

Kanner #1

IN THE MATTER OF ARBITRATION BETWEEN

EMPLOYEE

-and

EMPLOYER,

ISSUES

- I. Did the Employer have just cause to terminate Mr. Employee's employment based on intentional theft?
- II. Did Mr. Employee have notice of the Employer policy against theft and unauthorized possession of Employer property?
- III. Did the Employer give Mr. Employee adequate notice of the charge of unauthorized possession of Employer property?
- IV. Did the Employer discriminate against Mr. Employee?
- V. Did the Employer retaliate against Mr. Employee?

AWARD

Claimant, Employee, Jr., shall be reinstated to a position comparable to the one previously held by him.

Claimant shall not be awarded any back pay.

Claimant's discharge shall be expunged from Employer records.

July 2, 1990

Richard L. Kanner, Arbitrator

Hearing on the captioned matter was held on February 7, 1990. Briefs were submitted on or about May 24, 1990, and the hearing declared closed.

STATEMENT OF THE CASE

The claimant, Employee, was a co-manager of the gas station at the Employer store on Road A in City A, Michigan. The Employer discharged Mr. Employee for violation of its policy against theft and unauthorized possession of Employer property. Mr. Employee filed a timely grievance contesting his discharge under Employer's Termination Appeal Procedure. (Joint 1) As required by the appeal procedure, the Employer's Associate Services Manager conducted an independent review of the Employer's decision to discharge. He denied the grievance after that review. Mr. Employee then elected to arbitrate his case, which was arbitrated in City A, Michigan on February 7, 1990.

TESTIMONIAL BACKGROUND

The gas station in which grievant worked contains two booths, one of which contains a cash register and merchandise. The other booth contains oil products and other merchandise. Separate from these booths is another small building containing inventory and a telephone (hereinafter referred to as Inventory Building). Claimant uses the Inventory Building to reconcile cash receipts.

Person 1, Loss Prevention Manager, testified that, because of cash shortages occurring in the gas station, she had a TV camera installed in the Inventory Building. The TV camera was installed in a smoke detector device in the ceiling immediately over the table at which claimant and the other gas associates reconciled cash. (T 24, 26) The camera was concealed from view. Only the store director and store detectives knew about the installation. (T 25, 60)

On March 17, 1989 while watching the TV monitor in her office, she observed claimant talking on the telephone. While cradling the phone on his shoulder, he pulled out a cigarette from a package in his shirt pocket. He then patted his shirt pocket and then reached for a box on the shelf near and above the table. He retrieved three packages contained Bic lighters from the box. (T 27) He opened one package and lit his cigarette with the lighter. He then put the other two lighters back in the box and replaced the box on the shelf. (T 27) He put the other lighter in his shirt pocket, and threw the package container in the trash while continuing to talk on the phone. (T 27) When the conversation ended, claimant left the Inventory Building.

Person 1 had store detective Person 2 follow grievant. Person 2 reported to her by walkie-talkie that claimant went into the main store building. Person 1 then contacted store detective Person 3 and asked him to observe claimant in the store. Person 3 reported that claimant picked up some mail in the rear of the store, and returned to one of the gas booths. (T 28, 32) Person 1 told Person 2 to obtain the empty package and cash register journals from the inventory building and gas station booths. (T 28) Person 1 called gas station attendant Person 4, and was told that he had not sold any lighters that day. (T 39) Person 1 then had Person 3 and Person 2 bring claimant back to her office from the gas booth. (T 40)

At her office she asked claimant if he had a cigarette lighter to which he replied: "yes I do." (T 40) After claimant handed her a lavender Bic lighter, pursuant to her request as to whether he had a lighter, she asked him if he had paid for it to which he replied: "yes it is". I paid for it this morning with some cigarettes." Claimant then produced a sales slip which only denoted purchase of two packs of cigarettes - not the lighter. (T 41) When Person 1 pointed this out to him, he replied that the lighter was purchased from Person 4. Person 1 then called Person 4 and verified that he had not sold a lighter to claimant. Whereupon claimant asked: "what would

happen to him if he told me that the cigarette lighter wasn't paid for?" (T 42) When Person 1 responded that he should tell the truth, claimant admitted that the lighter had not been paid for. He told her that: "he had left his lighter on the cash register in the booth and that he had intended to pay for the one that was in his pocket." (T 91) Claimant told Person 1 that he had lied out of fear that he would be accused of theft in connection with the money shortages. (T 42)

