Helburn #2

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

BACKGROUND

The Employee is a mechanic employed by the Employer at its City 1, State 1 station. The Employee, with 19 ½ years with the Employer and its predecessors, has an A&P License. He testified that he has had no prior discipline and no attendance problems. His file includes commendation letters for job-related and community activities.

The Employee testified that Person 1 normally begins his day at about 4:30 a.m., filling the gas tanks in the Employer's oil, de-icer and air-start trucks. On December 2, 1996[1] the Employee began work at 6:15 a.m. He testified that about 6:50 a.m. he went to Airline 1 and asked Person 2, an Airline 1 employee, if he could purchase some av-gas for him. The Employee explained at the hearing that he wanted the gas to burn carbon deposits from the engine in his personal vehicle and thus to stop the engine from pinging. Person 2 responded that he was not sure that he could get av-gas, but that he would get something as good. The Employee said that he would leave two containers for Person 2 at Gate 45.

The Employee worked flight #785, which departed at 7:00 a.m., then got the two containers from his car in the employee lot and left them at Gate 45. He normally carried one container, but had two because he had been planning on asking Person 2 to get the fuel. The Employee then worked flights #272 and #439, which departed respectively at 7:30 and 8:10 a.m., and flight #284, which

[1] Dates will be 1996 unless otherwise noted.

arrived late at 9:20 a.m. Thereafter the Employee said that he drove in the oil truck, with the full fuel containers in the back, with steward Person 3 to the hanger, which is at least one-half mile from the terminal, across two runways. The Employer's vehicle fuel pump is 400-500 feet from the hanger. The Employee spent about 15 minutes at the hanger while Person 3 wrote out a grievance. About 10:20-10:30 a.m. they returned to the terminal, and the Employee parked the oil truck in front of the maintenance shop in full view. Because the airport grill was closed, the Employee and others went in his car to a nearby Restaurant 1 for lunch. The Employee testified that while on lunch break, he went to a gas station to have gas put in his car. He returned to the airport around noon, worked a flight and then went to the employee parking lot to put the two gas containers in his car.

Before the Employee took the gas to his car, Person 4, Line Maintenance Manager, had received a tip that the Employee had been stealing gas for some time and that he had two cans of gas on the oil truck that morning. Person 4 and Line Maintenance Foreman Person 5 drove to the maintenance shack, between Gates 45 and 46, and observed the fuel on the truck. They then asked airport security police to redirect the security video camera to the employee parking lot and Person 4 and Person 5 went to the lot to observe. According to Person 4, 10-15 minutes later the Employee drove out of the security check point and into the lot in the oil truck. The video tape viewed at the arbitration hearing showed that at 1:14 p.m. the Employee opened the hood of his car and went immediately around toward the rear of the car. Person 4 observed the Employee put the fuel in his car. The tape showed that the Employee then closed the hood, spending no time looking into the engine compartment.

Person 4 and Person 5 stopped the Employee as he was exiting the lot and asked why he was there. The Employee responded that he was checking the oil in his car. Person 4 asked what else

he was doing and the Employee replied that he was doing nothing. When Person 4 asked about the gas, the Employee said that it was av-gas to be used to stop the pinging in his engine and that he had gotten it from a young, tall fueler at Airline 2. Person 4 asked to go back to the Employee's car to look at the gas. When they got to the car, the Employee said that the keys were still in the oil truck. Person 4's contemporaneous notes read as follows:

> "...As we approached the truck the Employee started to come apart. He started breaking down and said "This is the first time I ever did this, you can't do this to me, my father just died and I have a wife and kids and a house and it would ruin me. I promise I won't ever do anything like this again." I told him I had reports of him doing this before. He claimed "No I swear, this is the only time." He kept trying to pull me away so Red couldn't hear" (CX-1).[2]

Person 4 said that the two gas cans were in the back seat of the Employee's car, covered by a ball jacket. The Employee said that the ball jacket was on the seat of the car. He testified that when he opened the hood he noticed that the plastic air intake was resting on the manifold and was melting, as it had fallen from its usual location. Since the problem was obvious and he could not then do anything to fix it, no time under the hood was necessary. Before reviewing the tape, the Employee could not remember if he had checked the oil. He also stated that when he said "This is the first time I ever did this," he meant that it was the first time he had ever asked for a favor and something like this had happened. The Employee knew Person 2 was not young or tall, but said that he got the gas from a young, tall fueler because that was whom he actually obtained the gas from, although he had initially spoken to Person 2.

Person 4 described the containers as light brown opaque plastic. The smaller one was a 2 ½ gallon container with a built-in handle. The larger one was flat and square with a round top. Neither had a nozzle; neither looked like a can bought at the gas station.

