

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AMERIGAS PROPANE

and

TEAMSTERS GENERAL UNION LOCAL 662

Case 1

No. 65339

A-6129

(Tomlinson Termination Grievance)

Appearances:

Norman I. White, McNees, Wallace & Nurick, LLC, 100 Pine Street, Harrisburg, Pennsylvania 17108-1166, appeared on behalf of AmeriGas Propane.

Nathan D. Eisenberg, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North RiverCenter Drive, Milwaukee, Wisconsin 53212, appeared on behalf of Teamsters General Union Local 662.

ARBITRATION AWARD

The Union and AmeriGas Propane 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 Union requested and AmeriGas Propane agreed that the Wisconsin Employment Relations Commission designate an Arbitrator to resolve a grievance filed on behalf of Ronald Tomlinson (Tomlinson or Grievant, herein). The Commission designated Paul Gordon, Commissioner, to serve as the Arbitrator. Hearing on the matter was held in Mosinee, Wisconsin, on February 12, 2006. No transcript was prepared. The parties waived the five day provision for decision pursuant to the agreement. Written briefs were filed by the parties by March 13, 2006, closing the record.

ISSUES

The parties stipulated to the following statement of the issues:

Was Tomlinson terminated for just cause?

If not, what should the remedy be?

RELEVANT CONTRACT PROVISIONS

ARTICLE 13
DISCHARGE OR SUSPENSION

SECTION 1 – No employee who has completed the introductory period shall be discharged or suspended without one (1) warning notice of the complaint in writing to the employee with one copy to the Union and Steward, except no warning notice is required for discharge due to:

- a. dishonesty;
 . . .
- j. falsification of records;
 . . .

SECTION 3 – The discharge, suspension or warning notice shall then be discussed by the Employer and the Union as to the merits of the case. Should it be found that the employee has been unjustly discharged or suspended, the employee shall be reinstated and compensated for all time lost at the employee's regular rate of pay.

SECTION 4 – The employee may be reinstated under other conditions agreed upon by the Employer and the Union or pursuant to the terms of the Arbitration Award. Failure to agree shall be cause for the matter to be submitted to arbitration as provided for in Article 10 of this Agreement.

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BACKGROUND AND FACTS

AmeriGas Propane is a national residential and commercial propane dealer. It has facilities in Marshfield and Rudolph, Wisconsin. AmeriGas has approximately 10 employees serving about 3,000 customers in the area. There is an office at the Rudolph facility where the district sales and service manager, David Vandre works. There are also two clerical office workers there, Jeanne Fischer, and Sally Bell, who are customer relations specialists, neither having managerial or supervisory authority. At the Marshfield facility there are two storage tanks and an office. Tomlinson, who has been employed by AmeriGas or predecessor companies for approximately 12 years, is a delivery/service driver operating mainly out of the Marshfield location.

AmeriGas offers a discount to its employees on the price of propane. All employees, including Tomlinson, have an AmeriGas account. In mid October, 2005, Tomlinson was putting a propane furnace into his house. He did not have a propane tank. He had made arrangements with Vandre for permission to use, for free, an AmeriGas boom truck over a weekend to set a 1000 gallon AmeriGas propane tank at his house. Tanks being used by AmeriGas customers remain the property of AmeriGas. On October 18, 2005 AmeriGas put out a notice to employees that the employee price for propane would be raised from \$1.15 per gallon to \$1.45 per gallon, effective October 20, 2005. Tomlinson and Fisher became aware of the notice by October 19th. Tomlinson wanted to be able to buy propane at the lower rate, but would not have the propane tank on his property until several days after October 20th.

