BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between TEAMSTERS "GENERAL" LOCAL NO. 200 and LIQUID CARBONIC SPECIALTY GAS CORPORATION	Case 3 No. 44224 A-4660

Appearances:

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., 788 North Jefferson Street, P.O. Box 92099, Milwaukee, WI 53202, by Mr. John Brennan, Attorney at Law, appearing on behalf of Teamsters Local 200.

Mr. Brian Curtis, Corporate Attorney, 135 South LaSalle Street, Chicago, IL 60603-4282, appearing on behalf of Liquid Carbonic Specialty Gas Corporation.

ARBITRATION AWARD

Pursuant to the terms of their labor agreement, the Teamsters "General" Local 200 (hereinafter referred to as either the Union or the Teamsters) and Liquid Carbonic Specialty Gas Corporation (hereinafter referred to as either the Company or the Employer) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute over the discipline imposed on employee Thomas Pauer. Daniel Nielsen was so designated. A hearing was held on October 16, 1990 in Milwaukee, Wisconsin at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the case. Post hearing briefs were submitted, which were exchanged through the undersigned on November 25, 1990, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following Award.

ISSUE

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

> "Did the Company have cause to suspend the grievant for one day? If not, what is the appropriate remedy?" 1/

PERTINENT CONTRACT LANGUAGE

***

ARTICLE XV

GRIEVANCES AND ARBITRATION

> Section 1. When any difference or dispute arises which cannot be agreed upon and adjusted by and between the parties hereto, said parties agree to submit the same to arbitration. *** The arbitration award shall be final and binding upon the parties. During the above-mentioned negotiations, there shall be no strikes and lockouts.

***

BACKGROUND

The Company distributes industrial gases through its Milwaukee, Wisconsin facility. The Union is the exclusive bargaining representative for the Company's truck drivers and helpers. The grievant is a truck driver working out of Milwaukee, and has been with the Company for 23 years. Prior to the incident which is the subject of this award, he had no disciplinary record.

1/ At the hearing, the Company raised a question of procedural arbitrability, contending that the contract was silent as to a standard of discipline for cases less than discharge, and that the grievance procedure did not extend to discipline less than discharge. The question of procedural arbitrability is not discussed in the Employer's brief, which instead focuses on the existence of cause for discipline and the appropriateness of the penalty. In light of this, and given the broad definition of a grievance in Article XV ("When any difference or dispute arises which cannot be agreed upon and adjusted by and between the parties hereto, said parties agree to submit the same to arbitration") which clearly brings this dispute within the scope of the grievance procedure, the undersigned has not included the procedural question in his statement of the issue.

The Company uses a bar code scanning unit to track inventory. The unit consists of a hand held computer, a scanner and a carrying harness. On May 15, 1990, the grievant reported for work, and found that his scanner was not working. He was told to wait while another employee brought a replacement part from another office. That employee showed up at about 10:00 a.m. without the replacement part, having forgotten it on his desk. The grievant was given the option of leaving the unit behind, or hand punching inventory numbers into the computer component. He chose to take the unit with him, even though there was no carrying harness available to him.

At his first stop, the grievant used the hand held unit to track the inventory. The second and third had orders too large to track by hand, so the unit was not used. His fourth stop was St. Luke's Hospital in Milwaukee. He used the hand held computer to record the inventory, and put the unit down. He does not recall whether he placed it on the back of his truck or on the cab, but believes it was on the back of the truck. He went inside to write up some paperwork, and then came out of the hospital, got in his truck and drove away.

After about eight miles, the grievant noticed that the computer was missing. He pulled over and called St. Luke's to see if he'd left it inside the hospital. They looked, and told him they couldn't find it. He then called the office and asked to speak to Shelley Adomaitis, the plant manager. She was on another line, so he instead spoke with Tim Heisterman, the assistant manager. He told Heisterman that he couldn't find the computer, and Heisterman told him to back track and look for it. The grievant then returned to St. Luke's to search for the computer. He made a drawing of the unit and had it distributed around the hospital. He then called back to his office, and spoke with Adomaitis. She told him "find that damn thing -- it's worth alot of money." He then retraced the route he had taken after leaving the hospital. Seven miles down the road, he spotted the unit along the right side. He retrieved it, noting that the display window was fractured and the casing was nicked. He turned it on and found that it would not function.

When the grievant brought the computer unit back to the plant, it would not download its inventory data. The data had to be redone by hand. Repairs to the unit cost the Company $700.