[2] JX, CX, and UX refer respectively to Joint, Company, and Union Exhibits

While in the parking lot, Person 4 took the smaller can, telling the Employee that the Employee would get it back if his story checked out. The Employee was then suspended without pay, pending further investigation and a hearing the next day.

After leaving the parking lot, Person 4 spoke with Airline 2 Manager Person 6, who said that he did not employ a young, tall fueler and that av-gas was blue (not amber as was Employee's fuel). At Airline 3, neither the tall, young fueler nor the older, regular fueler knew anything about the gas in the Employee's car. The following day at the Employee's hearing, attended by the Employee, Person 3 and Person 7 for the Union and Person 4 and Person 5 for the Employer, Person 2 was introduced as the individual who had supplied the gas for the Employee. Person 2 said that he had talked with the Employee about 6:45 a.m. when the Employee asked him to buy him some av-gas to stop the engine knock in his car. Person 2 had said that he would get racing gas instead in both containers and that about 9:00 a.m. he purchased the gas, reddish in color, at the Company 1 station going into City 2, State 1.

Not believing Person 2, Person 4 went to the Company 1 and got a sample of racing fuel, which was deep purple. About 4:00 p.m. Person 4 and Person 7, Local Chairman, called the Employee and told him of his termination. The following morning Person 4 and Person 5 spoke with Person 2 at Airline 1. He then said that he had gotten racing fuel in the large container and regular fuel in the small container, the latter fuel coming from either the 89 or the 93 octane pump immediately adjacent to the racing fuel pump. He bought some of each fuel to allow a mixture. Person 2 said that he brought the gas through the Employer baggage door at 9:00 a.m. A later check of the security system showed that the only time on December 2 that Person 2 used that door was at 12:26 p.m.

On December 4 Person 4 returned to the Company 1 and obtained samples of the 89 and 93 octane gas, which was light yellow. The three young women behind the counter had worked Monday, December 2 and none remembered selling racing fuel, nor was any such fuel delivered the following day. Still later on December 4, Person 5 again spoke with Person 2, who then said that he brought the gas through the Airline 1 cargo area. The 89 and 93 octane samples did not match the gas in Employee's car. A sample of Employer automotive fuel which Person 4 obtained was the same color as Employee's fuel.

On December 5, Person 2 was interviewed by Person 8, Regional Manager, and Corporate Security. Person 8's memo of the interview, a copy of which Person 4 received, indicates that the fuel cost about $15.00 total and that the Employee, who had given Person 2 $30.00, had said to keep the rest for his troubles. Person 2 said that two women and a man were working at the Company 1 when he was there. Person 2 verbally traced a circuitous route which he used once he returned to the terminal, but he could not explain why he had done this. He also said that he had asked Person 9 to take the fuel from Airline 1's air freight area to Airline 1's supply room near Gate 47, and that he later took the fuel to Gate 45, where Employee picked up the fuel at an unknown time. Further investigation by Person 4 at the Company 1 station showed that no males were working when Person 2 was there.

Person 2 had provided receipts for the fuel which he supposedly bought at the Company 1 station. When Person 4 showed these to the women who worked there, they said that they had written the receipts the night before for a man who asked for backdated receipts and knew the quantities of fuel to go on the receipts. A check of the store's records showed that no racing fuel was sold on December 2.

On December 10, Person 9 wrote a statement saying that he had picked up a five and a three gallon container, "red containers with yellow nozzle," at Airline 1 cargo and took them to the Airline 1 GSE room, where he last saw them at about 2:45 p.m. (CX-6). On January 7, 1997, Person 9 wrote a second statement in essence saying that Person 2 had called him at home and had told him to go along with the story about the fuel.

The Employee had been terminated for violation of the following Posted Rule of Conduct:

> 32. Dishonesty such as theft or pilferage of Employer property, the property of our customers or property of employees, or the misappropriation of funds entrusted to employees, or misrepresentation to obtain employee benefits or privileges will be grounds for immediate dismissal and may, where facts warrant, lead to prosecution to the fullest extent of the law (TX-3).

The termination had been grieved on December 4. The grievance was processed in accordance with Article 14 of the parties' Collective Bargaining Agreement (CBA) and denied at all steps of the procedure. Thereafter the grievance was considered by the System Board of Adjustment in accordance with Article 15 of the CBA. When the Board deadlocked, I. B. Helburn was selected from a National Mediation Board panel as neutral referee to sit with the Arbitration System Board of Adjustment.

The grievance was heard at Employer headquarters on December 8, 1997. The parties stipulated that the grievance was properly before the Board. Witnesses were affirmed before testifying and cross examined. Documentary and testimonial evidence was received. The Employee was present throughout and testified in his own behalf. A verbatim transcript was made of the proceedings, but a copy was not entered into the record, which was closed on December 8, 1997 following oral summation by both parties.