In the morning of Wednesday, October 19th Tomlinson called Fisher to discuss the possibility of getting the lower price, but not being able to take immediate delivery. Fisher is responsible for waiting on customers, record keeping and daily postings for drivers and deliveries, among other things. She keeps records for the volumes in the storage tanks, including the ones at Marshfield, which have measuring gauges for volumes. Delivery trucks such as Tomlinson's have a metered totalizer that measures the propane pumped. These records along with delivery records show the date, customer address of deliveries, volumes and other information. She also keeps track of this information. A large part of her job is to be sure that the volumes from the totalizers and delivery reports match and balance within ten gallons daily, and that this information balances with the large tank gauges monthly. She receives daily information on deliveries from the delivery/service drivers, such as Tomlinson, from written delivery tickets prepared daily by the drivers and kept in numerical order. Her data is transferred to Vandre, who reviews it, mainly for totals.

When Tomlinson called Fisher he asked her if she could post a transaction of propane gas delivery to his home, have him bill it to himself, and after he installed his tank on Saturday actually fill it. After he would bill it to himself, he would put the gas into one of the AmeriGas storage tanks. He would be then taking the gas back out of storage to fill his 1000 gallon tank once it was installed on his property. He had told Fischer about the tank he was going to get. Each knew that 80% to 85% of tank capacity was considered full. This meant filling the tank would mean something over 800 gallons. Fisher told him she was not sure she could post it that way. She had to think how that might affect her daily balances because, without a ticket the posting would be off 800 gallons. She told Tomlinson that she would have to call him back. She then talked to Bell about how to post this, but not to Vandre. She did call Tomlinson back about an hour later and told him that as long as his totalizer balanced, her posting would balance. But, she also told him to make sure he had those gallons out of the main storage unit prior to month's end. At month's end they have to take an inventory of all of the propane in their storage tanks, trucks, cylinders, and tanks in the yard. (This information must balance with monthly sales). She did not speak with Tomlinson about this again that day or thereafter.

Later that morning she did talk to Vandre and told him Tomlinson had called, her conversation with him, what Tomlinson wanted to do about switching product between the storage tank and a customer tank to get in on the lower price for gas, and her reply to Tomlinson. Vandre's reaction to Fisher was an absolute no, that they could not do that. Vandre did not instruct Fisher to get back to Tomlinson and she did not speak to Tomlinson again. She assumed Vandre would take care of it after that. Vandre did not call Tomlinson. Shortly thereafter Vandre left the office to work on another project, thinking he would get a call from Tomlinson asking to do that. Vandre expected he would tell Tomlinson no, it was against company policy. He had no authority to grant the permission. He had always instructed the employees at meetings, including Tomlinson, to "dot their I's and cross their T's", not do anything out of the ordinary and don't take anything from the company without his permission. But, he never got a call from Tomlinson and then forgot about it.

Fischer does not have authority to grant the type of permission for Tomlinson's request, and she did not believe he was asking her for permission. She did not tell him that she did not have authority to give permission to do this. She does have some limited authority to adjust prices on certain customer issues. She and Bell are a first line of contact between the office and the delivery/service drivers and have occasional telephone contact with them on delivery and service matters. No type of disciplinary action has been taken against Fisher over this matter.

On October 19, 2005, Tomlinson pumped from his delivery truck 850 gallons of propane gas into one of the large AmeriGas storage tanks at the Marshfield facility. He knew that his paperwork needed to look like he took delivery before October 20th to get the lower price.

Drivers have daily posting tickets. On October 19, 2005, Tomlinson filled out a posting ticket showing himself as driver and his assigned truck. The ticket shows a price for propane at \$1.15 and 850 gallons pumped from his truck. This is accurate information. The address on the ticket is Tomlinson's home address. This part of the ticket is where the location gas is pumped is supposed to be entered. This document does not contain the true location of where that propane was pumped that day because it was actually pumped into the large AmeriGas storage tank.

Drivers also are required to fill out a daily vehicle report. Tomlinson filled one out for October 19, 2005. This contained the gallons pumped that day as measured by the totalizer on his truck, and was off .4 gallons compared to his daily posting tickets. This is within acceptability.

