant.

The background set forth above is undisputed. The balance of the background is best set forth as an overview of witness testimony.

Howard E. Waite

Waite started work for the Company in July of 1988 as a management trainee. He completed his training in December of 1997, and became a Supervisor in the Coating Department in January of 1988.

Waite noted he was speaking with Lindner and Dembiec near the east end of Line 4 at roughly 4:30 p.m. on March 8, when he observed the Grievant walk around the far end of the steel plate storage area. Waite estimated the Grievant was 26 to 28 feet from him, walking toward him. Waite saw a lunch pail in the Grievant's left hand, a white paper towel box under his right arm and an air hose in his right hand. As the Grievant rounded the plate, he shifted the paper towel box from his right arm to his left. After this movement, the Grievant moved perhaps four paces toward Waite, then shifted his direction east to head back toward the doorway to the loading dock adjacent to the Compressor Area.

Waite concluded the Grievant was carrying air hose since its couplings were a shiny silver and the line was flexible enough to bounce as the Grievant carried it.

The Grievant then proceeded onto the loading dock and down the cat walk into the Compressor Area. Waite thought the Grievant's behavior was odd, and he walked down to the doorway of the loading area the Grievant had walked into. Waite then saw the Grievant walking through the Compressor Area. Waite paralleled the Grievant's path from behind the doorways to the loading docks. As he did so, he was able to see the Grievant walk north through the truck

unloading area to his own pickup truck, which had been backed into the truck unloading area. The Grievant proceeded along the driver's side of his truck to the back of the truck bed. Waite then stopped in the doorway to the loading dock immediately south of his office. He positioned himself, however, out of the Grievant's line of sight into the plant. He watched the Grievant put down his lunch box, open the shell of his truck bed, then pull the tailgate down to permit him to put the air hose and towel box into the truck. The Grievant sat on his tailgate for a while, manipulating something, then closed the tailgate and proceeded to the driver's door of the truck. After this, the Grievant walked back alongside his truck, heading for a stairwell which led back into the plant.

Waite then walked into the doorway of the loading dock, and shouted to the Grievant, who was walking up the stairwell, empty-handed. Waite called "Hey!" The Grievant looked surprised, shrugged his shoulders, and responded "What?" Waite then called, "You know what." The Grievant hesitated, then Waite told him to go back to his truck and bring the items he had placed in it. The Grievant returned to his truck and came back carrying a box of paper towels. The Grievant went to Waite's office, then returned to his duties on Coater Line 1. Waite approached the Grievant near the east end of Coater Line 1 and stated that he did not condone the Grievant's behavior, that the incident was not done, and that misappropriation of Company property was wrong. He did not use the terms "steal" or "theft" during this conversation.

He did not, at any time on March 8, ask the Grievant to return the air hose. He noted he hoped the Grievant would respond by doing the right thing and returning the hose. Beyond reporting the incident, Waite played no role in the decision to discharge the Grievant.

Waite acknowledged Coater/Feeders can legitimately use paper towels to clean themselves or their equipment. He maintains storage of such towels in his office for this purpose, however. He further noted Lindner and Dembiec did not bring any of the Grievant's conduct to his attention during the incident.

Roger Gato

Gato stated that he determined the Grievant should be discharged. From his perspective, theft is too serious to ignore and the Company must maintain a no tolerance policy toward theft of any type. The meeting of March 10 convinced him that Waite's account of the incident was more credible than the Grievant's, and the only reason the Grievant was not able to steal the towels was Waite's timely intervention. He detailed the basis for this conclusion by noting that Coater/Feeders typically get towels from Waite's office; that the Grievant altered his route from the break area, adding roughly sixty feet to his walk to his truck; that Waite observed the Grievant putting Company property into his truck; and that the Grievant was unable to offer a consistent account of his behavior on March 8. His demeanor during the March 10 interview was, in fact, "somewhat defiant."