ISSUE

The stipulated issue is:

Was the termination of Employee for just cause and if not what shall the remedy be?

EMPLOYER POSITION

For reasons summarized below, the Employer asserts that the removal was for just cause and that the grievance should be denied.

1. The Employer went to great lengths to check out the Employee's story, conducting a flawless investigation. There was no young, tall fueler, Person 2's story did not check out and was not consistent with Employee's assertions and Person 9 recanted his story.

2. When the Employee was confronted in the employee parking lot he acted as though he had something to hide. He was also evasive on the witness stand during the hearing. He knows that av-gas differs in color from other gas, but said that he could not remember the color of the gas.

3. The only sample of gas that matched the gas the Employee had in his car was that from the Employer pump. Neither the 89 or the 91 octane gas nor the racing fuel samples matched the gas in Employee's car.

4. The Employee was not credible, as shown by the video tape of the parking lot. He did not check the oil in his car as he said and did not look at the engine.

UNION POSITION

For reasons noted below, the Union believes that the termination was not for just cause, thus the grievance should be sustained and the Employee reinstated and made whole.

1. In its investigation, the Employer did not obtain samples of the 87 octane fuel from the Company 1 or fuel from Airline 1 Airlines. The gas in the Employee's car could have come from either of these sources. Reasonable doubts remain about exactly what happened.

2. The Employer trucks were filled at 4:30 a.m. and were still full at 1:30 p.m. The Employee made only one trip to the hanger and that was after the two containers had been filled with gas. He worked at the terminal at least one-half mile from the hanger and had no opportunity to siphon gas from the Employer trucks. Thus he did not steal gas from the Employer.

DISCUSSION

For reasons set forth below, the termination must be viewed as justified. Since the Union has raised the question of the appropriate quantum of proof, the analysis begins with consideration of necessary proof. After an extensive review of the subject of appropriate quantum of proof to be applied, Hill and Sinicropi conclude that the:

> "(e)videntiary labels that have been created and applied in the legal forum such as preponderance of evidence, clear and convincing evidence, and beyond a reasonable doubt are not particularly useful in labor arbitration."[3]

It is entirely possible, if not likely, that one arbitrator's "clear and convincing" is another's "preponderance of the evidence." As Arbitrator Benjamin Aaron wrote long ago, ultimately what is most critical is whether, after an unbiased and thorough analysis of the evidence, the arbitrator is convinced that the allegation is true. In the case at hand, after the various explanations which have been suggested for the origin of the fuel in the Employee's car have been stripped away, and after the Employee's words and deeds are analyzed, the allegation must be seen as true.

[3] Marvin F. Hill, Jr. and Anthony V. Sinicropi, Evidence in Arbitration (2d ed.), The Bureau of National Affairs, Inc., 1987, pp. 38-39.

The absence of samples of gas from the 87 octane pump at the Company 1 station and from the Airline 1 pump to compare with the fuel in the Employee's containers does not raise doubts about the Employee's guilt. First, assuming for the sake of discussion that Person 2 bought gas at the Company 1 Station, he very specifically stated to Person 4 and Person 5 that he got racing fuel and either 89 or 93 octane gas from a pump next to the racing fuel pumps. Person 4 testified that there was no 87 octane pump next to the racing fuel pump and there was no mention of 87 octane fuel. That the Employee received 87 octane fuel cannot be considered a reasonable possibility.

Second, there is no indication that either the Employee or Person 2 filled the containers with Airline 1 fuel. Thus there is no viable explanation for how Airline 1 fuel would have come into the Employee's possession. Without even a barely plausible explanation for the existence of Airline 1 fuel in Employee's containers, this scenario is not worthy of consideration.

Three individuals have been mentioned as possible explanations for the existence of the gas in the Employee's containers: a young, tall fueler, Person 9 and Person 2. The young, tall fueler is best described as a figment of the Employee's imagination. There was no such person at Airline 2. The young, tall fueler at Airline 3, the other fuel source, told Person 4 that he was not involved and this was accepted. Person 2 mentioned Person 9, but nobody has suggested that Person 9 and the young, tall fueler are the same person. Most critically, the Employee did not see who left the fuel at Gate 45. According to his story, after speaking with Person 2 about 6:50 a.m., the Employee made no contact with anybody involved in obtaining the fuel. He simply loaded the fuel on the oil truck and eventually took it to his car. If a young, tall fueler had been involved, the Employee would not have known this at about 1:20 p.m. when confronted by Person 4 and Person 5 in the Employer employee parking lot.

