Kanner #2

IN THE MATTER OF ARBITRATION

Between:

EMPLOYER,

and

EMPLOYEE,

OPINION AND AWARD

June 28, 1996

Richard L. Kanner, Arbitrator

ISSUE

IS THE DISCHARGE OF EMPLOYEE BASED UPON JUST CAUSE?

IF NOT, WHAT IS THE PROPER REMEDY?

INTRODUCTION

This is a discharge case under Employer's Termination Appeal Procedure.[1] The claimant, Employee, was a store detective in the Employer's loss prevention department at Store #41 in City A, Michigan. Employee was terminated on May 2, 1995, after an incident with a customer which allegedly involved several violations of the Employer's rules, and also was based upon Employee's past discipline record. After his termination, Employee filed a timely appeal under the Employer's Termination Appeal Procedure. (Joint Exhibit 2) The Employer denied his appeal at Step 1 and he elected arbitration.

[1]This being a non-union case, the parties stipulated that under the Employer Termination Appeal Procedure the above stated issue is appropriate. (Tr. I, 19, 20, 29)

Employee was hired on March 1, 1991 as a store detective intern in the loss prevention department at Store #41 in City A, Michigan. (Exhibit J2). The loss prevention department at the store consists of a loss prevention manager, certified store detectives, store detective interns, and greeters. Certified store detectives are detectives who have completed on-the-job training and a 120-hour basic training program. They have the power to make apprehensions.

Store detectives receive extensive training. As interns, they receive on-the-job training which consists of a lengthy list of tasks the store detective intern must complete successfully before becoming certified. (Person 1 Vol III, 398) Store detective interns also attend a 120-hour basic store detective training class. The class is taught over a period of fifteen days. A number of topics are covered including, criminal law, civil law, constitutional law, specific crimes, liabilities to the Employer related to loss preventions, safety training, and negotiations training. Store detectives also attend yearly recertification training, as well as monthly department meetings at the store. (Person 1 Tr. III, 398-99)

The theme of the training is that store detectives have three main responsibilities which are prioritized in the following order. First, store detectives are responsible for life and safety issues, including the safety of the store detective himself. Second, store detectives are responsible for minimizing potential civil liability to the Employer such as liability for negligence, false arrest, false imprisonment and defamation as a result of their actions. Third, store detectives are to protect Employer assets, for example, by apprehending shoplifters. Store detectives are taught to use these guiding principles in everything they do. (Person 1 Tr. III, 399)

Employee attended and completed the 120-hour basic training course in 1991. Person 1, now a corporate investigator/trainer at Employer, was a corporate trainer in 1991 and he taught

Employee's basic training course. Mr. Person 1 also taught Mr. Employee's recertification training in 1992 and 1993. (Person 1 Tr. III, 399)

On March 28, 1995 a customer was seen on surveillance camera to have concealed some merchandise. The customer was followed on camera, but this surveillance was broken on two occasions. It is alleged that Grievant approached the customer and violated the following rules and guidelines:

1. Employee approached a customer when he had not identified the merchandise concealed as Employer merchandise. (Person 2, Tr. II, 250)

2. Employee approached the customer after several breaks in surveillance. (Person 2, Tr. II, 249)

3. Employee approached the customer before the customer passed the last point of sale. (Person 2, Tr. II, 249)

4. Employee failed to disengage from confrontation with the customer and continued to detain the customer. He also made accusatory remarks notwithstanding that this was not an arrestable retail fraud case because of the break in surveillance.

5. Employee invoked a trespass in a situation which did not call for such extreme measures. (Person 2, Tr. II, 243-44)[2]

6. Employee shared information with the police about a retail fraud when the case was not prosecutable according to Employer's standards.

7. Employee did not write a report following the incident. (Person 2, Tr. II, 245-250)

Employee denies all the charges. He requests that the discharge be expunged from his record and that he be reinstated with full back pay.

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[2]A trespass occurs when a customer is asked to leave the store and refuses to do so.

THE MARCH 28, 1995 INCIDENT

Person 3, a detective intern who had three weeks of training, testified that on March 28, 1995 he monitored the surveillance camera. Employee was also present. (Employer Exhibit 30) He noted that in the shoe department a customer concealed some small boxes down the back of and in the front of his shirt. (Employer Exhibit 39, Tr. II, 323) The customer proceeded through the grocery and home fashion sections which resulted in losing him on the monitor. (Employer Exhibit 22, Tr. III, 324) Employee had already left the monitor office and had proceeded to the main store area. Person 3 radioed Employee but made no contact. (Tr. II, 325) He then went to the grocery area and observed Employee and store manager Person 4 walking up to the customer. (Tr. II, 326) Person 3 testified he observed the customer:

> "shaking his clothing like he did not have anything. I heard Person 4 ask the subject to leave the store. Subject said no. Person 4 then asked the subject again to leave the store, and he said, Not until I buy something, and then Employee told me to (call) Benton Township." Person 3 called the police and told the dispatcher, "that we had a guy that had concealed items and that he was asked to leave the store and he would not leave."