Claimant then wrote a statement covering the incident as follows:

"On 3-17-89 at about 10:30 a.m. I, Employee, went to the back room to take a phone call. I forgot my lighter out in the pay booth. I took a lighter out of a box in the back and used it and put it in my pocket. I then finished my phone call, and went out to the booth to get some papers I had to get copied and went to the store. After I got back I went straight to the booth. Person 5 was in the booth and on the phone, and Person 4 was busy with some customers. I was waiting for Person 5 to get off the phone so I could see what he needed. Dept/A came thru the door and told me I was wanted at the store, and gave me a ride up there. At that point the lighter was not paid for.

I wrote voluntarily with no threats or promises. I fully intended on paying for the lighter. This statement is true and can be used (at) public or private hearing." (Employer 2)

Person 1 further testified that, per Employer policy, an associate cannot ring up a personal purchase.¹ She added that approximately three minutes elapsed from the time claimant left the Inventory Building until he reached the main store. (T 45, 51) It was five to seven minutes after claimant had returned to the gas station booth that the two store detectives confronted him and brought him back to her office. (T 97)

Claimant testified that he has been employed by the Employer since August 4, 1984. On March 17, 1989 he was working on his reports in the gas station booth and smoked a cigarette. (T 19)

NOTICE - REGARDING: IN-STORE FOOD CONSUMPTION/PERSONAL PURCHASES

¹ " 3. Payment for merchandise or products by an associate must be made from the customer side of the counter and must be made to an on-duty associate. Associates cannot ring up merchandise or products that they are purchasing." (Employer 8)

Co-manager Person 6 called him and asked him to go to the Inventory Building to use the phone there as he had something personal to discuss. (T 220) Claimant inadvertently left his Bic lighter (lavender in color) on the top of the register, and left to take Person 6's call in the Inventory Building. While on the phone he took a cigarette from a package in his shirt pocket, but found his lighter was not there. (T 224) He then took a box of Bic lighters from the shelf above him and took two pink ones out but replaced them. He then took out a purple one and retrieved it from its package and lit his cigarette. (T 228) Claimant stated that he intended to pay for it when he got back to the booth. (T 225, 238)

Claimant further testified that he was aware of the TV camera as he was there when it was installed. He helped the installer with the installation "by moving stuff out of the way so they could run line." (T 270) Also the camera hangs four inches down from the ceiling. He described it as five inches across and the lens about two inches in diameter. It was not hidden in a smoke detector. (T 269) Most of the associates knew it was there. In fact he has waived at it and put his eye close to it in jest. (T 226, 227) While on the phone and sitting by the table, he was in full view of the camera, and also knew he was being monitored by security. (T 228)

Person 6 requested that claimant lend him \$300.00 as he was going to lose his house. Claimant refused the loan. (T 231) The conversation ended on a "bad note".

Claimant then walked back to the booth, reached in through the doorway, and picked up some reports which were right by the door, to take to the main store. Person 4 was in the booth waiting on customers. (T 232, 234) At that point claimant testified that he had forgotten that he had obtained a Bic lighter in the Inventory Building. (T 234, 235) He was, however, aware that he had a lighter in his shirt pocket, but only because the cigarettes were in his shirt pocket and he

always carries his lighter in the same pocket. (T 238, 240, 241) But he was unaware that it was not his original lighter. (T 236, 237)

While at the main store, he could not pay for gas station merchandise as such items were keyed only on the gas station register for inventory purposes through the Employer computer. (T 238) However, in any event, while in the main store, he was still unaware that he had a new lighter in his pocket. (T 239) He walked to the back of the store, picked up mail and delivered his reports. It then took three to five minutes to walk back to the gas booth.² During the walk back to the booth, he lit a cigarette with the new lighter. (T 280)

At the booth, Person 5, Maintenance Man, was on the phone as there was trouble with the gas monitor. Person 4 was busy at the cash register and with customers. Claimant waited to inquire of Person 5 as to the gas monitor trouble which had occurred in the past. (T 246, 247) However, before Person 5 finished his conversation, the two store detectives asked claimant to go to Person 1's office. He still was not aware that he had the new lighter in his pocket. (T 249) Less than three minutes had elapsed since he had returned to the booth. (T 250) Claimant testified that the first time he became aware that the new lighter was in his pocket is when Person 1 asked him if he had paid for the lighter. (T 251) He then felt he had "done something wrong." (T 251) "That I hadn't paid for the lighter; that I forgot to pay for the lighter and I knew in her eyes it was going to look like I stole it." (T 251)

Claimant admitted that he knew the Employer had a policy against theft, but never received the policy handbook. However, it was in the gasoline booth. (T 257)

² There is no testimony by either claimant or the Employer as to how long he was in the main store.