Bulk delivery ticket proof lists are also kept by Fisher as she posts daily tickets. She uses information supplied by drivers on the daily posting tickets and daily vehicle reports to prepare the proof lists. This shows the price per gallon and quantity of gallons delivered to each customer. A proof list is prepared for each driver, each day. This information is

transferred electronically to the corporate billing office. The total gallons on the driver daily vehicle report have to balance with the total gallons of the proof list. The proof list has a name and a customer number which is to match with the account number on the daily posting ticket, and is the location of delivery and address for billing. The proof list thus reflects the date, amount in gallons, price per gallon, transaction amount in dollars, name and customer number for billing. Thus, the 850 gallons from Tomlinson's October 19th daily posting ticket, along with the price of \$1.15 per gallon and cost of \$977.50 is reflected on his account on the proof list. The proof list for Tomlinson for October 19th, prepared by Fischer, is not accurate as to Tomlinson's account because it indicates that 850 gallons of propane was delivered by him to his address. Although the addresses themselves are not on the proof lists, customer numbers on the proof lists have corresponding addresses for billing.

Vandre did, as part of his normal duties, review and sign the October 19th daily vehicle report and proof list mentioned above. He normally only reviews the hours worked, the totalizer numbers and variance, if any. He does not have time to look through the customers listed on the proof list, but makes sure that numbers, hours and money balance. With 3000 customers and several Tomlinsons as customers, he may or may not have caught the matter had he looked at the names. Because he had previously given Tomlinson permission to use the AmeriGas boom truck to set the 1000 gallon tank, Vandre knew that Tomlinson did not then have a propane tank at his house.

On October 28, 2005 Tomlinson pumped 820 gallons of propane into the 1000 gallon tank which was, by then, at his house. He did not have 850 gallons in his truck at that time, only 820. On October 28th he filled out a daily posting ticket showing he pumped 820 gallons back into storage from his truck. No dollar or price per gallon would be required on the ticket to pump back into storage. The information on the ticket as to gas being pumped back into storage is not true. A daily vehicle report for Tomlinson for October 28th shows a totalizer amount within the acceptable difference range. The proof list for Tomlinson for that day contains the 820 gallon entry from the daily ticket and the totalizer amount from the daily vehicle report. Because of the verbiage on the daily posting ticket, the proof list shows the 820 gallons as having gone back into the company's own use, being its own storage tank. Because the daily posting ticket prepared by Tomlinson for that day has information that is not true, the proof list for that day is not accurate.

Tomlinson put 30 gallons of propane from his delivery truck into his home tank a couple of days later. When Tomlinson put the 30 gallons into his tank a couple of days after October 28th, he filled out a daily posting ticket but does not recall the delivery address he used. If he had used his home address then the system would have eventually generated a bill to his account for 880 gallons because the October 19th ticket already showed 850 gallons delivered to his house. His account is for 850 gallons.

Vandre also reviewed and signed the October 28th documents, but, again, only looked for the totals and balances. By then all of the information had been entered into the company computer system and he was unaware of what had actually taken place. He did not give Tomlinson permission to store the 850 gallons in the large company storage tank or generate the information placed on the respective company records.

As an additional part of his duties, Vandre reviews monthly the status of employee purchase accounts with AmeriGas to keep them current. In going through that process in early November, he came to the Tomlinson account and saw there was a tank with gallons on it. He checked computer records and saw Tomlinson paid \$1.15, but Vandre knew the tank did not go in at Tomlinson's until at least October 22nd. He then asked Fisher about it and she told him what happened. Vandre reported this to the marketing manager and to Human Resources. He sent the documentation to Human Resources. Eventually, Human Resources informed Vandre there would be a termination. On November 8th Vandre received a faxed letter of Tomlinson's termination to sign and deliver to Tomlinson. Vandre took this to Tomlinson and told him he was being terminated for falsifying records for his personal gain. The letter reads in pertinent part

It has come to our attention that you falsified Company documents for your personal gain on October 19 and 28, 2005. Our investigation confirms that you falsely documented the delivery of 850 gallons of propane to your home at the employee rate of \$1.15/gallon on October 19, 2005, when in fact, you did not even set a tank at your residence until the following weekend. You then falsely documented pumping 820 gallons of propane back into storage on October 28, 2005, when in fact, that is the day you delivered 820 gallons of propane to the tank at your residence.