Gato noted the Company does not have a formal policy on employe use of scrap, but that he believed employes were expected to ask for permission before taking material from the plant, even if the material had been placed in a dumpster. That the Grievant did not take any Company property off of the plant site was, to Gato, irrelevant. The Grievant's intent to steal, and the Company's legitimate interest in sanctioning such behavior made the removal of the items from the plant site irrelevant. He noted this is the first time the Menomonee Falls Plant has had to confront employe theft.

David McCarren

The specifics of McCarren's and Gato's testimony regarding the March 10 meeting vary slightly, but only on minor points. McCarren noted the inconsistency of the Grievant's responses on March 10 as a significant point to all of the Company's managers. He also noted the Grievant stated he was nervous on March 8 because other employes were making fun of him.

Bob Dembiec

Dembiec testified under subpoena. He stated he saw the incident from the time the Grievant walked around the plate storage area. When Dembiec first saw him, the Grievant was roughly thirty feet away, carrying his lunch box and a box of paper towels on one side and carrying a coil of some sort on the other. Dembiec thought Waite first saw the Grievant when he was walking down the stairs into the Compressor Area. As the Grievant walked through the loading dock doorway, his wife walked from Coater Line 2 to the same doorway to dump some trash in the dumpster. He noted he heard Waite call "Hey!" to the Grievant. At this point, he and Lindner called "thief" a couple of times, then quit. He noted they quit when it became apparent the incident was no joke.

Dembiec saw the Grievant open the rear of his truck, but noted he could not see anything else. When the Grievant threw the box of paper towels onto Waite's desk, he then left the office, flipped Waite the bird while Waite's back was turned, and returned to Coater Line 1.

Dembiec noted the Grievant routinely goes to his truck after taking his break. The Grievant always parks his truck in the truck unloading area if given the opportunity, and usually goes through the south loading dock doorway to get there. Dembiec did not get the impression the Grievant was avoiding him by selecting the route he took on March 8. He noted that he felt employes could take scrap material, but should ask permission to do so.

Doris Lortie

Lortie noted she took some scrap material to the dumpster adjacent to the loading dock which is next to the Compressor Area. After she had dumped the pail, she saw the Grievant walking toward the doorway leading to the stairway that connects the Compressor Area to the loading dock. She asked him what he was going to do with the conduit, and he responded that he expected to use it on his air compressor. She said Waite, Lindner and Dembiec were talking and sometimes laughing together near the end of Coater Line 4 when she left her work area and when she returned to it. She did not think they were laughing at the Grievant. She acknowledged that the Grievant is thin-skinned regarding heckling and has a temper.

Carol Grosklaus

Grosklaus stated that her understanding of Company policy is that material thrown into a dumpster can be taken, but that permission is required to take any non-scrap item from the plant. She could not recall Doris Lortie being mentioned at any grievance meeting she attended as Union Steward. She noted that the Grievant stated, at the grievance meetings she attended, that he had left the box of towels on the rear bumper of his truck, and returned to get them after Waite challenged him.

The Grievant

The Grievant stated that he preferred to use paper towels to the rags currently supplied by the Company, especially during the quality control process that uses copper sulfate.

He noted that on March 8 he pulled his truck inside the truck unloading area. There was nothing unusual in his work day until he took his break around 4:30 p.m. He took his final break for the shift in the break room, where he had a snack and read alone. Sometime around 4:50 p.m., he left the break room carrying his lunch box and a thermos. He got towels in the Press Department. As he passed the Machine Shop, he noted a length of conduit, which had been placed in the dumpster several days before. Thinking it was scrap, he decided he would take it for use with his air compressor. He placed the coil of conduit on his left wrist while he carried his thermos in his left hand. He had the box of paper towels under his left arm, while carrying his lunch box in his right hand. He proceeded across the plate storage area. He could hear Waite, Lindner and Dembiec laughing in the background as he approached the loading dock area. He saw his wife emptying a pail into the dumpster. She asked him why he had the conduit, and he explained what he hoped to do with it. He then proceeded to his truck.