He also attended a meeting where the policy handbook was distributed. (T 265, 266)

There is also a Notices Notebook in which the following appears:

"5. Associates making purchases must pay for the merchandise or products in total at the time they receive the merchandise or products. Associates may not extend credit to anyone without prior management approval.

We hope this review of your responsibility in this area will prevent any misunderstandings in the future which will result in immediate suspension and subsequent termination." (Employer 8)

But, he never read the notices or the handbook. However, he admitted that it was his duty as an associate and particularly as a co-manager to read it. (T 256, 257) Also, in one instance claimant aided in enforcing the theft policy against another associate. (T 258)

Person 7, Personnel Resource Manager, testified the Employer's policy handbook (Employer 3) was distributed to employees in November, 1986. (Employer 3, T 109) The following notice was posted near the time clocks.

"NOTICE - REGARDING HONESTY

..Based on this, we require you to be totally honest with customers, the Employer, fellow associates, vendors, suppliers, etc. Associates involved in theft or unauthorized possession of property from any of these sources will be terminated.

Dishonest associates hurt everyone. They can jeopardize everyone's job security through their actions. If you should become aware of anyone who is dishonest, it is your responsibility to notify a first assistant or loss prevention. Failure to do this will result in your discharge from the Employer." (E 4)

Further, said notice was inserted in the Notices Handbook. Managers were asked to review all notices with newly hired associates. (T 110)

Person 7 explained that claimant was discharged under the following theft policy in the policy handbook as follows:

Theft

Associates involved in or having knowledge of a theft or unauthorized possession of property from the Employer, fellow associates, vendors, or suppliers will be terminated, regardless of the amount of value of the merchandise. (E 3)

He stated that both items under the theft policy, i.e., intentional theft and unauthorized possession are strictly enforced because:

"We're a retailer. Our profit margins in our business are not big; they're thin. Stock loss through customer theft or employee theft can significantly cut into our bottom line. Any retailer in the country has that problem. It's a major problem.

We think that having such a strong policy, and strictly enforced, not only helps us make sure people understand the consequences, but may help to prevent someone from making that kind of a decision. And it's really there to protect a lot of good people.

Because if we just allowed people to not be terminated for theft, with explanations of, 'Well, geez, I forgot,' or, 'I meant to pay for it later, it would be an open invitation to theft. We couldn't control it. You couldn't react to it.

That could severely affect the Employer's ability to be profitable, and to have secure jobs." (T 127)

The strict enforcement of the theft policy by termination is "without exception, i.e., "regardless to the value of the product, regardless to length of service, regardless to work record.

That's what I mean 'without exception. "'(T 128) (Employer 6, 7)

Person 7 stated that the basis for grievant's discharge was "violation of our theft policy, and dishonesty". (T 146, 149) The charges included, according to Person 7, unauthorized possession as well as intentional theft. (T 159)

An Employer computer print-out denotes "Reason for Termination - theft/lighter .99 Dishonesty" as the reason for the termination of claimant. (Employer 6)

The term "dishonesty" referred to claimant's original position that he had paid for the lighter, and his immediate retraction statement to Person 1 when he failed to produce a sales slip. (T 150) Person 7 further testified that the phrase "unauthorized possession" was never explained to claimant or other associates. (T 182) He stated that the amount of time the merchandise was in the associate's possession, and the opportunity to pay are factors which he considers in respect to the charge of unauthorized possession. (T 182, 183) He examines "all the circumstances in the case" before deciding on discharge. (T 187, 190)

**I. DID THE EMPLOYER HAVE JUST CAUSE TO TERMINATE MR.
EMPLOYEE'S EMPLOYMENT BASED ON INTENTIONAL THEFT?**

THE THEFT CHARGE³

As argued by claimant, intent is a necessary element underlying the charge of theft. That is to say that, in sustaining its burden of proving theft, the Employer must show by objective evidence that claimant purposefully intended to steal the lighter.