This falsification of Company documents is grounds for termination for "dishonesty and falsification of records" as per Article 13, Sections 1a. and 1j. of the collective bargaining agreement.

Therefore, you are terminated from employment with AmeriGas Propane, Inc. effective immediately. Please return all Company property to me, including uniforms, keys, cell phone etc.

Tomlinson is paying for 850 gallons of propane gas on an AmeriGas Propane budget plan. The difference in cost as to the timing of the transactions is \$255.00. The 30 gallon difference between the October 19th and October 28th daily posting tickets is not accounted for on the AmeriGas Propane records which were produced as exhibits at the hearing. However, this does explain the 30 gallon difference on the two proof lists. The October 28th posting ticket and related records may or may not exist in other AmeriGas records. Both Vandre and

Fisher first became aware of this second 30 gallon delivery at the time of the hearing in this matter. There is no apparent reason that the 820 gallon own use entry on the October 28th proof list would have been readily associated with the 850 gallon Tomlinson entry on the October 19th proof list, given that Vandre only checked for totals each day.

As will be addressed in the discussion section below, Tomlinson testified at the hearing that on October 19th he talked to Fisher by phone the second time at the end of the day and told her he had put the 850 gallons into storage and had written the posting ticket. He testified that on October 28th he called Fisher and told her he had delivered 820 gallons to his house and had generated a posting ticket for that, and would put the remaining 30 gallons in at a later date.

POSITIONS OF THE PARTIES

AmeriGas Propane

In summary, AmeriGas argues that there was no permission given to Tomlinson for the transaction and that neither Fisher nor Vandre had authority to grant such permission. Tomlinson did not indicate to Vandre, when getting permission to use the boom truck, a desire to avoid a price increase which had not yet been publicized. Tomlinson does not deny the October 19, 2005 delivery ticket contains a lie as to the 850 gallons. Tomlinson never asked Vandre for permission for the transaction that would benefit him more than \$250, but did ask to use the boom truck. The October 28th delivery ticket showing 820 gallons pumped into storage is a lie and Tomlinson does not deny it.

Fisher was not punished for knowingly typing two inaccurate proof lists because she reported Tomlinson's inquiry to Vandre, and felt her responsibility ended at that point and she achieved no personal or financial gain. Tomlinson stood to gain, and perhaps heard what he wanted to hear in his conversation with Fisher and he decided to take a chance by not seeking approval from his manager. Fisher's conduct was entirely different than Tomlinson's, so there is no disparate treatment. Arbitral precedent is supportive of this distinction.

Tomlinson's expected claim that he honestly felt he had permission is an attempt to cover his dishonesty. The claimed permission is nothing but the clever manipulation of a trusting fellow employee.

The contract does not mandate that Tomlinson gets his job back with full back pay. The plain language of Article 13, Section 3 allows the parties to conclude that the discharge has been unjust and then mandates reinstatement with full back pay, while Section 4 allows a remedy other than full reinstatement and back pay. That "other" remedy can be brought about by the parties or by arbitration. The dishonesty of Tomlinson is beyond question. The unmitigated nerve of the employee to accomplish the theft of \$255 from the Company in

“broad daylight” cannot be rewarded with a return to work. There is no shield for the dishonesty in this case. As the parties stated in their agreement, “. . . no warning is required to discharge due to . . . dishonesty . . . falsification of records. . . .” Tomlinson must understand that he must be personally responsible for the personal gain he conceived and pocketed here. The grievance must be denied.

The Teamsters

In summary, the Teamsters argue that AmeriGas has the burden of proving just cause for Tomlinson’s discharge and that it failed to meet it’s burden. The Company fails to sustain its burden of proof for discharge for dishonesty and falsification of records where Tomlinson discussed his actions and obtained pre-approval. There was no intent to deceive the Company. Intent is crucial when distinguishing dishonesty from oversights and “honest error”. Willful deceit is essential for dishonesty to have occurred. Tomlinson lacked such intent. He had five conversations with Fisher and Vandre about his actions, starting with Vandre and the request to use company property to install the tank, through speaking with Fisher about the remaining 30 gallons. He made no attempt to hide his transactions from the company for the purpose of defrauding it.