The Grievant noted that he proceeded on the same route he always took to his truck. He took this route to avoid unnecessary contact with other employes. He did not believe that

he was being heckled on March 8, but had, through past experience, learned he could be combative with others. There were, he stated, four vehicles parked in the truck unloading area. He walked to the back of his truck, placing the towels and the conduit on the back bumper and placing the thermos and lunch box on the paved floor. He then opened the tailgate, putting the conduit in the truck bed. After that, he went to the front door of the driver's side of his truck, putting his thermos and lunch box in the cab. At that point, Waite yelled at him. He affirmed the accuracy of Waite's testimony regarding their verbal exchange. He carried the box of towels past Waite and Lindner, and placed them in Waite's office. He did not think Dembiec was with them at that time. He denied "flipping the bird" to Waite, but acknowledged he was quite upset with Waite. Shortly after he returned to Coater Line 1, Waite grabbed him by the shoulder and said something to the effect that Waite did not condone stealing or that if the Grievant wished to steal, he should be more discreet about it.

The Grievant acknowledged that, during the March 10 meeting, he offered inconsistent accounts for his behavior on March 8. He noted he could only roughly recall what he said at all. Until Gato phoned him on March 9, he had no idea his job was in jeopardy. Gato was the first supervisor who directly accused him of theft. The meeting of March 10 clearly concerned the future of his job, and he became so nervous he could not function well. He did not challenge Waite's actions on March 8, because he feared any response on his part could be considered insubordinate or might become insubordinate if he confronted Waite. He noted he was never asked by the Company to return the air hose, which he brought to the arbitration hearing.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Company's Brief

After a review of the evidence, the Company contends that the Grievant "stole property from the Company" and "was caught red handed." Under arbitral precedent, theft constitutes good cause for the "capital offense" of discharge. That the items stolen may be of little value cannot obscure that theft is a fundamental act of dishonesty warranting the termination of the employment relationship.

Nor can the Union's arguments alter these considerations. If burden of proof can be considered at issue, then "the better authority" under arbitral precedent "suggest that proof which is clear and convincing is sufficient" in cases involving moral turpitude. More significantly here, the burden of proof is an academic point since "there is no reasonable doubt (the reasonable doubt standard) or significant doubt (the clear and convincing standard) that (the Grievant) committed theft."

The implausibility of the Grievant's account is amply established by the evidence. The Grievant's contention that he mistakenly left the paper towels by his truck is belied by the fact that he obtained the towels far from the storage area for his work station. Beyond this, the Grievant's circuitous route through the plant demonstrates his intent to steal. His emotional and his verbal reactions to Waite's accusation demonstrate the conduct of a man seeking to avoid the truth. Nor can the Grievant's assertion that the air hose was a scrap piece of conduit be accepted. These items are visibly different. Credible testimony from a co-worker contradicts the Grievant's wife's corroborative testimony. Even if the Grievant's account concerning the conduit could be credited, his theft of the paper towels is sufficient to warrant discharge.

That Waite discovered the Grievant's theft before the Grievant left Company property is of no consequence. The intent to steal is the basis for discipline. To conclude that paper towels placed secretively into an employe's truck are not actually stolen until the truck passes beyond Company property is meaningless hair-splitting.

That Waite could have more thoroughly investigated the circumstances of the theft is similarly irrelevant. That Waite "told the story of his investigation warts and all" actually "demonstrates the credibility of his story." Nor can the Grievant credibly claim that the conduct of co-workers caused him to behave oddly on March 8. The testimony "from all witnesses" establishes that the Grievant was not mistreated that evening.

That Company rules authorize discipline or discharge for theft cannot be read to require a sanction less than termination. No employe can credibly claim surprise that theft would be punished by discharge. The facts are even more egregious here "since even now (the Grievant) continues to lie about his conduct on March 8, 1998."