In my view the salient and controlling point bearing upon such intent is claimant's knowledge of the placement of the TV camera. I am persuaded that he had such knowledge. His testimony has the ring of truth when detailing that he was present when it was installed, helped move furniture to enable the installer to place cables, waived at it in jest on occasion and finally that it was not concealed in a smoke detector but protruded from the ceiling.

³ The above five issues have to be addressed by virtue of the following provision in the Termination Appeal Procedure:

D. Standards to be applied by the Arbitrator

The jurisdiction of the arbitrator shall be limited to complaints protesting termination from employment. The arbitrator shall determine whether the termination was lawful under applicable federal, state and local statutory and common law and shall determine whether the Employer had just cause for termination. The arbitrator must consider and rule on every issue which was specified on the Termination Appeal Form or which was presented at the arbitration hearing and which was not resolved prior to arbitration.

The Employer asserts that such testimony is impeached by the fact that the Employer obviously would try to conceal the camera in view of its suspicion that one or more of its gas station associates were stealing funds. However, such conclusion does not, in my view, absolutely follow. Of times cameras are placed to forestall theft by putting employees on notice that they are being watched.

Further, Person 1 testified that she ordered the camera concealed in a smoke detector. However, she did not follow up to ascertain whether the maintenance personnel actually made such an installation.

Underlying my above conclusion is that in a discharge case the Employer must bear the burden of proof on each and every substantive issue. Where Person 1's testimony, relative to placement of a camera, was rebutted by the claimant the Employer had the burden of submitting rebuttal testimony, either by picture of the TV installation or testimony of the installers.

The probabilities inherent in the Employer's theory in the case controls as to whether it has sustained its burden of proof. As stated in Kaiser Steel Stamp Products, 72 LA 775, (April 16, 1979) quoting Edgar Jones (Volume 31 Proceedings NAA, Page 128):

"An experienced trier of fact is less apt to be misled by the invocation of the phrase 'the search for truth,' knowing that the task at hand instead is the more modest one of making 'findings of fact,' which is to say, statements of what the arbitrator concludes to have probably been the actual circumstances. An arbitrator or judge who 'finds the facts' does not certify that the facts as found are 'the truth'. 'Facts' must and will be 'found' - that is, determined - even if God from on high would think the trier's view of them to be remarkably inaccurate compared to what only God on high could possibly know to be the true account. The trier of fact can only certify that he has honestly and, he hopes, intelligently said the 'yes' and the 'no' to the claimant after doing his best to balance the competing contentions about what has occurred, and the competing views of what should be done about it." (emphasis supplied)

It is by the arbitrator's interpretation of the evidence and his/her exercise of experience and common sense that the probabilities are weighed and judged.

In addition to knowledge of being surveiled by the TV camera, other factors also militate against the Employer's theory that grievant intended to steal the lighter. These factors, together with claimant's knowledge of the camera placement, bolster the claimant's defense that he simply forgot to pay for the lighter.

First, I find that claimant did leave his lighter on the cash register. Accordingly, since he desired to light up a cigarette while on the phone, there was an immediate necessity to obtain and use a new lighter. In the usual theft situation the article is taken to be used at a later time - not immediately on the Employer premises. Also, since claimant's lighter was in the gas booth, why steal a second lighter.

Second, claimant was on the phone engaged in a personal conversation with Person 6 which had emotional overtones since he refused his request for a loan and the conversation ended on a bad note. Such a conversation could reasonably cause claimant to forget to pay for the lighter.

Third, while placement of an article in an employee's pocket is an indication of intent to steal, here I do not reach such conclusion. Claimant is a heavy smoker (one and one-half packs a day) and usually carries his lighter and cigarettes in his shirt pocket. Hence, it was natural for him to place the lighter in the same pocket.

Fourth, the item taken costs only 99¢. While employees do take such small items, it is rare, per the Employer's considerable number of theft cases reflected on its computer printout sheets. (Employer 6, 7) The fact of such a small amount, when taken together with all of the other above recited factors, denotes lack of criminal intent by claimant. Accordingly, I am of the view that claimant's actions in the Inventory Building are consistent with his theory that he intended to pay for the lighter, but simply forgot to.

The Employer further asserts, however, that the fact that the claimant lied to Person 1 is ample proof of his intentional theft.