Person 9 clearly was not involved. On January 7, 1997 he recanted his earlier statement. But, standing alone, the December 10 statement Person 9 wrote is a fabrication. Person 9 wrote that he moved red containers with yellow nozzles. Person 4's unquestioned testimony was that the containers were opaque light brown without nozzles. Person 9 wrote that he saw the cans at the Airline 1 GSE room as late as 2:45 p.m. Yet the cans were in the Employee's car about 90 minutes before that. Person 9's original statement thus could not have been true.

This leaves Person 2 who, based on an analysis of the evidence, did not purchase gas for the Employee at the Company 1 Station. He claimed to have purchased racing fuel on December 2, a day when the station sold no racing fuel. He claimed that two females and a male were serving as clerks when he was there, yet the males were not scheduled to work at the time. First he said he filled both containers with racing fuel, then changed his story and said that one was filled with regular fuel. He described the fuel as reddish in color, but racing fuel is deep purple. He claimed Person 9 helped him move the cans, but this was false. Even without considering his procurement of bogus receipts to try to cover his tracks or the changes in his story about how he brought the gas into the terminal area, it is clear that Person 2 did not purchase fuel from the Company 1 Station as he claimed. Nor is there the slightest indication that he obtained fuel for the Employee from any other source.

Thus far the analysis of the evidence leaves the Employee without any viable explanation for the fuel which he loaded into his car. This, alone, is significant indication of his guilt. But in addition, as explained below, in large measure the Employee's words and deeds were those of a guilty individual.

The Employee and fellow workers went to lunch in the Employee's car sometime after 10:30 and returned about noon. On both direct and cross examination, the Employee testified that during

this break he put gas in the car. If somebody were going to check the oil level, it would be reasonable to do so while gas was being put in the vehicle. There is no evidence that the Employee checked the oil during the trip to Restaurant 1, but at roughly 1:15 p.m. he told Person 4 that he had come to the employee parking lot to check the oil. It makes no sense for the Employee to have been at a filling station where it would have been convenient to check the oil and not do so, but to leave his work area within two hours to go to the parking lot and check the oil. Of course the evidence shows that he went to the parking lot to transfer the gas from the oil truck to his car. If the Employee had not been involved in wrongdoing, he would have had no need to tell Person 4 an obvious falsehood. The Employee did not raise the hood of his car to look at the air intake. Assuming it had come loose; the Employee would not have known that before raising the hood. And, since the video tape shows that he did not check the oil level, he did not go for that purpose. The only reasonable conclusion to be drawn is that the Employee opened the hood to disguise the real reason for coming to his car.

As noted above, the Employee invented the young, tall fueler. If the fuel transferred to his car had been legally obtained, he would not have had to invent a fictional character as the source. Later the Employee said that Person 2 had purchased the gas with the Employee's money. Yet, the evidence shows that this is not the case. And, while the Employee tried to provide a non-damaging interpretation of his remarks to Person 4, he has been unsuccessful in doing so.

Except for very small details, differences which might be expected given the passage of time between the incident and Person 4's testimony, Person 4's December 1996 notes are very consistent with his testimony. Consistency is one of the hallmarks of truthfulness. There has been no evidence, nor even unsupported argument, that Person 4 had any reason to distort his notes and his testimony to engineer the Employee's removal. The record contains no hint of prior

animosity between the two. Thus Person 4's notes and his testimony are deemed fully credible. A careful review of the relevant evidence shows that in the course of his brief emotionality the Employee, in so many words, admitted that he had been caught in wrongdoing.

The conclusion that the Employee stole fuel belonging to the Employer is the only reasonable and supportable conclusion which emerges from the evidence. The fuel was intended for the Employee's personal use. His attempts to show that it was obtained legitimately have failed, and these attempts stand in stark contrast to his emotional words to Person 4 in the employee parking lot. In light of all of the misstatements the Employee has made, his uncorroborated testimony that he had the fuel in the oil truck before going to the hanger the morning of December 2 and the testimony that the tanks in the three trucks were full that afternoon does not change the outcome. The Employer has proven the allegation.

The decision to terminate the Employee has been weighed against his 19 ½ years and the absence of prior discipline from his record. However, the Employer has a very specific posted rule against stealing and clear notice as to the likely consequences. For the Employee, the sad truth is that even without a specific rule, proven theft normally results in discharge. The size or value of the theft tends not to be relevant. What is relevant is that an employee who steals from his or her employer breaks the bonds of trust which are necessary for a productive employer/employee relationship. An apology and a heartfelt assertion that it will not happen again are not sufficient to rebuild shattered confidence in the employee. This may be particularly true in an industry in which the public's safety and lives depends on the integrity of the work force.

It is tragic that Employee has traded away an excellent job and a career for $l0-$15 worth of gas. It was a monumentally bad trade. But that does not diminish the justification for the Employer's action.

AWARD

The termination of Employee was for just cause. The grievance is denied.