Adomaitis spoke with other Company officials about the incident. Peter Kenney, the Regional Manager, was contacted and suggested that a one day suspension would be appropriate. Kenney checked on a situation in California where a Company driver in a different bargaining unit had backed over the unit, destroying it. This was apparently the only other case in which a Company driver had damaged a bar code unit. The California employee was suspended for two days, and asked to pay for the unit, although the request for reimbursement was later dropped. Adomaitis and Kenney both agreed that the grievant should receive a one day suspension and be asked to pay for the cost of replacing or repairing the computer. They believed that, since he voluntarily took the unit out without a harness, he should have shown special care with it. They also considered his failure to apologize an aggravating circumstance.

On May 17th, Adomaitis imposed a one day suspension on the grievant:

> On May 15, 1990 the bar code equipment, Telxon-701KS hand held computer, issued to you was lost. After retracing portions of your route you managed to find the unit, however, it was severely damaged as it fell off your truck while you were driving on the expressway.
>
> As you are aware, this equipment is extremely costly. It's use has become an integral and routine part of our business and is critical for maintaining customer cylinder inventories. You have failed to care for this equipment properly and in fact demonstrated gross negligence and carelessness with no remorse. This is a very serious situation and therefore you are notified of the following:
>
> > +You will be suspended for one (1) day without pay - Monday, May 21, 1990
> >
> > +You will be held responsible for the cost of repair and/or replacement of the computer.
> >
> > +Any other deviation from proper handling or misuse of bar coding equipment or other deviations from company policy will result in further disciplinary actions up to and including dismissal.
>
> It is the policy of Liquid Carbonic to take action when valuable equipment is carelessly handled. We expect employees to perform in a professional manner at all times - especially when this type of equipment is in use."

The instant grievance was thereafter filed, requesting reimbursement of the one day suspension, removal of the letter of discipline from the file and a statement from the Company that employees would not be held financially liable for accidental damage to Company property. The Company denied the grievance in a May 23rd letter from Adomaitis to the Union's Business Representative:

> Dear Mr. Sheehan:
>
> We are in receipt of the grievance filed by Mr. Tom Pauer.
>
> Our response is as follows:

1.) Mr. Pauer's negligence in "losing" a critically important asset of our business cannot be accepted by Liquid Carbonic. In these days of hazardous material concerns, we have to be able to have the highest level of confidence in the professionalism of our drivers.

2.) We would not expect Liquid Carbonic employees to be held financially responsible for any Liquid Carbonic property which was damaged accidentally. We view the circumstances surrounding this case as gross negligence and not accidental.

If you require further information regarding this matter, please contact us. We would be willing to schedule a meeting to resolve this grievance.

The grievant submitted a letter to the Company on June 8th, protesting the grievance response, and defending his professionalism. He pointed out that he had regularly been entrusted with trucks having far greater value than the bar code computer, and that he had used the computer hundreds of times before this incident without any problem. He characterized the accusation of gross negligence and carelessness as "absurd and a lie", noting that "Accidents do happen."

The Company later determined that it would not assess the grievant for repair costs, but let the discipline stand. The matter was not resolved in the grievance procedure and was referred to arbitration. Additional facts, as necessary, will be set forth below.

THE POSITIONS OF THE PARTIES

The Position of the Company

The Company takes the position that the penalty imposed in this case is entirely appropriate and should be sustained. The grievant caused $700 worth of damage to a valuable piece of equipment through his failure to properly care for it. This is the first instance of damage to bar code equipment in this bargaining unit. The Company considered the grievant's long service and lack of prior discipline in deciding to impose only a one day suspension rather than some more severe discipline. While the grievant claimed at the hearing to be aware of cases involving much greater damage to trucks without resultant discipline, there was no foundation for his claim of knowledge, and that testimony should be discounted.

The Company points out that there is no discipline language covering suspensions in the

contract, and that management's right to discipline employees is restricted only by the general proposition that the discipline be supported by "cause". The Company cites the well known arbitrator Whitley McCoy for the proposition that an arbitrator should not substitute his judgment of an appropriate penalty for that of management unless "discrimination, unfairness, or capricious and arbitrary action are proved -- in other words, where there has been abuse of discretion." Elkouri & Elkouri, HOW ARBITRATION WORKS, 4th Ed.,(BNA, 1985) at page 665. Such proof is lacking in this case, and the discipline should be sustained.

The Position of the Union

The Union takes the position that there was no cause for discipline in this case, and that the grievance should be granted. Even if some measure of discipline could have been proven, the Union argues, a one day suspension is inappropriate and should be reduced.

While the grievant caused the Company some financial loss, it is inconsistent for the Company to impose discipline here where other drivers in the past have damaged trucks in accidents and not been disciplined. The Union suggests that his poor relationship with Adomaitis has more to do with the discipline than the damage to the bar coder.