It is clear that claimant lied to Person 1 falsely telling her that he had paid for the lighter when he purchased cigarettes, and then telling her that he had paid Person 4.

Claimant's statement in his Termination Appeal recites:

"I was accused of stealing a lighter. I wasn't going to steal it, I however admit that I didn't follow proper purchasing procedure After being accused of stealing the lighter I denied that it wasn't paid for at first. Then admitted that I hadn't paid for the lighter yet once I realized what had in fact occurred." (Joint 1)

The intent thereof is to convey the impression that he initially thought the lighter in his pocket was his old one, and only after being accused of stealing it did he first realize that he had the new lighter and had forgotten to pay for it. However, as pointed out by the Employer, grievant's testimony reflects that he only told Person 1 the truth after she caught him lying about paying for the lighter.

While, as hereinafter set forth under the remedy section of this opinion, I decry claimant's lying to Person 1, I am not persuaded that such action denotes that he intentionally sought to steal the lighter. Claimant was naturally in a state of panic when he first realized that he had forgotten to pay for the lighter when Person 1 asked him if it was paid for. Not only was his integrity at stake in reference to the lighter, but, as he testified, he also felt that he would then be a suspect relative to cash shortages which had occurred. His panic was evidenced by his lame attempt to persuade Person 1 that he had receipts which obviously he did not have, and that he had paid Person 4 which obviously Person 1 could and did immediately check.

Accordingly, I conclude that grievant's lying and even his mischaracterization on the Termination Appeal of when he had admitted not paying for the lighter is not sufficiently

persuasive evidence of his criminal intent. This particularly so in view of the above discussed evidence that claimant was only guilty of forgetfulness.

I. DID MR. EMPLOYEE HAVE NOTICE OF THE EMPLOYER POLICY AGAINST THEFT AND UNAUTHORIZED POSSESSION OF EMPLOYER PROPERTY?

II. DID THE EMPLOYER GIVE MR. EMPLOYEE ADEQUATE NOTICE OF THE CHARGE OF UNAUTHORIZED POSSESSION OF EMPLOYER PROPERTY?

It is at the point that claimant left the Inventory Building and picked up some papers at the booth that the Employer's theory, based upon unauthorized possession, begins as this was his first opportunity to pay for it. But before addressing all of the factors and arguments bearing upon such charge, it is necessary to address claimant's contention that he was not given notice that his discharge was based on such charge. Claimant contends that the sole basis for his discharge was an intentional theft.

It is eminently clear that the theft policy is bifurcated into two elements: (a) intentional theft, and, (b) unauthorized possession of Employer property. It is also equally clear that claimant knew or should have known that such was the Employer policy. However, he neglected to read both the Employer policy handbook and the notices book in which these policies and notices are contained. It was, however, his duty, both as an associate and particularly as a co-manager to familiarize himself with all Employer policies and notices. Where these documents are readily available and are posted and distributed, lack of notice thereof cannot ever be an excuse else employees could escape discipline or discharge by simply stating that they were unaware of the Employer policies.

But being aware of Employer policy is not the same thing as being clearly notified of which particular policy was violated when being disciplined or discharged. Every associate has the right to clear notice of the grounds of discharge. Such principle is founded upon due process by which such notice enables the associate to prepare defenses at subsequent Employer interviews and at arbitration. Additionally, such notice limits the Employer to the charge set forth so as to preclude it from embellishing the grounds for discharge by adding other grounds for the first time at arbitration. For example, an associate may not be discharged for insubordination and subsequently, at arbitral hearing, have other charges, such as absenteeism, added.

In essence, as argued by the claimant at hearing, the Employer has to take a position as to what are the grounds upon which it contends it has just cause for discipline or discharge, and clearly notify the claimant of such position.

Such itemized grounds for discharge are usually reduced to writing in a termination letter. Here, there is no such letter so as to make it clear to claimant why he was discharged. Nor is there any evidence that claimant was specifically told that he was being discharged for unauthorized possession of Employer property as well as, in the alternative, intentional theft.

It was, however, the Employer's clear position at arbitral hearing, through opening statement and testimony, that claimant was discharged based on the entire theft policy which includes both of said charges.