Viewing the record as a whole, the Company concludes that "the grievance should be denied."

The Union's Brief

The Union initially contends that "(b)ecause the charge . . . is theft, the Company has assumed not only the burden to prove the offense but the obligation to establish it by . . . evidence beyond a reasonable doubt." Arbitral precedent establishes this and that "(t)heft is composed of action and intent." If either element is missing, the Union argues that the discharge must be reversed.

The Union contends that to prove "the 'action' prongs of the offense, both taking *and* asportation must be proven." The element of intent, the Union argues, should not be implied "based upon a purely circumstantial case." Each element must be demonstrated beyond a

reasonable doubt, which means that "(t)he Arbitrator need not find that (the Grievant) is innocent, but only that there is some other credible explanation for the facts than that presented by the Company."

The evidence will not establish that the Grievant attempted to steal the paper towels. The element of intent "is missing." The Grievant did not try to remove the towels from the plant. Even if it is assumed he put the towels in his truck, "there is still no theft, because the loading dock is inside the employer's building." Established arbitral precedent demonstrates theft cannot be found on these facts. That the Grievant had a legitimate use for the towels further underscores the impossibility of credibly finding the intent to steal. A detailed review of the testimony establishes, according to the Union, that "Waite's account is not credible," and that the Grievant did no more than forget the towels when he became flustered at Waite's conduct. Even if Waite's account could be considered credible, the Union argues that "the Company still failed to meet its burden of proof." That the towels were momentarily inside the Grievant's truck "is the *entire* circumstantial case for intent to steal." That case "is not convincing proof even if believed." The Grievant has paid for Company property in the past and has no demonstrated record of dishonesty.

The evidence is even weaker regarding the air hose, since "the Company cannot even prove that a piece of hose is missing . . . (and) (t)here is literally no *corpus delicti*." Waite's testimony that he saw the Grievant carry hose, not conduit, lacks credibility, and Dembiec did not see the Grievant carry hose or conduit. That the Grievant produced the conduit he took from the trash bin is telling evidence of the weakness of the Company's case. The assertion that the Grievant brought to the hearing a piece of conduit not taken from the trash bin "is a weak and pathetic contention." The Grievant freely admits he took the conduit from the trash bin, and the evidence establishes that the Company does not discourage and actually encourages such conduct.

Viewing the record as a whole, the Union concludes that there "was no just cause for the discharge." The most charitable view of the Company's case would indicate the Grievant's "error was a minor one of protocol and did not rise to the level of theft." Since the Company's rules "do not provide for discharge for theft, but only a warning, suspension or discharge, the Arbitrator should exercise his discretion to reinstate (the Grievant)." The Union concludes the Grievant "should be reinstated and made whole."

DISCUSSION

The stipulated issue is whether the Company had just cause to discharge the Grievant. Because the parties have not stipulated the standards defining just cause, the analysis must, in my opinion, address two elements. First, the Company must establish the existence of conduct by the Grievant in which it has a disciplinary interest. Second, the Company must establish that the discipline imposed reasonably reflects that interest. This does not state a definitive analysis to be imposed on contracting parties. It does state a skeletal outline of the elements to be addressed and relies on the parties' arguments to flesh out that outline.

The discharge rests on theft. The parties do not dispute that proof of theft requires an act of misappropriation and the intent to steal. Issues of intent are best avoided as matters of proof because of the difficulty of establishing states of mind. Here, however, the Company's work rules distinguish between general and major rules of conduct. Theft is covered as a major rule warranting, depending on the circumstances, punishment from a warning to immediate discharge. This discretion makes consideration of intent unavoidable. If the Grievant had been wasteful in his use of a box of paper towels, the loss of that box would, presumably, warrant a warning to address correctable conduct. The same economic loss, if the box was stolen, can warrant a more stringent sanction for the dishonesty manifested in theft tears at the basis of the employer/employe relationship.