Vandre took no action to stop Tomlinson from taking actions which would result in his termination after discovering Fisher had told him he could pay the old rate. Vandre did not note or refuse to sign the paperwork reflecting the transaction. Based upon his conversations with Fischer, Tomlinson believed that he had permission to make the transaction as long as the deliveries were completed by the end of the month. The Company admits he informed them of his plans before taking action. Thus, the Company cannot show that Tomlinson acted with intent to defraud the Company.

Just cause is not supported where the Company approved or ratified Tomlinson’s conduct. Dishonest record keeping is an insufficient justification for discharge where extenuating circumstances exist. The tickets generated on October 19th and 28th do not accurately reflect the transactions which occurred. However, they were in no way fraudulent or an attempt to deceive the company. Tomlinson had discussed this with Fisher, who would be reviewing the transactions, and got her implicit approval. In light of the guidelines received from Fisher, Tomlinson’s actions are justifiable since there was no other way of recording the transactions. This does not reflect a desire to file fraudulent papers, but of being billed at the old rate and comply with Fisher’s guidelines. Given Tomlinson’s communications with the company, any dishonesty in record keeping was ratified by the company. The misstatements in the billing records were the result of poor oversight and miscommunication from the Rudolph location, not any intent to defraud the company.

The issue of remedy is not at the discretion of the arbitrator, and if it is found that the company unjustly terminated Tomlinson, he should be awarded full back pay. Article 13, Section 3 of the contract states “should it be found that the employee has been unjustly discharged or suspended, the employee shall be reinstated and compensated for all time lost at the employee’s regular rate of pay”. Provisions of Section 4 do not require a contrary result. The phrase “pursuant to the terms of the arbitration award” refers back to Section 3, which requires back pay. Article 10, Section 2 states “It is understood that the arbitrator shall not have the authority to change, alter, or modify any of the terms or provisions of this Agreement”. Reinstated with back pay is a mandatory requirement based on the language of the agreement. Once a determination has been made that just cause is lacking, the language of the contract requires reinstatement plus a make whole remedy.

DISCUSSION

The key issue in this case is whether Tomlinson was terminated for just cause. The collective bargaining agreement does not define just cause other than in Article 11 STRIKE AND LOCKOUT, Section 2, which is not applicable here. The parties did not stipulate to a definition of just cause in this matter. Generally, just cause involves proof of wrongdoing and, assuming guilt of wrongdoing is established and that the arbitrator is empowered to modify penalties, whether the punishment assessed by management should be upheld or modified. See, *Elkouri & Elkouri*, Sixth Edition, p. 948. In essence, two elements define just cause. The first is that the employer must establish conduct by the Grievant in which it had a disciplinary interest. The second is that the employer must establish that the discipline imposed reasonably reflects its disciplinary interest.

There are conflicts in the testimony between Fisher and Tomlinson as to the number of times they spoke on the phone and what, if anything, was said. Both testified they spoke by phone twice on October 19th. Their testimony is consistent as to the first conversation. After that, Fisher says she called Tomlinson back later in the morning and told him the totalizers have to balance and any gas put into storage had to be removed from the large storage tanks by the end of the month so that the totals and records would balance. She testified that after that she did not speak with him about this matter. Tomlinson testified that he called Fisher towards the end of the day and told her about pumping 850 gallons into storage so she would understand the posting ticket with his address on it. He testified he called Fisher on October 28th and told her about the 820 gallons pumped at his house, not into storage, and that he would pump 30 more gallons after that. Regardless of which is more persuasive and consistent with the other evidence, under either’s testimony the fact remains that the address on the October 19th and October 28th posting tickets are not the addresses where Tomlinson actually pumped the propane. Given that, Fisher’s testimony is the more persuasive and consistent with the other evidence. Both she and Vandre testified that the first time they became aware of the 30 gallons being pumped after October 28th was when they heard about it at the hearing. It is important that both she and Vandre testified to this. If Fisher had received