The Company characterized the grievant's mishap as more than a mere accident, instead constituting "gross negligence". If the grievant were a grossly negligent employee, he would not have 23 years and 1,500,000 miles of driving without an accident. He diligently searched for the computer after it was lost, going so far as to make drawings of it to distribute at the hospital. While there is always some degree of negligence in an accident, there was nothing about the grievant's actions before or after the loss of the computer suggesting an especially egregious lack of care. This was, the Union submits, simply a run of the mill mistake.

Even if there was some basis for discipline, the Union asserts that the Company failed to consider mitigating circumstances and improperly considered irrelevant factors. The grievant's long record of service, his lack of any discipline and his efforts to remedy the mistake once discovered should all count in his favor. The lack of discipline for drivers who had damaged trucks in the past should dictate at most a verbal warning in this case. The Company made no investigation in this case before deciding on the level of discipline, since neither Adomaitis nor Kenney spoke with the grievant to hear his side of the story. The Company's reliance on a supposedly similar incident in California is misplaced, the Union argues, since Adomaitis and Kenney had no information surrounding that case, including the existence or substance of any collective bargaining agreement covering the employee, his length of service or prior record. Because there was factual basis for the conclusion of "gross negligence" and because the California case cannot be shown to have any relevance, the discipline imposed here was, the Union submits, wholly arbitrary.

For all of the foregoing reasons, the Union asks that the grievance be granted and the

grievant be made whole for his losses.

DISCUSSION

There are two elements to this dispute. The first is whether the Company had cause to discipline the grievant for the damage to the hand held computer. If so, the second question is whether the measure of discipline was contractually appropriate.

Just Cause for Discipline

The Company contends that the grievant was disciplined for "gross negligence and carelessness with no remorse." Certainly these are commonly understood to be disciplinable acts. Gross negligence is frequently listed in labor agreements and arbitration awards as an offense that can lead to summary discharge. On the facts of this case, it seems something of an overstatement. Negligence is an act or omission which is not consistent with the actions that a reasonably prudent person would have taken. Gross negligence suggests a conscious or willful disregard of, or indifference to, the duty of care expected -- a course of conduct just short of recklessness.

Here the grievant put the hand held computer down on the back of the truck and forgot it was there when he drove off. He claims, and the claim is sensible, that he always used a harness to carry the computer, so that there was not usually an issue about where he put it when he was done taking inventory. He was used to having the computer with him on the road, and he was used to carrying on his person in the harness. On this day, no harness was available, and the usual routine was thus changed. The Company makes much of the fact that the grievant was offered the opportunity to leave the computer at the office and do inventory without it, arguing that he voluntarily assumed the risk of losing the equipment. This is not particularly persuasive, since it is unlikely that the grievant would foresee his act of negligence and guard himself by refusing to take the equipment with him. He testified that he took the computer along because it saved the company money to have the inventory recorded on the machine, and there is no reason to question the line of reasoning that led him to his decision.

The conduct of the grievant does not contain any element of conscious or willful disregard of the need to handle the computer carefully, and the degree of his culpability cannot be fairly said to rise to level of "gross negligence". This is not to suggest that he was not negligent in leaving the computer on the back of his truck, leading to $700 worth of damage. Even though inadvertent, the grievant's action bespeaks a lack of proper care in the handling of Company property. The fact that the grievant's conduct is more properly characterized as ordinary negligence than gross negligence has some bearing on the degree of discipline that can be supported, but does not free the grievant from any disciplinary liability. An employer has the right to expect its workers to exercise care in their duties, and a co-extensive right to respond to employee negligence with corrective discipline. Thus the undersigned concludes that there was cause to discipline the grievant for damaging the Company's computer, and the sole question is

whether the measure of discipline was appropriate.

Appropriateness of the Suspension

While the Employer has the right in the first instance to determine the severity of a penalty, it is commonly accepted that an arbitrator has the inherent authority to modify the penalty if circumstances warrant and the contract does not forbid such modifications. 2/ Such a modification is not an act of leniency, since leniency is within the province of an employer. Instead it turns on mitigating factors and such fundamental notions of fairness as equality of treatment and proportionality. 3/

The mere fact that an arbitrator may reduce penalties does not lead to the conclusion that he should automatically do so. An arbitrator is not free to substitute his judgment for the Employer's simply because he would have made a somewhat different decision had it originally been his to make. There is a range of permissible discipline in nearly every case, and the fact that an employer has reached the margin does not strip it of its discretion. 4/ Absent evidence of a violation of established disciplinary norms (as in a claim of disparate treatment), or the presence of factors traditionally considered to mitigate a penalty, the discipline imposed may be reduced only where it is grossly out of proportion to the grievant's offense.