Person 3 stated that Employee did not attempt to block the customer in any way. The customer left the store when Employee asked Person 3 to call the police. (Tr. II, 328) Person 3 was in the office with Employee watching a replay of the surveillance tape when Officer Person 6 arrived. Person 6 asked, "What happened." (Tr. II, 340) Person 3 rewound the tape and played it for Person 6. (Tr. II, 329) Person 6 called another officer who stopped the customer at his home.[3]

Employee testified that, when in the monitor room, Person 3 advised that a customer was concealing some merchandise. He then observed the customer on the monitor doing so in the

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[3]Employee had the parking attendant note the customer's license plate number.

shoe department. (Tr. III, 440) He could not identify the nature of the merchandise. (Tr. III, 446) He continued to observe the customer on the monitor. Employee then left for the main concourse aisle in front of the registers. He spotted the customer who "looked back at me." (Tr. III, 442) As he continued to walk toward the customer, the customer again looked at him. Employee then walked outside the store:

> to wait for the subject coming through so I can be outside the building. As I walked that way I saw Person 4 standing approximately here by the entryway in an area we call the in-store bakery. I waved for Person 4 to follow me. We went out both sets of doors. I told him that we had a subject concealing some merchandise and we were going to stop him.

Grievant further testified:

(By Mr. Person 5): Why did you go outside?

A: So I would be out of the subject's view so he wouldn't be looking at me again. Person 3 had the subject still on video surveillance and my intentions would be -- I would have called Person 3 when I had seen the subject coming and I asked him if he lost surveillance but we never got that far. As we stood out there the subject came across the back of the lanes and approached the greeter stand car area.[4]

At that point I lost surveillance of him. I called Person 3 on the radio and I asked him if he had him on video surveillance anymore and Person 3 responded no. At that point I told Person 4 that we were going to go in and throw him out, have the customer leave, and Person 4 said okay. We re-entered the building. Person 4 and I walked down the grocery center aisle.

because the crime hadn't been completed. He didn't pass the last point of payment yet. We couldn't go into the store and stop him. That is why he had waited outside the store as we are allowed to stop after they pass the last point of payment yet.(Tr. III, 443,)

The customer again looked at Employee who was standing outside the entrance door. The customer then turned back down the center grocery aisle and "cut down one of the first two or three grocery aisles." At this point Employee lost surveillance of the customer. He radioed

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[4]The greeter stand is just inside the entrance door to the store at #275 phone location on the map of the store. (Employer Exhibit 28)

Person 3 and was told that Person 3 also had lost surveillance on a couple of occasions. (Tr. III, 444) He told Person 3 that he and Person 4 were going to ask the customer to leave and he asked Person 3 to join them. Employee added that he did not stop the customer at the greeter stand area because the crime hadn't been completed. He didn't pass the last point of payment yet. We couldn't go into the store and stop him. That is why he had waited outside the store as we are allowed to stop after they pass the last point of payment." (111,444)

Employee and Person 4 re-entered the store walking down the center aisle of the grocery department looking for the customer and found him by grocery aisle 4 or 5. (Tr. III, 445) Employee had his walkie-talkie in hand. Person 4 was wearing a jacket with the Employer name on the front. The customer then "shook out his shirt and said that he didn't have anything." (Tr. III, 446) As they got closer to the customer, the customer again shook his jacket and shirt and stated that he didn't have anything.

Since Employee and Person 3 had previously lost surveillance of the customer, Employee stated that the situation had then changed from a retail fraud (theft) to a trespass situation. The trespass rule is that only the manager can ask the customer to leave the store under certain circumstances as hereinafter discussed. (Tr. III, 447) Employee told the customer "all I want is the merchandise back." Grievant testified:

> "and he said, I don't know what you're talking about. I then motioned for Person 4 to ask the subject to leave and Person 4 did. He asked the guy to leave the store and the subject refused. He said he wanted to purchase something. He said that he would leave when he was done shopping. I motioned for Person 4 to again ask the guy to leave." (Tr. III, 448, 449) Person 4 then again asked the customer to leave. Employee added: "I don't recall saying anything to him (Person 4). I might have pointed that this guy's got to go, like. I didn't say anything but I might have pointed to the subject and pointed to the door." (Tr. III, 449)

Employee then asked Person 3 to call the CITY A (police). All during this time the customer was in the aisle in front of Employee and Person 4 who were standing side by side. (Tr. III, 451) Employee denies ever attempting to block the customer from proceeding forward toward the exit. The customer never tried to walk past him and Person 4. (Tr. III, 453) The customer left the store and Employee and Person 4 followed him. Employee radioed to the parking attendant in the parking lot to obtain the customer's license number. After quickly checking some areas to find the merchandise, Employee called the police dispatcher and asked them to "run the license plate." (Tr. III, 453) He told the dispatcher that the customer had left the store. The dispatcher advised him that Officer Person 6 was on his way to the store to handle the situation.

Employee and Person 3 were reviewing the video tape when Person 6 arrived.[5] Person 6 asked "What is going on?" Employee asked Person 6 to "run" the plate number and told him what had happened:

> "we had a guy in here concealing a lot of merchandise and that we wanted -- we lost surveillance of him and didn't make our stop. He left and we wanted a license plate so hopefully we could get a name so we could document the incident with the car license plate number, who it came back to. It helps in our documentation in case there was a further or another incident of that type." (Tr. III, 455)

Person 6 called dispatch with the license number and received back the customer's name and address which Employee copied. Employee also told Person 6:

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[5]It appears that all three then ascertained that the merchandise was packages of Polaroid 600 film. (Employer Exhibit 24)

> that I told him that when we approached the subject that he shook out his jacket and we didn't believe that he had any merchandise on him anymore at the time he shook his jacket out, and as we were doing this another officer, Officer Person 7 (phonetic), came over the radio and said that he was in the area of the subject so -- he was in the subject's neighborhood and asked if he should stop the vehicle or if we needed the vehicle stopped or if he should watch. At that time Sergeant Person 6 said -- gave him permission or said, Okay, see what you see. (Tr. III, 456)