The acts of misappropriation turn on the Grievant's placement of a box of towels and/or an air hose into the bed of his locked truck. The evidence poses a fundamental factual issue only regarding the box of paper towels. Gato testified that the discharge sanction can rest on theft of paper towels alone. This makes analysis of the air hose issue arguably irrelevant. It is, however, necessary to examine because resolution of the point is of some relevance in addressing the alleged theft of paper towels.

The allegation that the Grievant stole an air hose rests on Waite's testimony. Arguably, the factual dispute can be resolved by crediting his testimony over the Grievant's. In my opinion, however, resolving disputed fact based on individual witness credibility is persuasive only when there is no other means available. The relationship of individual testimony to known fact is more reliable than attempting to weigh the personal credibility of conflicting witness accounts. In this case, the testimony of neither Waite nor the Grievant can be rejected, standing alone, as incredible.

Whether the Grievant carried an air hose or conduit represents a troublesome issue of fact and there is little known fact to assist in the determination. However, what corroboration exists favors the Grievant's account over Waite's. Initially, it must be noted that while air hose and conduit are visually distinguishable, they are sufficiently similar in appearance that over distance they could be mistaken. This means that Waite's testimony that he perceived an air hose can be granted without resolving the issue whether the Grievant actually held an air hose. Corroboration of this fundamental point lay within Waite's control. Had Waite looked in the bed of the Grievant's truck, the grievance may never have resulted. That he did not cannot resolve this issue, but underscores that the absence of the most fundamental corroborating fact cannot be held against the Grievant.

More significantly, what corroborating fact exists favors the Grievant's account. His production of the air hose at hearing is not determinative, but a fact worth noting. Concluding the conduit was assembled after the discharge requires a series of assumptions that strain plausibility. At a minimum, the production of the conduit was a bold move. That the conduit was worn, and made of components not distinguishable from those used by the Company attests to craftsmanship on the Grievant's part or truth. The conclusion that the Grievant faked

the wear on those components is less plausible than the conclusion he produced the conduit he took from the plant. His wife's testimony that he held an air hose on March 8 is also entitled to some weight. It is not necessary to conclude she is more credible than Waite to note that Waite's testimony did not place her anywhere near the Grievant on March 8. Dembiec's testimony, however, establishes that she was. Dembiec, unlike the Grievant's wife, testified at least in part adversely to the Grievant. That Waite's account does not include her does not mean he misrepresented the point. However, it does indicate he was not sensitive to fact not supporting his feeling that the Grievant was stealing air hose. Underscoring this is Waite's testimony that he did not check the Grievant's truck for the air hose to give the Grievant the opportunity to "do the right thing" by returning it. This testimony is irreconcilable to other testimony. Waite's testimony underscores Gato's conclusion that the Company viewed the theft of the paper towels, standing alone, to warrant discharge. Waite's conduct on and after March 8 offers no support for concluding that if the Grievant had returned an air hose on March 8, he could have expected any fate other than the one he received. This does not establish that Waite's testimony was incredible. It does, however, underscore that he was not sensitive to facts conflicting with his view that the Grievant was stealing.

In sum, what corroborative evidence exists on the point favors the Union's view that the Grievant took an air hose from a dumpster on March 8. The first element of the cause analysis rests, then, on the allegation that the Grievant stole paper towels on March 8.

The factual issues are more troublesome regarding the box of paper towels. This dispute must be resolved as an issue of fact. Broader contentions asserted to preclude making this determination are not persuasive. That the Grievant did not remove the towels from Company property does not present a basis to conclude the Grievant did not steal them. Removal from Company property may be a necessary element to criminal theft. To bring this consideration into labor arbitration implies, however, that the Company cannot assert a legitimate interest in enforcing standards of conduct more stringent on its employes than those imposed by government against its citizens. That the Company agreed to a just cause standard does not mean it agreed that industrial justice and criminal justice are synonymous. That the Company did not check the Grievant's truck at the time or as he left the plant complicates, but does not preclude, determining whether or not the Grievant intended to steal the box of towels.