a call from Tomlinson on October 28th that referenced the additional 30 gallons, it would be reasonable to expect that AmeriGas would have searched its records for a 30 gallon entry from Tomlinson's posting tickets and daily vehicle reports to present as evidence for the hearing. They did not. That does not mean that Tomlinson did not prepare such a posting. But if he had told this to Fisher it is likely that this document, and its paper trail, would have been searched for by AmeriGas to account for the 30 gallon discrepancy between what Tomlinson was being billed for and what the other records show he pumped. This indicates that the 30 gallons was not mentioned to Fisher. That, in turn, makes it less likely that the entire October 28th conversation took place. There is no reason why Fisher would not tell Vandre everything she knew when he asked her in early November. Because Vandre was not aware of the 30 gallons, Fisher could not have and did not tell him. And, Fisher is a disinterested party, whereas Tomlinson's interest could affect his remembrance and recall. It is true that both Fisher and Tomlinson testified to the effect that they do have frequent telephone contact concerning deliveries and service matters. This does leave open the possibility of there being some mention by Tomlinson of these items that were not readily recalled by Fisher. But the unusual nature of Tomlinson's request makes it unlikely that she would overlook such conversations. Accordingly, as to the nature of the phone calls on October 19th and October 28th, Fisher's testimony is the more persuasive.

The first element of just cause requires an examination of the conduct of Tomlinson in which AmeriGas had a disciplinary interest. Here the record is very clear. Article 13, Section 1, sets out several matters of conduct which both AmeriGas and the Union recognize as having a disciplinary interest for AmeriGas. Those specifically include Section 1 a. dishonesty, and j. falsification of records. This case obviously involves propane which is the property of AmeriGas. AmeriGas has every right and need to accurately know how much of its property it has in each of its facilities, including large storage tanks and delivery trucks, at any given time – not just at month end for the large storage tanks, even though those are only regularly measured monthly. AmeriGas has a right and a need to have accurate records of the handling of its property at all times. It has a right and a need to have accurate delivery and billing records, particularly locations where sales of products are delivered to. AmeriGas also has a right to expect that all employees will record accurate, true information on all records and in all conversations and transactions between employees themselves, with customers, and with the general public. AmeriGas has a disciplinary interest in Tomlinson's transactions here.

In large part there is very little question about conduct which constitutes just cause for discipline. There is no question that Tomlinson violated Article 13, Section 1 j., when he knowingly put false addresses on two posting tickets. On October 19th he put a false address on the delivery location as being his home address when in fact he pumped 850 gallons of propane into a large AmeriGas storage tank. On October 28th he put a false address on the delivery location as being pumped back into storage when in fact he pumped 820 gallons into the tank then located at his home address. These locations were not true. This is dishonest because he has drawn a false line between what he told Fisher – and would reasonably expect that she would pass on to Vandre – and what he told AmeriGas at large on the posting tickets.

His tickets do not honestly reflect what he did and become a violation of Article 13, Section 1 a. This false information on the posting ticket resulted in inaccurate proof lists for those days. That proof list information then went into the AmeriGas central billing which, by extension, would not be accurate. What may start as a relatively small matter becomes a very large matter when the basic information works its way throughout the AmeriGas records and billing system. And this is not to say that the \$255.00 difference in price is seen as a small matter. \$255.00 would not seem to be a small matter to Tomlinson or one in his position. It would not seem to be a small matter to AmeriGas, given it's effect on the entire records and billing system - not to mention if numerous employees were to do the same thing. The false and dishonest information placed on the October 19th and October 28th posting tickets is a violation of Article 13, Section 1 a. and j.