Admittedly, Employee did not prepare a report of the incident. He testified:

> "It wasn't my case to begin with. It was Person 3's case. He initially saw the concealment. He had done the work, finding this person, so it was Person 3's case. He gets credit for it so Person 3 wrote the report for this incident that happened. Person 3 wrote his report, I reviewed it, I told him that he needed to add some things in there. He rewrote his report, gave it to me again. I looked at it and I said that looks good and he turned his report in that night." (Tr. III, 458)

Employee admitted to knowledge of the following rule:

> Store Detectives: A) All people involved in incident or apprehension must write a report, B) If reports are not complete, they will be returned. . . (Tr. III, 474)

Employee admitted that it was the practice to submit a report of all incidents. (Tr. III, 474, 475) Employee added, however, that subsequent to the submission of Person 3's report to Person 2 dated March 28, 1995 in which Employee was mentioned, Loss Prevention Manager Person 2 did not ask him to submit a report until April 15, 1995 when Person 4 asked her to review the procedure used in this incident.

As to the training that Employee received relative to a trespass situation, he stressed that only the store manager can request a customer to leave, and then only if there is sufficient reason. (Tr. III, 474)

Person 4, Store Manager, became Night Store Manager in November 1994. He testified that on or about April 15, 1995, after thinking about the March 28 incident and feeling that "there was something wrong there", i.e., (whether correct procedure had been followed) he approached

Person 2. (Tr. II, 296, 297) He submitted a report to her which he affirmed as to all details at arbitral hearing. In part his report recites as follows:

> I, Person 4, Night Store Manager at #41 City A, was in charge of the store on the above date. I was called to the greeter stand by the grocery department by store detective Employee. Employee said that there was a black guy down the center aisle of grocery wearing a hat, that this person he believed had concealed some merchandise. Employee did point out who this person was to me. We were watching him from outside of the front doors when we lost sight of him. Employee and I came into the store where we spotted him again. Employee and store detective intern Person 3 had been talking over the situation, Person 3 being in the monitor room, when Employee and I came back into the store and spotted the person, the person was starting to leave, or was actually headed towards the entranceway of the store. Employee then approached the man, who had not passed the check lanes by the "274" phone on the pole by the greeter stand. At this time Employee asked the man “where's the stuff?" The man at first did not say anything. Employee then said "Where did you put it?" The man said he didn't know what he was talking about. All this time Employee was standing in front of the man and when the man acted as if he was going to go around Employee, Employee moved over in front of whichever way he was going toward. The man then headed back towards the grocery department. When we got back to the cracker display, which is where Employee and I had last seen him before loosing eye contact with him. Employee said "Did you dump the stuff here?" "Where did you dump it?" "We just want our merchandise back." The man said that he just wanted to buy some candy he had in his hand. At this point Employee asked me to ask the man to leave the store. The man said all I want to do is buy some candy. Employee then said to me "Call CITY A POLICE DEPARTMENT." The man after hearing him say this then left the store. Employee then went outside to get a license plate off the car this man was getting a ride in. Employee then went into the L.P. office. At this point, I'm not sure if he or Person 3 called CITY A POLICE DEPARTMENT or if they just stopped in the store, but shortly after this incident Delmar, a sergeant from CITY A POLICE DEPARTMENT was in the L.P. office. (Employer Exhibit 29)

Person 4 added that he did not see Person 3 at the scene of the incident. As the customer was leaving, he observed Person 3 at the service desk on the phone. (Tr. II, 299)

Person 4 testified that only the store manager can invoke a trespass, i.e., ask a customer to leave. He was "not sure" whether it was proper to ask a customer to leave in the subject situation, i.e., a clear observed theft on the monitor and then a loss of surveillance. (Tr. II, 302) He had never been confronted with a similar situation. On occasion he had asked customers to leave for

"disruptive behavior in the store." He stated he was "probably" incorrect in invoking a trespass in the subject situation. He did not, however, receive any discipline.

Person 4 stated that the first time he met with the Grievant was in the store in front of the door, and then walked with Employee outside the store. Employee radioed Person 3 who was in the monitor room. Person 3 told Employee that he had lost surveillance. Both he and Employee also lost sight of the customer as he walked back toward the grocery department.

Person 4 again saw the customer coming out of the grocery aisle walking toward the front of the store near the greeter desk and phone location 275. (Tr. II, 314, 318) They followed and Employee stepped in front of the customer and asked, "Where did you put the stuff." The customer had not said anything nor had he shaken his coat or shirt. Person 4 testified:

> Q. (By Ms. Person 8): Did the customer make any physical movement at that point?
>
> A. Yes, he did. He tried to walk around Employee.
>
> Q. And what did Employee do?
>
> A. Moved in front of him.(Tr. II, 317)
>
> A. He tried to walk around him one way, Employee stepped in front of him that way, and then he tried to walk around him another way and Employee stepped that way. (Tr. II, 320)

Person 4 further testified that, after the customer denied taking anything, he walked away and they both lost the customer for about 30 seconds. They then saw him picking up some candy. (Tr. II, 321) The customer then walked back towards the front of the store. Employee again approached him and stated, "All I want is our stuff back." The customer responded, "I just want to buy this candy, and that's when Employee asked me to ask him to leave." (Tr. II, 316)

BURDEN OF PROOF

The ensuing discussion of the disputed facts herein and the ultimate opinion and award has to be understood in connection with the nature of the burden of proof in this case. It is basic that the Employer bears the burden of proving just cause.