But what is to be emphasized is that the claimant understood that he was being solely charged with the intentional theft. In fact his Termination Appeal recites: "I was accused of stealing a lighter." (Joint 1)

In the "results of review" section on the Termination Appeal form, the Employer simply responded: "you were terminated for just cause. I have further concluded that the Employer did

not discriminate or retaliate against you." (Joint 1) Given the claimant's above statement on the Termination Appeal form, the Employer's response inferentially agrees with his supposition that he was discharged for "stealing a lighter". Nowhere thereon is there any indication that claimant also was charged, in the alternative, with unauthorized possession of Employer property.

The only other written document, setting forth the basis for the claimant's discharge, is the computer print-out reflecting his "reason for termination" which recites: "Theft/Lighter/.99 Dishonesty" (Employer 6) Again nothing is therein set forth about "unauthorized possession." The charge of "unauthorized possession", covers situations, as here, where the claimant alleges that he forgot to pay. An associate may be guilty of unauthorized possession, and not be guilty of intentional theft. Theft is based on intent and unauthorized possession is based on forgetfulness. Accordingly, absent any clear notice to claimant of a charge of unauthorized possession, the Employer may not add it at arbitral hearing notwithstanding that Person 7 may always have understood the charge against claimant to encompass both theft and unauthorized possession.

UNAUTHORIZED POSSESSION

Such conclusion that grievant's due process rights have been violated is dispositive of the charge of unauthorized possession leaving only the appropriate remedy to be addressed. However, notwithstanding, I deem it in the party's interest to address the merits of the unauthorized possession charge.

The unauthorized possession element of the Employer's theft policy is eminently reasonable in view of the thousands of items carried by the Employer; the numerous opportunities for theft by associates; and given the common excuse by associates that they intended to purchase the item, but simply forgot to do so. In any event, I have no authority to

"add to, detract from, change, amend, or modify any law, hand book, rule, policy or procedure in any respect." (Employer 1)

Further, I am of the opinion that such policy is clear as to its purpose and intent. In policy notices associates are importuned to "pay for the merchandise or products in total at the time they receive the merchandise or products." Therefore, failure to pay results in unauthorized possession of the item. (Employer 8) Both theft and unauthorized possession are set forth as dischargeable offenses in another notice. (E 4)

I do not agree with the claimant that either the handbook or these two notices have to add that the length of service or otherwise clean record will not militate in favor of an associate. The Employer has the right to adopt stringent work policies. As stated in Toussaint v Blue Cross and Blue Shield, 408 Mich 579, 623-624 (1980):

"[Employers who promise not to discharge except for cause] must be permitted to establish their own standards for job performance and to dismiss for non-adherence to those standards although another employer or the jury might have established lower standards.

An employer who agrees to discharge only for cause need not lower its standard of performance. It has promised employment only so long as the employee does the job required by the employment contract. The employer's standard of job performance can be made part of the contract. Breach of the employer's uniformly applied rules is a breach of the contract and cause for discharge. In such a case, the question for the jury is whether the employer actually had a rule or policy and whether the employee was discharged for violating it. (emphasis supplied)

Associates, when applying for employment, tacitly agree to abide by these policies.

But what constitutes unauthorized possession sufficient to warrant a discharge based on just cause depends upon the particular facts in each instance. (Employer 1) As testified to by Person 7, one who forgets to pay for an item can only be guilty of unauthorized possession after being given a reasonable opportunity to pay for it. Where such reasonable opportunity exists and

the associate does not pay for the item, the question then arises as to whether criminal intent to steal is involved. That is say that to the degree the associate has the opportunity to pay, his/her defense of forgetfulness is impeached.

It is specifically to obviate such questionable defenses of innocent mistake that the rule proscribing unauthorized possession was promulgated. Accordingly, where the associate's initial action in taking the items and the circumstances do not clearly point to an intent to steal, the Employer still may avail itself of the lesser charge of unauthorized possession where reasonable opportunity to pay ensues.

As applied to the instant case, the claimant spent a few minutes after his telephone conversation going to the booth and picking up papers to take to the main store. He claims complete forgetfulness of the fact that the new lighter was in his shirt pocket. I find as a fact that he had no real opportunity to pay for the lighter at that time. It is a fact that he reached in the booth, picked up the papers, and Person 4 was busy with customers at the time. According to the Employer policy, claimant could not have paid for the lighter by ringing up the sale himself. (Employer 8, No. 3) He then went to the main store where again he had no opportunity to pay as the registers there were not keyed to reflect the sale of a product sold from the gasoline station.