Nor can the Company's investigation be dismissed as so flawed that it is unnecessary to consider whether the Grievant, in fact, intended to steal the box. As noted above, Waite could have resolved the factual issue by looking into the Grievant's truck rather than shouting at him to bring the items with him into the plant. The evidence establishes that Waite had reason to question the Grievant's behavior. Beyond this, there is no persuasive evidence that any of the management representatives who reviewed the incident acted in other than the good faith belief that the incident warranted consideration as theft.

In sum, resolution of the first element of the cause analysis requires determining whether the Grievant, in fact, sought to steal the box of paper towels. Resolution of this fact is troublesome, but the evidence will not support the conclusion that the Grievant intended to steal the box of paper towels.

The strength of the Company's case should not be understated. Waite's testimony cannot be dismissed as incredible. That testimony establishes that the Grievant deviated from what Waite perceived as a northerly path through the dock area to take a longer, more circuitous route through the truck unloading area. Beyond this, the Grievant's anger after the incident coupled with the inconsistency of his defense of his actions can reasonably be viewed as the action of a guilty man. That he did not take towels out of Waite's office affords reason to believe the towels were destined for someplace other than Coater Line 1.

The strength of the Company's case should not, however, be overstated. Waite's demeanor as a witness and the substance of his account manifest his sincere belief that he caught the Grievant in the act of theft. The correspondence of his belief to fact is not, however, beyond question. Ignoring the dispute regarding what the Grievant carried or how, if at all, he switched his load from hand to hand, it is not apparent why he would change course as Waite testified. If he was aware he was stealing, his conduct is impossible to explain. Why would he alter his course to avoid detection only to take the detected materials to his truck? The alteration of course would seem to presume, and react to, detection. More significantly, Dembiec testified that the Grievant did no more than follow the path he typically takes. It was a longer path on March 8 because he parked his truck further to the north than typical. As noted above, Dembiec did not testify as a defender of the Grievant. This underscores the significance of that testimony.

The Grievant's anger and inconsistent explanations can be taken to manifest guilt. Dembiec's testimony that the Grievant was sufficiently angry at Waite to "flip him off" is credible. The difficulty is that his anger and the inconsistent explanations that followed are difficult to view as a clear reaction to the charge of theft. Those reactions can no less plausibly be taken to manifest confusion and fear. His anger, standing alone, is unremarkable. He has a reputation as thin-skinned. More significantly, as will be discussed below, it is difficult to treat his anger or confusion as an unequivocal reaction to the charge of theft.

That the Grievant took towels from an area other than Waite's office supports the inference of theft. That support cannot be ignored, but cannot be treated as unequivocal. It is not remarkable that the Grievant would take towels from the Press Department, if he needed them on his return to Coater Line 1. Where he got them does not resolve, but begs the issue of intent.

Ultimately, resolution of this point cannot be restricted to the Grievant's conduct standing alone. As noted above, there is reason to infer the Grievant intended to steal the paper towels. A broader view of the context of the alleged theft, however, manifests fundamental doubt regarding the Grievant's intent from each witness to the event. That doubt was resolved against the Grievant by the Company, but cannot be so resolved here.

Waite's testimony cannot be dismissed as incredible, but is hard to reconcile with the conclusion that he believed in all sincerity that the Grievant intended to steal. As noted above, his failure to see the Grievant's wife manifests a certain unwillingness to perceive fact other than fact supporting his belief the Grievant was stealing. Beyond this, it is difficult to understand why he did not clearly confront the Grievant with an accusation of theft. The ambiguity of his response indicates he was himself less than sure what the Grievant was doing. That the theft of paper towels warrants summary discharge is difficult to reconcile with returning the Grievant to work on Coater Line 1 for the balance of his shift. No less difficult to account for is permitting the Grievant to leave a stolen air hose in his truck to be taken home at the end of the shift. The evidence does not indicate March 8 was a particularly busy or unusual shift. That Waite told the Grievant the matter would not end there falls something short of confronting a thief with the consequences of theft.

This ambiguity makes it impossible to read too much into the Grievant's anger and inconsistent explanations for his conduct. Waite never confronted him with an accusation of theft. That the Grievant would be angry at Waite is as readily explained by the inference that he forgot the paper towels and felt harassed as by the inference that he had just been caught stealing towels. On March 8, the Grievant was permitted to finish his shift. On March 9, he was offered overtime before being summoned to the March 10 meeting. Against this background, it is difficult to read too much into his stumbling explanations for his conduct at that meeting. Until that meeting, the jeopardy he was in was not unequivocally apparent. That he consistently denied stealing the air hose and towels cannot be ignored. That he had trouble accounting for the events of March 8 is troublesome, but not determinative.

Testimony of other witnesses underscores the fundamental ambiguity of the events of March 8. Dembiec noted that he and Lindner yelled "thief" at the Grievant, only to stop when they realized the matter was not a joke. It is undisputed that Waite, Lindner and Dembiec spoke during part, if not all, of the time the Grievant walked from the plate storage area through the truck unloading area to his truck. How Lindner and Dembiec could think the matter was a joke is impossible to reconcile to Waite's testimony. Waite effectively stalked the Grievant. How Dembiec could see this as a joking matter is not apparent, unless it is assumed that he did not think the confrontation unfolding before him was a fundamental charge of theft. It thus appears that Dembiec, no less than any other witness, was uncertain on what was happening until well after the fact.

In sum, the record manifests that Waite sincerely believed that the Grievant stole Company property on March 8. The record will not, however, support a conclusion that this sincere belief corresponds to proven fact. The evidence indicates that certainty regarding the theft evolved with each level of review. This is not necessarily objectionable. The Company sought to defend the security of the workplace, and viewed as a policy matter, the incident was significant. This cannot, however, mask the fundamental factual ambiguity which plagued the incident from the moment it occurred. Against this background, the first element of the cause analysis has not been met. The Company has not proven the Grievant intended to steal an air hose or paper towels on March 8.

The remedy set forth below flows from Section 6.2 and does not require further discussion. The Award employs the terms used by Section 6.2 regarding reinstatement.

Before closing, it is appropriate to tie the conclusions stated above more closely to the parties' arguments. As discussed at hearing, the Grievant's length of service or past performance record has no bearing on this grievance, which turns on whether or not he intended to steal on March 8. The parties each advanced arguments regarding the burden of proof, and the quantum of proof necessary to meet that burden. These arguments can become relevant in cases in which both parties have met their burden to produce evidence and doubt remains on a fact or facts of consequence to the ultimate determination. In theory, any doubt left upon review of the evidence must be resolved against the party bearing the burden of proof. In theory, quantum of proof concepts specify the amount of doubt necessary to turn a determination against the party bearing the burden of proof. This was a well-litigated case, in which both parties amply met their respective burdens to produce evidence. The evidence produced fails to establish that the Grievant in fact intended to steal on March 8. This underscores only that the evidence is insufficient to infer intent to steal. Characterizing the burden of proof as "beyond a reasonable doubt" or "clear and convincing" cannot alter this conclusion. In the absence of the inference of intent to steal, just cause for the discharge does not exist.

The Company asserts that even though it has not confronted theft issues in the past, it can reasonably institute a no tolerance policy, which must be respected without regard to the amount at issue. This contention cannot be faulted. However, it focuses on the second element of the just cause analysis. How severely to sanction theft is an academic point when the intent to steal has not been proven.

AWARD

There was not just cause for the discharge of the Grievant.

As the remedy appropriate to the Company's violation of Section 6.1, the Grievant shall be reinstated and compensated for the time lost due to the discharge at his regular rate of pay. References to the discharge shall be expunged from his personnel file(s).

Dated at Madison, Wisconsin, this 4th day of December, 1998.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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