Such "burden" is real and of considerable consequence in placing upon the Arbitrator the duty to determine that the Employer has proved its case by a preponderance of the evidence. Such is the standard of proof uniformly applied in cases involving discharge. A preponderance of the evidence means that the evidentiary scales must tip in favor of the Employer. But such a general proposition requires further refinement. It is necessary to define the rationale or underlying basis involved in such a standard. The standard is met when the probabilities inherent in both its theory of the case and the evidence and testimony supporting same are stronger than the probabilities inherent in the Union's case. In determining the most probable facts the Arbitrator does not determine the truth in the abstract sense, but only determines whether the "finding of fact" is supported by the weight of the evidence as "probably" true. As stated by the arbitrator in Kaiser Steel Stamped Products quoting Edgar Jones, President of the National Academy of Arbitrators, 72 LA 774, 775 - 1979):

> 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)

Therefore the point to be emphasized is that the arbitrator's duty is not to find facts in the absolute sense. It is only that version of the facts which most "probably" occurred that is the test upon which the burden of proof rests.

THE CHARGES AGAINST EMPLOYEE

1. Employee approached a customer when he had not identified the merchandise concealed as Employer merchandise. (Person 2, Tr. II, 250)

3. Employee approached the customer before the customer passed the last point of sale. (Person 2, Tr. II, 249)

It is clear that both Person 3 and Employee did not know the nature of the items stolen by the customer until after the monitor tape was reviewed with Officer Person 6. However, I deem the above two charges as not pertinent because I find that Employee contacted the customer to effect a trespass -- not an apprehension for retail theft. It is obviously necessary that stolen merchandise be identified as belonging to the Employer before a customer is stopped for theft. (Tr. II, 249, 250) When Grievant left the monitor room he was unaware that Person 3 had lost surveillance. But when he and Person 4 were outside the store and intending to apprehend the customer for theft, he lost surveillance. He then radioed Person 3 and was advised that Person 3 had also lost surveillance. In such a case an apprehension is obviously proscribed as it is not known if the merchandise is still in the customer's possession and whether the merchandise does in fact belong to the Employer. Once apprised of the break in surveillance the only option left is to invoke trespass, if appropriate to do so. Therefore, the viability of the above two charges is only pertinent to a theft situation, not a trespass. The legitimacy of Employee's invocation of a trespass remains to be discussed.

THE TRESPASS

2. Employee approached the customer after several breaks in surveillance. (Person 2, Tr. II, 249)

4. Employee failed to disengage from confrontation with the customer and continued to detain the customer. He also made accusatory remarks notwithstanding that this was not an arrestable retail fraud case because of the break in surveillance.

5. Now Employee invoked a trespass in a situation which did not call for such extreme measures. (Person 2, Tr. II, 243¬44)

The prime question is whether Grievant violated any rules by invoking a trespass. Initially, the Employer asserts that Employee should not have approached and conversed with the customer in the first instance because surveillance had been broken. Therefore there was no proof that the customer still had the merchandise. Further, Employee should not have invoked trespass by directing Person 4 to ask the customer to leave.

Employee contends that the customer initiated the discussion and therefore he had a right to reply as above recited. Also under the circumstances of the initial theft, the customer had "disrupted" the store operations, per the rule hereinafter discussed. Therefore the manager, at Grievant's request, could ask him to leave.

Person 2 testified that training includes specific instruction relative to when to invoke a trespass. She stated:

> "Store detectives are not supposed to engage subjects they are watching in any type of conversation unless they are intending to stop them for theft." (Tr. II, 242) "Employee should not have asked him where the merchandise was because that's considered accusatory, and then he should not have asked him to leave because that's not the training guidelines to ask him to leave." He should have not engaged verbally at all with this person and just observed him." (Tr. II, 243,244)

Person 1, Corporate Investigator/Trainer, testified that Grievant and all detectives are trained as to when it is appropriate to speak to a customer. (Tr. III, 411) He stated, "We don't ask customers where the merchandise is unless we have all the elements of a crime and we have a legal right to approach them and arrest them. (Tr. III, 415) In a trespass situation it is the

manager who has the sole authority to speak to the customer. (Tr. III, 417) He pointed out that the particular training plan pertinent to a trespass recites as follows:

> X. Ban undesirable customers from Employer Property.
>
> A. Determine if the behavior of the customer is such that banning is justified.
> e.g. profanity
> recurrent thief
> obscene behavior
> malicious destruction of property
> disruption of unit operations, etc (emphasis supplied)
>
> B. Contact the Manager-in-Charge, describe the behavior of person and request that they be banned.
>
> C. Arrange for the Manager-in-Charge or their designate to be present to conduct the banning.
>
> D. Attempt to identify the subject.
>
> E. Have Manager-in-Charge request ID and ban the subject.
>
> F. Observe banned person to the outside door.
>
> G. Contact police if subject refuses to leave.
>
> H. Document the reasons for the banning and identification of the subject on the appropriate Loss Prevention form. (Employer Exhibit 36)

I am persuaded that here the customer knew that both Employee and Person 4 were employees of Employer's when he was first approached as he and Employee had previously "eye-balled" each other. Also Employee had a walkie-talkie in hand and Person 4 had an Employer's jacket on.