It is a fact that on his way back from the main store to the booth claimant lit another cigarette. But, contrary to the Employer's argument, this may or many not have jogged his attention sufficient to recall that he was using the new lighter. The new lighter was the same general shade (lavender/purple) as his old lighter. Hence, he could very well have regarded it as his old lighter. As noted, he testified that at that point he was still unaware that the lighter in his pocket was the new one. When he arrived back at the booth, Person 4 was still busy with customers and Person 5 was on the phone discussing a gas monitor problem which captured

claimant's attention as he had been concerned with this on-going problem. Again he had no opportunity to pay for the lighter. During the few minutes that claimant waited for Person 5 to hang up in order to talk to him, the store detectives arrives and escorted claimant to Person 1's office.

I am not persuaded that the Employer has, to this point, sustained its burden of proof that sufficient opportunity for payment had elapsed to warrant the conclusion that claimant was guilty of unauthorized possession of Employer property.

Where the Employer dictates that the associate may only have another associate ring-up a personal purchase, that other person must be free to do so. Here on both occasions when claimant was at the booth, Person 4 was busy and, hence, unable to ring up the sale. On the first occasion claimant could have remained in the booth until Person 4 was free to ring-up the sale of the lighter, but claimant's mind was focused on taking papers to the main store. On the second occasion at the booth, while three to five minutes had elapsed, Person 4 was continually busy, and again claimant's mind focused on Person 5's telephone communication relative to the gasoline monitor problem.

Again, as testified to by Person 7, a careful analysis of the nuances surrounding every fact must be made in a case based on unauthorized possession which involves a defense of forgetfulness.

It should also be added that, in my view, where an associate is found guilty by the Employer of unauthorized possession short of intentional theft, his/her final termination record should reflect same, and should not reflect theft.

IV. DID THE EMPLOYER DISCRIMINATE AGAINST MR. EMPLOYEE?

V. DID THE EMPLOYER RETALIATE AGAINST MR. EMPLOYEE?

It is noted that claimant's Termination Appeal also alleges facts denoting that he was discriminated and retaliated against. (Joint 1) I find no evidence to sustain either charge against the Employer.

REMEDY

I have concluded that claimant lied to Person 1 due to his panic at having forgotten to pay for the lighter. However, notwithstanding his emotional reaction to Person 1's inquiry, the fact remains that he lied instead of readily admitting that he had simply forgotten to pay. Such egregious conduct and reaction to the situation by claimant led the Employer to believe that, in fact, claimant had intentionally stolen the lighter. Such lying by claimant misled the Employer and caused it to be somewhat less than careful in its analysis of the facts and circumstances surrounding the claimant's initial taking of the lighter and subsequent opportunities to pay for it. Accordingly, claimant's own statements during the interview with Person 1 in large part caused the Employer to discharge him for theft.

The termination appeal procedure which governs my authority in this case provides are follows:

F. Relief

If the arbitrator finds that the associate violated any lawful Employer rule, policy or procedure established by the Employer as just cause for termination, and finds that the associate was terminated for that violation, the associate's termination must be upheld and the arbitrator shall have no power to reduce the termination to some lesser disciplinary action.

If the arbitrator finds that the associate was unlawfully or unjustly terminated, the arbitrator may grant any remedy or relief that a court of competent jurisdiction could grant. However, in no event shall the arbitrator award relief greater than that sought by the associate.

If the arbitrator finds that the associate was unlawfully or unjustly terminated and finds that reinstatement would be appropriate under the circumstances, the arbitrator shall order the Employer to either offer the associate reinstatement to a position comparable to the one previously held by the associate or, in lieu of reinstatement, to pay the associate a monetary award equal to the present value of the associate's future wage loss provable with reasonable certainty.

In any award of back pay, the arbitrator shall deduct any lawful setoffs for the associate's interim earnings, for any other sums paid in lieu of employment during the period after discharge, and for any amount attributable to a proven failure by the associate to mitigate the damages. (E 1)

Accordingly, since I have found that claimant's discharge was not based upon just cause, I have the authority to reinstate him and award back pay. I decline to do so for the above stated reasons.

AWARD

Claimant, Employee, shall be reinstated to a position comparable to the one previously held by him.

Claimant shall not be awarded any back pay.

Claimant's discharge shall be expunged from Employer records.

Richard L. Kanner,

Arbitrator

July 2, 1990