Tomlinson contends he had permission from Fisher to post the transactions the way he did. He did not have permission from Fisher because she did not have authority to give permission. This is the type of transaction which Tomlinson should have known that only Vandre could give, if he could give it at all. Vandre has told the employees, including Tomlinson, to "dot I's and cross T's", and not do anything out of the ordinary without his permission. Clearly the false addresses on the posting tickets was not "dotting I's and crossing T's", and this was out of the ordinary. Tomlinson himself must recognize that this transaction would be out of the ordinary or he would not have contacted Fisher in the first place. But, it is clear that Tomlinson was informing the office of what he wanted to accomplish and he reasonably can be seen as seeking a way to dot the I and cross the T. Moreover, Fisher's statement to him when she called him back contains some ambiguity. She told him that as long as his totalizer balanced, her posting would balance. But, she also told him to make sure he had those gallons out of the main storage unit prior to month's end. This may have informed Tomlinson how the transaction might be accomplished to have daily and monthly totals balance, but it was not permission to do so. There is nothing to suggest that Tomlinson could reasonably understand that Fisher had authority to make these types of decisions or give such permission, even though Fisher's statement, read in isolation, may sound permissive. Given Vandre's previous and clear admonition to employees, Tomlinson was not justified in relying on Fisher's statement without checking directly with Vandre, such as he had done for use of the boom truck.

Tomlinson argues that AmeriGas ratified his actions so as to approve them. AmeriGas, through Fisher and Vandre, did not ratify Tomlinson's actions. Once Fisher informed Vandre of what Tomlinson asked and what she told him, she felt her responsibility on the matter was done. At this point the responsibility shifts to Vandre. Vandre, to his credit, admits he forgot about the matter when he did not hear from Tomlinson directly. He did not notice the transaction on the daily vehicle reports or proof list and would not be expected to. But, importantly, he did not knowingly do anything affirmative that would ratify or approve Tomlinson's actions after the fact. He did not contact or inform Tomlinson or AmeriGas that he approved of what Tomlinson wanted to do.

There being a violation of Article 13, Section 1 a. and j., without permission or ratification, there is just cause for discipline.

The second element of just cause is that the employer must establish that the discipline imposed reasonably reflects its disciplinary interest.

The issue becomes does termination reasonably reflect AmeriGas Propane's disciplinary interest. AmeriGas argues termination is called for because the case actually is one of theft. The case involves falsification of records and dishonesty which work to the personal gain of Tomlinson. However, it is not a theft case. Tomlinson is paying for the propane at an employee discount rate. There is no indication that he could not have rightly purchased at the lower rate if he had a tank at his home. It is how he structured the transaction to beat a price increase that is violative. He did not try to get propane without paying for it. The evidence does not show intent on Tomlinson's part to defraud his employer, but rather to cut a corner he was not allowed to.

It is significant that Tomlinson did not attempt to hide, even in plain sight, what he wanted to do and was doing. He called Fisher and discussed how to conduct the transaction. There is no reason to think that Fisher would not relay this to Vandre. Indeed, she did. The nature of the conversation, even using Fisher's version, does not show any attempt by Tomlinson to keep the matter secret between him and her. He then clearly left a paper trail with his name, address, number of gallons and price that reflected he was getting 850 gallons of propane at \$1.15 per gallon. Eventually, that is exactly what happened. These were AmeriGas records that Tomlinson would know would clearly show propane going to him and not to some other customer. He made no attempt to hide this, other than for the timing. And, Fisher's statement on its face can be viewed with some ambiguity. Vandre did not make a point to check further into the matter because even he forgot about it. This meant that although Tomlinson did not get permission, he did not get a denial either before going further. Although Tomlinson has been admonished along with others not do anything out of the ordinary, he was not specifically told not to do this. The communication on the proposed transaction was not complete by either Tomlinson or Vandre.

The fact that Fisher has not been disciplined is not a factor. She is in a completely different set of circumstances and there is no apparent reason why she should be disciplined.

Tomlinson has been an employee of AmeriGas or its predecessors in interest for about 12 years, a significant length of time. There is no record of any prior discipline or work issues. He testified at the hearing as to what he did. Even though his testimony and Fisher's are different on some matters, they are not different on the fact of false addresses for deliveries. This is the key element in the matter. He has been candid in these proceedings as to what he actually did to falsify the records and what he wanted to accomplish. He sought approval but should not have thought he actually got it. This is a very bad error in judgment on Tomlinson's part, not something tantamount to a crime. His actions did not involve the public or other customers.