A further training plan recites:

> As it states in the Customer Contact Procedure and in LP training: no one is to be apprehended if there is a loss of surveillance. If you do this, you are inviting a customer contact. (Employer Exhibit 34)

Accordingly, even any "contact" with a customer is proscribed when surveillance is broken.

Preliminarily, Employee argues that the above rules were set forth in training plans and sessions. He was not aware of them as they were not codified in any publication given to store detectives. I am, however, persuaded that these rules were clearly articulated in numerous training sessions sufficient to put Employee on notice. Although desired, it is not required that an employer publish all rules in written form so long as the employee is made well aware of them.

Before discussing Employee's argument that past practice indicates that the above rules were not followed, it is necessary to apply the facts to the above rules. Initially, Employee argues that, since the customer initiated the discussion by denying that he had stolen any merchandise and by shaking his shirt to show that nothing was concealed therein, he had the right to respond to the customer. Such position by Employee is in conflict with Person 4's testimony and statement that Employee initiated the two contacts and the discussion with the customer by asking him at the first contact, "Where's the stuff?" and at the second contact approximately 30 seconds later after losing the customer in the grocery aisle, "Did you drop the stuff here?" (Person 4 Employer 29) Such conflict, as well as the conflict in testimony between Employee and Person 4 relative to Employee blocking the customer's attempt to walk toward the exit has to be resolved within the well accepted principle of arbitral jurisprudence that there is a presumption or probability in favor of the veracity of a supervisor. Such presumption flows from the fact that the Grievant, whose job is at stake, has much to lose, but the supervisor has nothing to gain by coloring his/her testimony.

Such presumption in favor of a supervisor is also founded on other practical considerations. In most instances of misconduct witnesses are not readily available. Hence the

Employer, who bears the burden of proof, must rely on the supervisor's word in a one on one situation between the supervisor and the employee. The practical reason for said principle is that the Employer's ability to manage the enterprise through the disciplining of employees for misconduct would be seriously impugned if, in a one on one situation, the Grievant's word prevailed over that of the supervisor. Since, as stated, the Employer has the burden of proof by a preponderance of the evidence, discipline could never be sustained in the face of contradictory and equally weighted testimony between an employee and a supervisor.. This follows because the weight of the evidence in favor of the Employer could never "preponderate" in its favor in such a "Mexican standoff" situation. Therefore unless there is testimony or evidence substantively tending to impeach the supervisor's veracity, such presumption must follow.

Accordingly, I conclude in favor of Person 4's veracity. Grievant initiated the contacts and articulated the said accusations to the customer. Such probable conclusion is made more viable within the purview of the above burden of proof discussion by the fact that, by Employee's own testimony, the customer had identified him and therefore knew he was a store detective. Therefore, it should have been apparent to Employee that, during the loss of surveillance, the customer would probably dump the merchandise. Hence, it was natural for Employee to have probably asked him where he dumped the merchandise since, by the customer's shaking his shirt out, it was apparent that the customer no longer had the merchandise.

Further, the probabilities inherent in the situation militate against Employee. In my view Employee was probably "pumped up" to the point of exasperation to find that the customer had gotten away with an attempted theft. Hence, he made the contacts and articulated the accusatory statements to the customer.

The above rules, clearly presented and emphasized in training, are particularly important because of our litigious society in which lawsuits for false arrest and accusation of theft are frequently filed against retail establishments. Hence, the rules reasonably circumscribe when an apprehension (proof of theft) or a trespass can be invoked.

Accordingly, per the above rules, no contact should have been made by Employee. Particularly no such accusatory expressions should have been made which exacerbated the already illegal contact.

But Employee further argues that, per the above rule (Employer 36) the fact that the customer had taken some product and subsequently "dumped it", resulted in "a disruption of unit operations." Therefore, a trespass could be invoked.

I cannot agree. As described by employer witnesses, "disruption" refers to rowdiness or rudeness, et cetera. All the examples set forth in Employer Exhibit 36 are of this nature. It is probably not uncommon for a customer to steal merchandise and for whatever reason, including being spotted, decide to dump the merchandise. But no witness, including Employee, testified that in training the present type of situation was included in a definition of "disruption of operations" to warrant invoking a trespass.

To hold with Employee's position, would result in every theft and subsequent loss of surveillance allowing a contact with a customer. Such a contact could, as in the subject case, result in accusations by the detective and a claim of detention by the customer with a resultant lawsuit against the employer for illegal detention. I find no ambiguity in the use of the phrase "disruption of unit operations." The subject circumstances did not "disrupt" the store's operation as in the above examples. (Employer Exhibit 36) Accordingly I find that the Grievant should not have pursued, contacted, and engaged in any accusation or any discussion with the customer.

But of even more serious import is the issue of whether Employee blocked the customer from his forward progress toward the exit. Again, Person 4's testimony and written statement reflect that Employee continually attempted to block the customer's forward motion. (Employer Exhibit 29) In accordance with the above principle relative to the veracity of a supervisor's testimony against that of an employee, I find that such action of blocking the customer occurred notwithstanding Grievant's denial. I reach such conclusion notwithstanding the fact that Employee points out that Person 4 failed to testify that the customer shook out his shirt or jacket. I agree with both Person 3's and Employee's testimony that the customer did so. But such a minor discrepancy, which does not substantively bear on Person 4's veracity, is not sufficient to impugn Person 4's credibility in connection with the above substantive issues.

Person 3 did not observe Employee initiate such contacts, make such accusatory statements, and block the customer because he did not arrive at the scene during Employee and Person 4's first contact with the customer at or near the greeter location and phone #275. This is where such actions and statements occurred. Person 3 only appeared on the scene when Employee, Person 4 and the customer were near grocery aisle number 7 or 8. Further, although Person 3 testified that he never observed Employee, Person 4, and the customer near the greeter stand (the first contact with the customer by Employee), he also admitted that for about 20 seconds he was unable to see that area on the monitor. I am persuaded that, in fact, there were the said two contacts by Employee and Person 4.

I find that Person 4's testimony is credible. Such blocking of the customer amounts to an apprehension or arrest by attempting to restrict the customer’s movement. Hence, at this point Grievant's intent to invoke a trespass was, by the fact of his actions, actually changed to an apprehension. This particularly follows by virtue of Grievant's coincidental accusatory

expressions to the customer. The blocking and accusatory statements and in view of the fact that the customer did not have any merchandise on him could have exposed the Employer to a cause of action by the customer for false arrest.

The issue of Employee's request to Person 4 to ask the customer to leave when the customer refused to do so as he wanted to continue shopping remains to be addressed. Since the original contact by Grievant violated the trespass rules, his request to Person 4 to have the customer leave was also incorrect. The customer, who evidently had decided to dump the merchandise, was no longer legally culpable. As stated, no "disruption" had occurred. Hence, Employee should not have requested Person 4 to ask the customer to leave. In these circumstances the customer had a legal right to refuse to leave. Accordingly, Employee should not have requested Person 3 to call the police as hereinafter discussed.

The fact that it is Person 4 who has the sole authority to make the decision to ask the customer to leave is beside the point. The manager is not trained in loss prevention rules and procedure and often has to rely on the recommendation of the detective who has both the facts and knowledge of the correct procedures and is extensively trained. Of course, the manager need not follow the detective's recommendation. While Person 4, as manager with sole authority to order the customer to leave, is to be considered somewhat culpable in following Employee's request, in the circumstances, the fact that he was not also disciplined is not pertinent particularly in view of his lack of experience as a manger and the uniqueness of the situation.

PAST PRACTICE

Employee further argues that, notwithstanding the above rules relative to trespass, the practice was not to follow them.

Person 9, Loss Prevention Detective, testified that it is the practice to invoke trespass in the subject circumstances. The manager is called and asked to have the customer leave. (Tr. III, 479-81) However, Person 9 could not document any specific instances except that he has done so. But he could not recall any dates or examples. (Tr. III, 419) Employee has the burden of proving a past practice in derogation of clear rules. The practice must be substantiated by sufficient examples. Nor did Person 9 produce any copies of reports to the Loss Prevention Manager covering the subject kind of circumstances wherein a trespass was invoked and was approved by the Loss Prevention Manager.

David Person 9, Manager, testified:

Q. If you had a -- if a manager had a Loss Prevention person come to them and say, I had a subject under surveillance concealing items but I lost contact with the subject, I'm unable to apprehend him, but he knows who I am, is it within accepted policy or practice for the manager to ask the customer to leave?

A. Again, that's up to the individual manager in charge. Personally, unless the person is continuing to disrupt the business, usually I would not ask them to leave. (Tr. II, 363)

As to the subject situation, Person 9 testified that only if a customer was "verbally abusive, loud, disrupting business" would he have asked him to leave. (11, 363) I find Person 9's testimony insufficient to support Employee's position relative to past practice.

Person 3 testified that, where there is a loss of surveillance after a theft, a manager can be asked by the detective to have the customer leave. (Tr. II, 330, 348) Person 3, as a new intern, has never been involved in a situation similar to the subject case. (11,348) But since August 1995 he has completed his training and is a store detective. He testified that he has observed other managers request customers to leave under the subject circumstances. (Tr. II, 351) However, on cross-examination he retracted this statement and stated that he had only heard about these

situations. (Tr. II, 356) Person 3 could only recall one situation involving Manager Person 10 and himself wherein surveillance was lost and Person 10 still asked the customer to leave. (11, 352) Person 10 added that Person 3 had asked him to ask a customer to leave on one occasion, but only because the customer was abusive to Person 3. (Tr. II, 366) When he subsequently confronted the customer, who was then compliant, he did not ask him to leave. (Tr. II, 366) I find that Person 3's testimony does not support Employee's position as to a past practice allowing detectives to request a manager to ask a customer to leave under the subject circumstances. Employee also testified as to past practice. He stated:

> "It's not a practice to ask somebody to leave if you lose surveillance of them if it's your own fault that you've lost surveillance and -¬if you see a kid with a tape and he conceals a tape and you lose him for five aisles and you find the kid again, you're not going to stop this kid. He hasn't seen you -- or to your knowledge he hasn't seen you. It's not a practice then to have somebody go up and ask this person to leave. That's your own fault, you've lost that one and you go on. You watched the person leave, you got your information what you can get and you go on from there. You can't prosecute that." (Tr. III, 467)

Such testimony appears to support the Employer's position that loss of surveillance precludes invoking trespass.

Employee characterized "disruption" which can precipitate a trespass as "kids being rowdy." (Tr. III, 474) According to Employee the particular facts of the subject case were never discussed in training relative to invoking trespass. (Tr. III, 474) It is also noted in this connection that the subject situation is not set forth in the rule as an example (Ex.36)

As stated, I am persuaded that, given the said importance of a detective's role and the possible liability exposure to the Employer, all of the above rules were clearly articulated at numerous training sessions. Accordingly, proof of past practice in abrogation of such rules, must be clear. I find that Employee and Person 3's conclusionary testimony relative to past practice,

absent supporting details as to dates, circumstances and reports of same, is not persuasive particularly in the face of Person 9's contradicting testimony.

EMPLOYEE DID NOT WRITE A REPORT FOLLOWING THE INCIDENT

Employee asserts that, since Person 3 was the first to observe the customer stealing, he was nominally in charge of the case. Therefore, Person 3's report, which Grievant helped to draft, was sufficient to obey the rule. (Employer Exhibit 36H) It is also noted that, in connection with discipline issued to Grievant on September 15, 1993, he was given the following rule among others:

> Documentation
>
> All customer contacts must be thoroughly documented with reports written by each witness immediately before they leave for the day. (Emphasis supplied) (Employer Exhibit 11A)

It is also noted that in another training plan which was articulated to Grievant at a training session is to found the following:

1. Record all of the information about situations and incidents accurately and concisely.

   A. Utilize the rules of report writing.
      1. Reports should be written in the first person.

Report writing is an integral part of the Loss Prevention function. Thousands of reports will be written this year and many will be enhanced by following these rules of report writing. (Employer Exhibit 39)

I agree with the Employer that all persons involved in an incident should write a report. This is reasonable and necessary as people can differ in their accounts and it is important to have all the information in any incident.

It is noted that Person 3's statement dated March 28, 1995 denotes that both he and Employee were involved in the incident. (Employer Exhibit 30) Loss Prevention Manager

Person 2 signed receipting for the report. It was not until Person 4 questioned Person 2 about the legitimacy of the procedure used in the incident on April 15 that she first felt that Employee should have also written a report. She had not asked for a report from Employee to that date. Therefore, I consider that Person 2 waived the necessity of Employee submitting a report and he is not therefore guilty of violating such rule.

6. Employee shared information with the police about a retail fraud when the case was not prosecutable according to Employer's standards.

The Employer argues that it was Employee not Person 3 who called the police after the customer left the store. In doing so he shared information with the police based on a retail fraud (theft) and not relative to a trespass. Thereby, Employee sought to involve the police in proving that Grievant actually stole the merchandise.

It is noted that the police dispatch record denotes only one call at 12:30 a.m. from Employer's. (Employer Exhibit 17) The name of the caller is not identified and no details are set forth. Since Person 4 observed Person 3 at phone #275 after Employee had told Person 3 to call the police, I conclude that Person 3 made this call. But in my view whether Employee also made a call is not pertinent. What occurred between Employee and Officer Person 6 in the office is what is controlling of the above charge.

Person 6 arrived and his report reflects that Employee told him he had lost surveillance after observing the customer concealing the merchandise. The customer "claimed not to be in possession of anything and was not stopped by security." (Employer Exhibit 16) Person 6's report also reflects that the incident was a "RTF" (Retail Fraud) and was reported by "DIFFERENT SPELLING OF EMLOYEE NAME" which is obviously Employee. The dispatch report denotes that a call came in at 12:30 a.m. which is the same time that appears on Person 6's

report. (Employer Exhibit 17) Person 6 testified that he was shown the video tape by Person 3 and Employee on which the customer was stealing merchandise. Then Employee told him it was "a retail fraud case notwithstanding that Employee had told him surveillance had been lost." (Tr. I, 54)

I am persuaded that Employee told Person 6 that this was a retail fraud case because of the fact that Person 6 noted "RTF" on his report. Accordingly, it appears that, notwithstanding Person 6's knowledge from Employee that surveillance had been broken, Person 6 figured that Employee considered it a retail fraud case in any event. This fact, in connection with Employee's request to run the customer's license number, led Person 6 to approve Officer Person 7's request to stop and search the customer's car at his home. This was done to aid Employer's in a possible prosecution if the merchandise had been found.

I conclude that the Employer has proved the above charge #6 that Employee "shared information with the police." Such "sharing" set in motion what could have resulted in a false arrest complaint by the customer. Since Employee's original contact with the customer, accusatory remarks, and blocking the customer's egress, was illegal, this, together with involving the police, was a most serious infraction of the rules by Employee and exhibited a lack of judgment. In the circumstances Employee should not have had Person 3 call the police. Also when Person 6 arrived, Employee should have told Person 6 that the case was closed as surveillance had been lost.

THE REASONABLENESS OF THE DISCHARGE

Considerable verbiage has been devoted by arbitrators to their authority to modify discipline or discharge. Employers assert that weight must be given to management's decision to discharge the Grievant. In this respect, Arbitrator McCoy is often cited as follows:

> ...it is primarily the function of management to decide upon the proper penalty...If an arbitrator could substitute his judgment and discretion honestly exercised by management, then the functions of management would have been abdicated, and unions would take every case to arbitration...The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved--in other words, where there has been abuse of discretion. (Stockholm Pipe & Fittings, 1 LA 160 (1945))

Arbitrator Harry H. Platt, a former President of the National Academy of Arbitrators, characterized such arbitral authority in a less stringent fashion as follows:

> In many disciplinary cases, the reasonableness of the penalty imposed on an employee rather than the existence of proper cause for disciplining him is the question an arbitrator must decide...In disciplinary cases generally, therefore, most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe, under all the circumstances of the situation. This right is deemed to be inherent in the arbitrator's power to discipline and in his authority to finally settle and adjust the dispute before him. (Platt, "The Arbitration Process in the Settlement of Labor Disputes", 31 J. Am Jud. Soc. 54, 58, (1947). (Emphasis supplied).

In a more recent case, Arbitrator David E. Feller, also a former President of the National Academy of Arbitrators, generally subscribed to Platt's position and stated as follows:

> The usual understanding is that an arbitrator who finds that a discharge was excessive punishment for misconduct may determine that some lesser punishment was justified and issue an award in accordance with that determination...I think rather that I am obliged to make a judgment as to the maximum discipline which could reasonably be imposed. This involves consideration of the employees' record, the nature of their offense and any extenuating circumstances that may exist. (Continental Pacific Lines, 54 LA 1231, 1246, 1970). (Emphasis supplied).

Given the myriad of situations and the volume of cases where such penalties have been expunged, modified, or sustained, one fact is clear. Each case can be differentiated by its particular facts so as to justify the Arbitrator's conclusion. In my opinion, the bottom line followed by the majority of Arbitrators is that, where the discipline/discharge appears unreasonable in the light of all the facts, the Arbitrator has the authority to modify or vacate it.

But I am also of the view that management's decision should not be upset lightly if within broad parameters of reasonableness.

In assessing whether the subject discharge is within reasonable parameters, several factors must be considered, i.e., length of seniority, the quality of seniority as evidenced by past discipline record, the heinous aspect of the misconduct, and any other mitigating circumstances. Length of seniority is a factor because longstanding employees develop some equity in their jobs. Hence, their misconduct cannot be viewed in the same light as that of short seniority employees. Management often contends that short seniority should militate against the Grievant. Hence, the contrary should also obtain.

EMPLOYEE'S PAST DISCIPLINE RECORD

There are two items of past discipline on Employee's record which the parties agreed could be contested at arbitral hearing and testimony was taken thereon. These items will be hereinafter addressed.

Employee does not contest the four items of past discipline as follows:
A three-day disciplinary layoff for a third degree violation he received on November 6, 1991 for an incident occurring October 13, 1991. (Employer Exhibit 1) The following warning was appended to that item of discipline:

> "Also, understand that any other Third Degree Customer Contact by you will result in discipline up to and including termination." (Employer Exhibit 1)

On September 15, 1993 Grievant was disciplined for a second degree violation for failure to file a report and failure to fully investigate the incident. (Employer Exhibit 12)

Again on September 15, 1993 Grievant failed to file a report and failed to investigate an incident in which surveillance was broken. He was guilty of second degree first offense and given a warning. (Employer Exhibit 11)

On February 9, 1995 Grievant was warned for using a recording device during an interview with a fellow associate. (Employer Exhibit 21)

As stated, there are two other items of discipline which the Grievant does contest. On August 21, 1993 he received a three-day disciplinary layoff. (Employer Exhibit 3) On January 29, 1994 he received a five-day disciplinary layoff. (Employer Exhibit 13) In view of my final conclusion in this case it is only necessary, in my view, to rely on the above items of uncontested discipline. Therefore it is not necessary to determine the validity of the two contested items of discipline. In view of the subject discharge case the parties agreed that such contested items would be tried at hearing. But the disposition of such disputes is only pertinent, in my opinion, if the same bears on the remedy herein. I am of the opinion that the subject incident together with the other uncontested items of discipline are sufficient to enable me to sustain the discharge.

Employee further argues that the subject incident only amounts to a second degree customer contact which according to the rules is defined as:

> 2nd Degree
>
> Conduct by the store detective was not reasonable and a customer contact occurred. The detective's actions did not conform to training or all efforts were not made to minimize liability and protect Employer assets. (Employer Exhibit 11A)

Employee characterizes the subject incident as a 2nd degree first offense which carries the following discipline:

2nd Degree Customer Contacts

A store detective that creates a 2nd degree customer contact will be subject to the following procedure.

1st offense - a thorough review will occur. An Associate Interview Report (AIR) will be written. The AIR will consist of a review of the positive and negative actions of the store detective. The AIR will also include the actions required of the store detective to be successful in the future. The AIR will also include that a future 2nd degree customer contact within one year will result in an additional AIR and a day off without pay. (Employer Exhibit 11A)

Employee argues that the Employer seeks to turn this case into a 3rd degree offense carrying the following penalty:

A store detective that creates a 3rd degree customer contact will be disciplined up to and including termination.

In a short four years of employment Grievant has been disciplined frequently. The first discipline on November 6, 1991 involved a 3rd degree offense and was based upon a similar situation as the subject situation. (Employer Exhibit 1) As stated, Grievant was then warned that another similar 3rd degree offense would result in termination. In the subject case I find that Grievant committed a 3rd degree offense which is defined as follows: "An illegal arrest occurred or an illegal act was conducted by the store detective during a customer contact." (Employer Exhibit 11A, p. 1) Particularly aggravating is the fact that Employee attempted to block the customer's egress each time he moved forward. As stated, such action amounts to an arrest. This together with Employee's incorrect contact in the first instance and accusatory remarks to the customer constituted a most serious action which could easily have exposed the Employer to legal liability. When all these violative actions and past discipline record together with Grievant's relatively short seniority are considered together with Employee's involvement of the police with the resultant stopping and searching of the customer's automobile, I am persuaded that the

Employer's action of discharge is reasonable. While arbitrators have authority in discipline/discharge cases to reduce penalties, such authority should not be exercised if the employer's action is within reasonable parameters and is not arbitrary and capricious.

AWARD

Employee's discharge is sustained. His appeal to arbitration is denied.

June 28, 1996