The penalty assessed against the grievant is a one day suspension. Mitigating the severity of the offense are the facts that (1) the grievant was not grossly negligent by any usual interpretation of that term, (2) the grievant has been employed by the Company for 23 years, (3) the grievant has no disciplinary history in his 23 years with the Company, and (4) the grievant has no history of negligence or carelessness in his 23 years with the Company. Peter Kenney, the Company's Regional Manager, asserts that he considered the grievant's record in recommending only a one day suspension to Adomaitis. Adomaitis, for her part, testified that the grievant's failure to apologize was an aggravating factor in her decision to impose a suspension, stating her belief that this outweighed his efforts to locate the unit and that "he should for once admit that he made a mistake."

2/ City of Detroit, 76 LA 213 (Roumell, 1981) at page 220; Fairweather, PRACTICE AND PROCEDURE IN ARBITRATION, 2nd Ed. (BNA 1983), hereinafter referred to as "Fairweather", at pages 501-503; Elkouri, at pages 667-688; Hill & Sinicropi, REMEDIES IN ARBITRATION, (BNA 1981), hereinafter referred to as "Hill", Chapter 4, pages 97-105.

3/ City of Detroit, 76 LA 213 (Roumell, 1981) at page 220; Elkouri, at pages 669-670.

4/ See Stockham Pipefittings Co., 1 LA 160 (McCoy 1945).

The Company claims that it factored in the grievant's length of service and work record in arriving at the penalty and, although a one day suspension seems at the margin of reasonableness for an accident by a 23 year employee with a clean record, the undersigned cannot say it is so grossly disproportional as to demand modification solely on the basis of past work record. In this regard, the Company's concern over the grievant's lack of remorse is a factor. A lack of remorse might raise a reasonable concern in management that the grievant was indifferent to the loss and/or might repeat the conduct in the future. While not heavily weighted, the undersigned agrees that the lack of remorse does aggravate the offense.

As stated above, an employer is entitled to some latitude in setting penalties, and an arbitrator must be sensitive to the different disciplinary practices of different companies. An arbitrator must be more sensitive, however, to consistency of discipline within the same plant. Weighing a penalty's consistency with past acts of discipline is fundamentally an act of deference to the parties' judgment of their disciplinary climate. If a penalty has been judged roughly proportional to the offense in the past, an arbitrator should not apply some abstract, personal standard in upsetting the discipline, but should instead bow to the historical standard. Attempting to ensure that penalties are consistent across cases involving similar offenses and similarly situated employees also dispels suspicions of favoritism, discrimination and disparate treatment. The Union presented testimony that two unit members had in the past suffered preventable accidents with their trucks, resulting in damage to the vehicles and, in one case, injury to an innocent third party. The initial disciplinary response of the Company was a letter of reprimand in each case. 5/ These are the only other cases of discipline for accidents raised in the record. The imposition of a one day suspension for causing $700 worth of damage to a hand computer cannot be squared with letters of reprimand to drivers who engaged in negligent conduct while operating very expensive and potentially dangerous trucks. The Company has set a disciplinary standard for accident cases, and if it is to be changed that change cannot be accomplished on an ad hoc basis by simply imposing a heavier measure of discipline against this grievant than had been used against negligent employees in the past.

The grievant was guilty of a disciplinable act. The inconsistency of discipline within the Company, in combination with the grievant's clean record, his 23 years of service, and the failure of the Company to support its charge of gross negligence (as opposed to ordinary negligence),

---

5/ The Company attacked this evidence as lacking an adequate foundation. The incidents were initially described by the grievant, who based his testimony on hearsay rather than personal knowledge. Adomaitis, who was plant manager at the time of these accidents, confirmed the fact that these two workers had received reprimands for their accidents, although one ultimately was persuaded to leave the Company as a result of his safety record. The testimony of Adomaitis, confirming the grievant's on these critical points, satisfies any concerns regarding the foundation for this evidence.

compel the conclusion that the one day suspension was an inappropriately heavy measure of discipline. The appropriate level of discipline, as measured against the Company's own past standard, is a written warning to the grievant.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The Company had cause to discipline the grievant for his negligence in misplacing and damaging a hand held computer on May 15, 1990. The appropriate measure of discipline was a written reprimand. The Company shall reduce the one day suspension to a letter of reprimand, and shall reimburse the grievant for any losses flowing from the suspension.

Signed this 7th day of February, 1991 at Racine, Wisconsin:

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator