ARBITRATION DECISION NO.:
235

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Transportation
District 2 - Walbridge Outpost

DATE OF ARBITRATION:
February 2, 1990

DATE OF DECISION:
February 27, 1990

GRIEVANT:
Marlon Wharton

OCB GRIEVANCE NO.:
31-02-(89-04-03)-0018-01-06

ARBITRATOR:
Anna Smith

FOR THE UNION:
Lois Haynes
Advocate

FOR THE EMPLOYER:
Rebecca C. Ferguson
Advocate
Meril J. Price
Second Chair

KEY WORDS:
Removal
Theft
Just Cause
Circumstantial Evidence

ARTICLES:
Article 5-Management Rights
Article 24-Discipline
§24.02-Progressive Discipline
§24.05-Imposition of Discipline

FACTS:
The grievant was an Equipment Operator I employed by the Ohio Department of Transportation. The grievant was off his route, outside his truck with a partially full fuel can, a hose wet with fuel and the fuel lid of

his truck open when he was discovered by a local patrolman. The grievant stated that he had found the fuel can on his assigned route. The grievant was persuaded to write a statement to the effect that he was taking fuel out of the truck to take home. The grievant was removed for theft and a violation of Ohio Revised Code Section 124.34.

EMPLOYER'S POSITION:

There is just cause for removal. Theft of fuel is serious and cannot be tolerated, therefore, removal is commensurate with the offense. If, in fact, the grievant found the fuel then the employer's work rules require him to leave it. The grievant has knowledge of the employer's work rules and penalties. The rules are posted and were discussed in meetings. The burden of proof in this case is no higher than in other questions and may be met by circumstantial evidence. The patrolman/witness is credible; he has no personal interest in the case. Disparate treatment is not present due to factual differences between the cases cited by the union.

UNION'S POSITION:

There is no just cause for removal. In cases of theft the employer must prove guilt beyond a reasonable doubt and circumstantial evidence is insufficient proof. The grievants admission of guilt was made under duress. The penalty imposed is punitive, not corrective. The employer failed to investigate the incident. The grievant was subjected to disparate treatment compared to similarly situated employees.

ARBITRATOR'S OPINION:

There is just cause for removal. The patrolman's explanation of the events is more credible than the grievant's. Some facts are not rebutted by the grievant. Circumstantial evidence by itself is insufficient to meet the burden of proof. The grievant's statement that he was stealing fuel is taken as true. There is no evidence of duress. The grievant had notice of the employer's rules concerning theft and items found in the road. Theft is so serious that notice is not to be required. There is evidence that the employer investigated the grievant's claims. Progressive discipline is not violated by dismissal in cases of theft. Disparate treatment is not proven due to factual differences. There are no mitigating circumstances to warrant altering the penalty.

AWARD:

Grievance denied.

TEXT OF THE OPINION:

In the Matter of Arbitration
Between

**THE STATE OF OHIO,
DEPARTMENT OF TRANSPORTATION**

and

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11,
A.F.S.C.M.E., AFL-CIO**

OPINION and AWARD
Anna D. Smith, Arbitrator

Case No. 31-02-(89-04-03)-0018-01-06
Removal of Marlon Wharton

I. Appearances

For the State of Ohio:
Rebecca C. Ferguson, Labor Relations Officer
and Advocate, Ohio Department of Transportation
Meril J. Price, Second Chair,
Office of Collective Bargaining
Patrolman James R. Gantt, Lake Township Police Department
Trooper G.M. Samson, Ohio State Highway Patrol
John M. Tansey, Highway Maintenance Superintendent 2,
Ohio Department of Transportation

For OCSEA/AFSCME Local 11:
Lois A Haynes, Staff Representative and Advocate
Marlon Wharton, Grievant
Larry Bockbrader, Signal Electrician, Ohio Department of
Transportation and Chief Steward
Randal W. Schimming, Equipment Operator 1,
Ohio Department of Transportation
Elizabeth A. Hauenstein, Chief Steward
and Chapter President, District One

Observer:
Jay Vasconez, Intern with
Ohio Department of Transportation

II. Hearing

Pursuant to the procedures of the Parties a hearing was held at 9:15 a.m. on February 2, 1990 at Government Center, Toledo, Ohio before Anna D. Smith, Arbitrator. The Parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded, and to argue their respective positions. No post-hearing briefs were filed and the record was closed at the conclusion of oral argument, 1:00 p.m., February 2, 1990. The opinion and award is based solely on the record as described herein.

III. Issue

The Parties stipulated that the issue before the Arbitrator is:

Did the Department of Transportation discharge Mr. Marlon Wharton for just cause in accordance with Article 24 of the Agreement?

If not, what shall the remedy be?

IV. Stipulations of Facts

1) Mr. Marlon Wharton was hired by the Department of Transportation, District 2, on October 14, 1986 as an

Equipment Operator 1. He was assigned to the Walbridge Outpost as an Equipment Operator 1 until his removal on March 24, 1989.

2) Mr. Wharton's supervisors were Mr. John Tansey, Highway Maintenance Superintendent 2 and Mr. Johnnie Grimes, Highway Maintenance Superintendent 1.

3) Directives A-301 and DH-O-117 were posted in Mr. Wharton's work location.

4) Mr. Wharton had no discipline in his file at the time of the incident on February 23, 1989.

5) Mr. Wharton worked 11:00 p.m. to 7:00 a.m. assigned to road patrol on February 23, 1989 and was driving truck number 657.

6) Mr. Wharton parked the State truck behind the Lakeland Conservation Gun Club on State Route 163.

7) Patrolman Gantt, Lake Township Police Department, questioned Mr. Wharton behind the Gun Club. There was a fuel can on the ground, next to the truck when Patrolman Gantt arrived.

8) Mr. Wharton was not arrested by Patrolman Gantt.

9) Patrolman Gantt contacted the Ohio State Patrol. Trooper G.M. Samson was dispatched to the Lakeland Conservation Gun Club.

10) A pre-disciplinary meeting, in accordance with Directive A-302, was held at the District Headquarters in Bowling Green on March 2, 1989.

11) Mr. Wharton attended and was represented at the meeting by Mr. Larry Bockbrader, OCSEA/AFSCME Steward, Mr. Tansey, and Ms. Ferguson, Labor Relations Officer, were present. Patrolman Gantt appeared as a witness. Subsequently Mr. Wharton was removed.

12) The Department of Transportation, under different circumstances, has issued lessor forms of discipline for charges of theft.

13) This case is properly placed before the Arbitrator for determination.

The following documents were received as Joint Exhibits:

1) State of Ohio/OCSEA Local 11 Contract, 1986-89;

2) The Grievance Trail;

3) Directive A-301;

4) Directive A-302;

5) A-302 Notice of Hearing;

6) Directive DH-O-117;

7) Radio Log for February 23, 1989;

8) Lake Township Police Department General Offense Report;

9) Ohio State Patrol Inter-Office Communication

V. Relevant Contract Clauses

Article 5 - Management Rights
Article 24 - Discipline

VI. Case History

The Grievant in this case, Marlon H. Wharton, was employed by the Ohio Department of Transportation as Equipment Operator 1 for approximately two and a half years. At the time of the incident that gave rise to his removal, he was assigned night patrol duties on the 11:00 p.m.-7:00 a.m. shift, driving truck 657 on I-280 and State Route 420 out of the Walbridge Outpost. His supervisor, John Tansey, found his performance fair and his discipline record was clean. Directive A-301, June 1, 1987, "Disciplinary Actions" (Joint Exhibit #3) and Directive DH-O-117, January 8, 1986, "Handling and Disposal of Items Removed from Roadway by Department Personnel" (Joint Exhibit #6) were posted at the Grievant's work place. Directive A-107, March 1, 1986, "Stolen or Missing State Property", had been posted sometime in the summer prior to the incident and pointed out at a meeting. The record does not disclose whether the Grievant was at the meeting. At approximately 12:45 a.m. on February 23, 1989, he and his truck were discovered by Patrolman James R. Gantt of the Lake Township Police Department behind the Lakeland Conservation Gun Club, which is located on State Route 163, about fifteen minutes from the Walbridge Outpost. In his possession were a 5-gallon fuel can, which contained a contested amount of diesel fuel, and a hose which was wet with fuel. Upon questioning by Patrolman Gantt, Wharton first stated that he had stopped at the Gun Club to urinate and to check the fuel can which he had found on State Route 420. By means which are in dispute, Patrolman Gantt was subsequently able to persuade Mr. Wharton to write the following statement:

“I was taking fuel out of the truck to take home. My state truck and used my hose. the [sic] police had me pour the fuel back in the tank.”

(Joint Exhibit #8)

Wharton was visibly nervous and upset during the interview. At some disputed point, Patrolman Gantt radioed the State Highway Patrol. When State Trooper G.M. Samson arrived, Gantt told him what he had observed and concluded, and asked how to proceed, standard protocol to avoid conflict between the law enforcement agencies. Trooper Samson was advised by his supervisor that Gantt should do the paperwork since he had been first on the scene. Before Wharton was released, Patrolman Gantt had him pour this fuel from the can into the truck's fuel tank. He then confiscated the can and hose, and released Mr. Wharton with his truck. Mr. Wharton did not report the incident to his employer either at that time by radio, or when he returned to the garage that morning. His supervisor, Mr. Tansey, came to work early the next three mornings and made himself visible to see if Wharton would say anything to him about it, but he did not.

On February 24, 1989, a pre-disciplinary hearing notice was issued, charging Mr. Wharton with minor neglect of duty, insubordination, theft, leaving the work area without permission, unauthorized use of a State vehicle, and violation of §124.34 of the Ohio Revised Code (Joint Exhibit #5). Said hearing was held on March 2 with the result that Wharton was removed from employment for theft and violation of §124.34 Ohio Revised Code, termination effective March 24, 1989. This removal was subsequently grieved and a Step Three hearing was held. At both the A-302 and Step Three hearings, the Grievant recanted his written statement to Patrolman Gantt, returning to his original oral statement that he found the can and hose on State Route 420. The grievance was denied and subsequently processed through the grievance procedure to arbitration, where it presently rests.

VII. Positions of the Parties

Position of the Employer

In seeking denial of the grievance, the State makes three general arguments: (1) the Employer's rules are reasonable and the Grievant knew or ought to have known of them and the consequences of their violation; (2) the Employer has met the required quantum of proof that its rules were violated by the Grievant; and (3) the penalty of discharge is appropriate in this instance.

With respect to the rule proscribing theft and the consequence of removal on the first offense without extenuating or mitigating circumstances, the Employer maintains that this is necessary for efficient operations. Diesel fuel is a valued commodity and theft of any amount by any employee cannot be tolerated.

The Grievant knew or ought to have known of the rule about theft of State property. Directive A-301 (Joint Exhibit #3) was posted in his work place as was Directive A-107 regarding stolen or missing State property (Employer Exhibit #1). Both were pointed out in meetings prior to the incident, as testified to by Witness Tansey. Citing Arbitrator Pincus in ODOT/OCSEA G-87-1494 (Hurst), the State argues that even if proper notice had not been given, theft is so patently unacceptable that forewarning is not required to sustain discharge.

The Employer answers the Union's allegation that the Grievant found the fuel can and hose along the road with Directive DH-O-117 on the handling of materials removed from the roadway. This directive, which also was posted, states in bold type: "No materials shall be taken by employees for personal use!" (Joint Exhibit #6) Moreover, the Grievant knew he was supposed to leave items found in the right-of-way.

With respect to the required quantum of proof, the State argues several ways. First, it asserts that no higher standard need be met in questions of moral turpitude than in other questions. Citing Arbitrator Graham in DMH/OCSEA, G87-0208 (Deboe), it argues that the neutral must only be convinced that the Grievant did that with which he is charged and that the penalty is appropriate. Second, it concedes that much evidence against the Grievant is circumstantial, but Arbitrator Jonathan Dworkin has ruled that circumstantial evidence is often the only evidence available to the employer and it can be used (cite not provided).

The State further argues that the standard for proving theft was set by Arbitrator Pincus in ODOT/OCSEA, G87-1494 (Hurst), and it has met all four tests:

(1) personal goods of another must be involved; (2) the goods must be taken without the consent of the other; (3) there must be some asportation; and (4) both the taking and the asportation must be with intent to steal, or an intent to deprive the owner of his property permanently.

The decision to discharge the Grievant was based primarily on the Grievant's written voluntary admission that he took the fuel out of the truck to take home. Patrolman Gantt's testimony and written report (Joint Exhibit #8) about the circumstances surrounding the admission of guilt supports the Employer's contention of theft: Gantt saw the truck's fuel tank lid open, fuel was dripping down the side of the truck, the fuel can's lid was open, and the hose was wet with fuel. He had the Grievant sit in the back of the cruiser and apprised him of his belief that he was trespassing and stealing. He conferred with the State Patrol, told the Grievant he would make a report and read him his Miranda rights. After acknowledging that he understood his rights and waiving them, the Grievant indicated he was stealing the fuel and taking it home for his personal use. He expressed his concern about the disposition of the case. Patrolman Gantt said he had evidence for charges of theft and trespassing. He did not, however, know what the State Department would do. Gantt solicited Wharton's cooperation to make a statement in his own words and in writing. Wharton agreed to do it. Gantt also testified that he did not tell the Grievant that he was going to arrest him, nor did he threaten to arrest him if he did not confess. He did say that he could arrest him with the possible result of jail time, but he never said he was going to. Gantt provided further detail as to how the Grievant's written statement was produced. He did not use a written question-and-answer format. Rather, he had the Grievant fill out the form (Joint Exhibit #8). When Wharton returned the form, he asked if it was okay. Gantt indicated there was nothing about the vehicle and handed it back. Wharton added more to the statement. What was written was

in his own words and own writing.

The State further contends that Gantt is a credible witness. He did not know Wharton prior to the incident, did not know he was going to lose his job nor did he have a reason for wanting him to lose his job. It maintains that union attempts to discredit his testimony fell flat.

The State also argues that the Grievant's testimony is not credible. His story conflicts with Ptl. Gantt's and changes with retelling. His explanation of what he was doing with the fuel can and hose, and special fear of police are self-serving since his job is at stake.

The Employer concludes that although no one saw the fuel being removed from the truck, the facts surrounding the case and the Grievant's own admission prove he took the fuel.

The State's third argument is that the penalty of discharge is appropriate in this case. The Collective Bargaining Agreement in §24.02 and Directive A-301 work together to ensure appropriate disciplinary action. Management takes theft very seriously and seeks discharge on the first offense without mitigating or extenuating circumstances. Arbitrator Keenan in ODOT/OCSEA 31-12-8809260041-01-06 (Snyder) held that theft is one of those offenses for which progressive discipline need not apply, except in extraordinary mitigating circumstances. Conditions that would reduce the penalty do not exist here.

Regarding the Union's allegation of inconsistent application of the penalty, it is true that the Department of Transportation has issued lessor forms of discipline for charges of theft. However, as pointed out by Arbitrator Keenan in the Snyder case, disparate treatment does not exist where the differences are due to variations in circumstances. While the Department has issued lessor forms of discipline in other cases, it has done so under different circumstances from this case.

For all of these reasons, the State contends it had just cause to remove Mr. Wharton and requests that its actions be sustained.

Position of the Union

The Union arguments center on quantum of proof and appropriateness of the disciplinary action. First, the Union contends that the Employer must prove beyond a reasonable doubt that Mr. Wharton was guilty of theft. This it has not done since it offers only circumstantial evidence and a statement written by Mr. Wharton under very suspicious conditions. The Employer's principal witness, Ptl. Gantt, did not see the Grievant take the fuel and no one took actions to prosecute the alleged theft. The Union further raises questions about the reliability of Ptl. Gantt's testimony through two witnesses, the Grievant and Larry Bockbrader. Amongst else, the Grievant testified that Ptl. Gantt did not call the State Patrol until after taking his written statement, that the truck was not wet with fuel until after Gantt had him pour the fuel into it, and that he wrote his statement after being told to write that he took the diesel fuel. He further testified that he wrote the statement because he was afraid he was going to be arrested and he has an unusual fear of police arising from an incident in his youth. Thus, the Union alleges that the statement was obtained under duress, when the Grievant was frightened and confused.

Mr. Bockbrader, who has experience as a part-time deputy sheriff for Wood County and police officer in the Luckey Police Department, testified that he would have handled the incident and report differently in several respects, that the amount of fuel involved made the alleged crime a misdemeanor rather than felony, and that he did not think Ptl. Gantt had any evidence of theft nor, in his opinion, did the Grievant's written statement show intent to steal. Moreover, the Union goes on, the Employer's reliance on township police is improper because the usual policy is for the State Patrol to run the entire investigation.

Regarding the inappropriateness of the disciplinary action, the Union argues thus: Article 24 of the Collective Bargaining Agreement requires just cause for discipline and that the Employer follow progressive discipline with action commensurate with the offense. One principle of just-cause discipline is that actions taken be corrective. The Employer's disregard of the Grievant's version of what transpired so jaundiced its view of the incident that it did not take corrective action, but imposed the last-resort penalty of discharge.

The Union further argues that the Employer has shown disparate treatment. Elizabeth Hauenstein, Chapter President and Chief Steward from District One, testified that in a case arising prior to the 1986-89 Contract, two employees (Peck and Brinkman) received 30-day suspensions for theft. In that case, the value

of the property taken (an engine) exceeded $150, the people involved were charged with petty theft, and the theft was proven in court. The Union contends that although this case occurred in a different district, both districts are parties to the same Collective Bar-gaining Agreement and use the same discipline directive. Therefore, the Employer has acted in a discriminatory fashion by imposing discharge in the instant case.

The Union concludes and argues that the Grievant was not terminated for just cause and requests that he be reinstated with all back pay and fringe benefits. It further expresses its concern that those who testified for the Union be free of harassment for this action.

VIII. Opinion

The central issue in this case is whether the Employer has proved to the Neutral's satisfaction that the Grievant was engaged in stealing when accosted by Ptl. Gantt. The Employer's case rests on two supports: the observations of Ptl. Gantt and the written statement taken from the Grievant the night of the incident.

As both sides to the dispute point out, Ptl. Gantt's observations amount only to circumstantial evidence. He did not see Wharton take the fuel from the State vehicle. Rather, he drew certain conclusions from the location, behavior of the individual, and conditions of the hose, can and truck: Wharton was stealing. The Union disputes some of Ptl. Gantt's reported observations (notably the amount of fuel in the can and when the truck dripped fuel) and offers a different interpretation: Wharton was inspecting the contents of a can he found by the side of the road. Neither version by itself is overwhelmingly convincing, although there are details of each witness's story that make Gantt's more likely true than the Grievant's. For example, the Union does not dispute the Employer's allegation that the truck's fuel tank lid was open when Gantt arrived on the scene, nor does it offer its own explanation for why it was open before the Grievant completed his alleged inspection of the hose and put it away. The Union also does not explain why the Grievant was willing to carry a fuel can to the Gun Club, but not to the garage. It is hard to believe that he did not suspect that the fuel can contained a volatile fluid when he first picked it up. If he did suspect it, why was he willing to risk carrying it from S.R. 420 to the Gun Club, but not from the Gun Club to the garage without emptying it? And if he did not know what the can was, why didn't he leave it by the road as instructed by his supervisor or radio for instructions? The Grievant also testified that on inspection he could not tell what was in the can because his sense of smell was rendered useless by a cold and headache. So, he felt the hose and concluded from the oily feel that it was probably diesel fuel. This seems a weak basis to risk fouling his truck's fuel with a largely unknown fluid. These problems, taken together, raise serious doubts in the Arbitrator's mind as to the claim that he was merely investigating a found item prior to taking it back to the garage for disposal, but it could have happened the way the Grievant said, for none of these problems are, by themselves, fatal to the Grievant's story.

It should be pointed out, however, that the Grievant's version of what he was doing and planning contains elements of theft as set forth in the Hurst case by Arbitrator Pincus (ODOT v. OCSEA G87-1494): the traveler's fuel can and hose were taken without the traveler's or the State's consent with the intent of depriving the owner of the property permanently (burning the fuel in the truck and throwing the can in the dumpster).

Be that as it may, because Gantt's version contains no similar inconsistencies, unexplained behavior, or logical flaws, and he lacks an interest in the outcome, his version is the more believable. This circumstantial evidence, however, is not enough to prove the charge of theft and sustain the discharge, because it is ambiguous by itself. More is needed.

The second piece of the Employer's case is the admission written by the Grievant that he was taking the fuel out of his State truck to take home. The Union maintains that this is a false statement given under an abnormal fear of arrest. The Grievant testified that Gantt told him that he had the right to take him in right then, and that he believed he was going to be arrested. He maintains that under the circumstances he was willing to do anything and wrote what he was told to write. Ptl. Gantt admits that the Grievant appeared to be very nervous, but he emphatically denies that he told him he was going to arrest him. He did say he told him that he had evidence for a theft and trespassing charge, and that he could arrest him, possible leading to jail time, but he never said he was going to arrest him. He also testified that he told the Grievant that he could

not advise about the State department. Regarding the content of the written state-ment, Ptl. Gantt testified that although he did prompt the Grievant to write something about the vehicle, this would not have changed the outcome, since a verbal admission was obtained after the Grievant was Mirandized.

The stories told by the two witnesses are similar in several respects. It is clear that the officer told the Grievant of his suspicions, that he read the Grievant his rights and interrogated him, and that the Grievant was afraid. But nowhere in the record is there evidence that promises, threats, or physical or mental duress were used to obtain the Grievant's written statement. It would appear that Gantt did inform Wharton of the possible consequences of his actions, but providing information does not in and of itself constitute a threat. No doubt the Grievant felt the pressure of the circumstances and was afraid, perhaps more than a person without anxious memories of police. But the Arbitrator does not see evidence of undue pressure placed on the Grievant to confess a crime he did not commit, nor anything else that raises a reasonable doubt in her mind that his written statement was false, even if the officer lead the Grievant to write the words of the statement. The Arbitrator takes it to be a true statement of what the Grievant was doing when accosted by Ptl. Gantt.

The Union also challenges the Employer's witness through the testimony of Bockbrader, who has training and experience as a law enforcement officer. That training and experience notwithstanding, the Arbitrator can only conclude that different officers of different training and experience handle similar situations differently. Trooper Samson's testimony about how he handles interrogations is consistent with this view. Moreover, Bockbrader was not on the scene, so his testimony on how he would have handled the situation is hypothetical. Regarding Bockbrader's opinion that Gantt had no evidence of theft and that the written statement does not show intent, the witness is entitled to his opinion, but what matters here is whether the Arbitrator is convinced by the Employer's evidence of theft. This she is. Despite the efforts of the Union to discredit Ptl. Gantt and to raise an alternate explanation for what he saw, the written admission of the Grievant with the circumstantial evidence of Gantt's testimony and report, convince the Arbitrator that the Grievant did take fuel from his State truck with the intent of using it himself. In short, the Employer's charge of theft is proved.

The Employer also contends that Mr. Wharton knew of the rule prohibiting theft and its consequences. There is little point in discussing this contention since the Union only disputes the meeting on Directive A-107, which clarifies the meaning of State property and procedures for reporting theft and loss. It is clear from the Grievant's testimony that he knew he was supposed to leave items found on the road, even if he did not attend the meeting where this directive was discussed. Moreover, the Arbitrator agrees with the Employer and Arbitrator Keenan that theft of an employer's property is one of those acts so obviously wrong that no prior notification of discharge is necessary.

The only remaining issue to be discussed is the appropriateness of the Employer's disciplinary action. First, the Union argues that the Employer's disregard of the Grievant's story so jaundiced its view that corrective action was prevented. John Tansey, the Grievant's supervisor, attended the A-302 hearing in which the Grievant stated that his garage furnace burns fuel oil, rather than diesel fuel. Thus, one would conclude that the Grievant had not use for the State fuel and he also would not have told Gantt that he was taking it to use in that furnace. Tansey looked into the matter and learned that diesel fuel would burn in a fuel oil burner, albeit dirtier. This indicates that the Employer did, in fact, consider the Grievant's story and not merely dismiss it out of hand.

Second, it is true that the contract calls for progressive discipline in §24.02 and the Employer's disciplinary directive A-301 is dedicated to that principle. However, as others have observed, theft of the Employer's property is one of those offenses for which discharge may be warranted on the first offense. It is this Arbitrator's view that the contract anticipates offenses warranting first-occurrence termination in its §24.02 requirement that "Disciplinary action shall be commensurate with the offense," as well as in §24.05's language that "Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment." I do not believe that it is unreasonable for an employer to terminate an employee who steal’s the employer's property of whatever value. For this reason, I am unimpressed by the fact that the amount of fuel involved would have made the theft a misdemeanor. I do agree that, in some cases, extenuating circumstances may mitigate the disciplinary action. No such circumstances have been

offered here, however.

Finally, the Union argues that the Employer has imposed a lessor penalty for theft in the past and is therefore disparately treating the Grievant. The Employer admits it has imposed a lessor penalty in the past, but asserts that the circumstances were sufficiently different to justify the different penalty. The case offered by the Union in support of its claim -- the Peck and Brinkman case -- was described by Witness Hauenstein: the employees involved were advised by her to report to management that they took the engine; the employees were charged in court and theft was proved; they subsequently received 30-day suspensions. An arbitration award cited by the Employer (ODOT v. OCSEA 31-12-(88-0926)-0041-01-06 (Snyder) provides further detail showing significant differences from Wharton's case. The employees did not recant their confessions, they voluntarily returned the property, and pled guilty in court to the lessor charge of disorderly conduct. The report of this case by Arbitrator Keenan raises enough questions about the comparability to the instant case that it cannot be relied upon to establish discriminatory conduct. Therefore, this Union claim is unproved.

In sum, the Arbitrator has no reason to reduce the Employer's action of removal, it being reasonable and commensurate with the offense, there being no extenuating or mitigating circumstances, and disparate treatment has not been established.

IX. Award

The grievance is denied in its entirety.

Anna D. Smith, Ph.D.
Arbitrator

Shaker Heights, Ohio
February 27, 1990