Considering all of the above, termination of Tomlinson's employment is an excessive penalty.

Having found just cause for discipline, but that termination of employment is excessive, the issue of modification of penalty by the arbitrator is presented. The Teamsters have argued that not only is there no just cause to discipline, but also that the Agreement limits the arbitrator's authority to an award of full back pay. The issue is answered by the Agreement. Article 10 Section 3 provides:

It is understood that the arbitrator shall not have the authority to change, alter, or modify any of the terms or provisions of this Agreement.

Article 13 Section 4 provides:

The employee may be reinstated under other conditions agreed upon by the Employer and the Union or pursuant to the terms of the Arbitration Award. Failure to agree shall be cause for the matter to be submitted to arbitration as provided for in Article 10 of this Agreement.

Contrary to the argument of the Teamsters, the Article 13, Section 3 provisions for "reinstatement and compensation for all time lost" cannot be read alone. Agreements must be read as a whole with no part being made superfluous. Here, Section 4 specifically states "or pursuant to the terms of the Arbitration Award". And, again contrary to what Tomlinson argues, Section 4 does not refer back to Section 3. Rather, it refers to Article 10, the arbitration article. Reading Article 10 and Article 13 Section 3 and Section 4 together and giving meaning to each, Article 13 Section 4 does allow an arbitrator to make an award of reinstatement with terms other than reinstatement and compensation for all time lost. This means that the arbitrator is empowered to modify the penalty.

Considering the circumstances, termination of employment is an excessive penalty for the conduct involved. There is just cause for discipline. The disciplinary interests of AmeriGas have been set out above. These are serious matters. Tomlinson has been an employee long enough to have known that only Vandre could give permission, if at all possible, for the transaction. He sought and obtained Vandre's permission to use the boom truck and to get a 1000 gallon tank. He should have realized, if he did not, that Fisher could not grant permission. An employer must have trust in what an employee says, does and writes. Balanced against this are the considerations discussed above as to why a penalty of termination of employment is excessive in this case. Both parties have taken positions with

little if any middle ground. Neither presented evidence of other examples of discipline imposed by AmeriGas for similar violations (assuming any exist), or of lesser penalties for less serious violations. AmeriGas is correct in that Tomlinson must understand that he must be personally accountable for the personal gain he conceived and pocketed here. However, nothing near termination of employment is needed or called for to accomplish that.

The Agreement has little by way of required progressive disciplinary measures written into it. The warning notice, training and testing provisions of Article 13 do not apply here. A suspension without pay for 10 working days is a reasonable reflection of the disciplinary interest here. With this discipline there is little likelihood that this violation or anything like it will happen again.

A suspension without pay for 10 working days will provide a serious financial disincentive to Tomlinson, and others, on matters of false records, honesty, and all other items in Article 13 of the Agreement. This should make Tomlinson understand that he is personally responsible for the personal gain, and then some. This discipline exceeds any benefit he may have derived. There is nothing in the Agreement or record which indicates the arbitrator has any ability to change or adjust the \$255.00 price benefit Tomlinson received and that is not being done here. But, given the wage rates in the Agreement, that price break will be a very expensive consequence in view of 10 days of lost wages and the blemish on his record. This suspension is more serious than a written reprimand or suspension of fewer days. Such lesser discipline would come close to a wash with the price break. The nature of the violation calls for a more serious penalty than that.

Accordingly, based upon the evidence and arguments in this case, I issue the following

AWARD

The grievance is sustained in part and denied in part. Tomlinson is to be reinstated with the termination reduced to a ten working day suspension without pay retroactive to November 8, 2005. He is to be made whole for the period of time after the suspension. The arbitrator will retain jurisdiction for 45 days from the release of this Award as to implementing this remedy.

Dated at Madison, Wisconsin, this 21st day of April, 2006.

Paul Gordon /s/

Paul Gordon, Arbitrator

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