

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION
OF THE PACIFIC on behalf of
ROMAINE JACKSON,

Grievant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC CASE NO. 37-05

DECISION NO. 518 - MEC

DECISION AND AWARD

APPEARANCES

Schwerin, Campbell, Barnard and Iglitzin by *Robert Lavitt*, Attorney, appearing for the Inlandboatmen's Union of the Pacific.

Robert McKenna, Attorney General, by *David Slown*, Assistant Attorney General, appearing for the Washington State Ferries.

NATURE OF THE PROCEEDING

This matter is before the Marine Employees Commission as the result of a grievance filed by the Inlandboatmen's Union of the Pacific (IBU) challenging the discharge of Romaine Jackson. The parties, having timely exhausted the steps of the grievance process, are properly before the Arbitrator. Therefore, this matter was heard in Arbitration on November 3, 6 and December 13, 2006.

STATEMENT OF THE CASE

The Washington State Ferries, a division of the State Department of Transportation, operates ferry service across the Puget Sound. As part of that service, the WSF collects passenger tolls on behalf of the State of Washington. Those tolls are collected from each car and passenger at each terminal by one of many WSF Ticket Sellers. These employees are charged

with the responsibility to collect and electronically record the payment of fares. One of WSF's busiest terminals is Colman Dock, on the Seattle waterfront. At Colman Dock, each auto Ticket Seller is stationed one of four booths at the entrance to the dock.

Inside each booth, there is a "POS" machine, essentially a complex cash register designed to record sales and account for funds received. At each transaction, the Seller enters the type of passenger fares, the destination and the machine indicates the total amount of the transaction. In order for a seller to complete a transaction, he or she must hit the type of payment or "media," that is "cash," "check," "charge," or "travelers check," and then he or she must press the "enter" key. Once these keystrokes are made, the POS device prints a receipt and the transaction is complete. Before the transaction is complete, the seller may erase, or "back out" his or her last entry by pressing the "clear entry" key. As the seller proceeds through the transaction, the customer is able to view a screen that demonstrates the progress of the transaction and a cumulative total. (See Ex. 55) According to WSF policy, Ticket Sellers are to complete each transaction by hitting "enter" and are to provide a receipt to each customer. WSF Ex. 36.

Romaine Jackson began work at WSF in 1993 as an on call employee in the terminal department. As such, he worked primarily as a traffic attendant but occasionally did some ticket selling. In 2002, Mr. Jackson became a permanent ticket seller. On December 31, 2002, as the result of problems with cash variances, Mr. Jackson was demoted back to the traffic attendant position. Once he served the period of the demotion and received additional training, he returned to the ticket seller position where he remained until his termination in October of 2004.

Investigation

On August 23 and December 6, 2003, the WSF was notified by two separate customers that unusual receipts had been given out by a Ticket Seller at Colman Dock. As the result of

these incidences, the WSF contacted the Washington State Patrol and initiated video surveillance of each of the ticket selling booths at Colman Dock. The WSF purchased and installed cameras into each selling booth. The cameras were hidden within an overhead speaker such that the cameras recorded the seller's activities as seen from overhead. The videotaping began on March 13, 2004.

According to the Investigative Plan developed by Melissa Johnson, then Operations Revenue Control Manager, "[t]wenty-five Sellers were identified for investigation." WSF Ex. 4. Ms. Johnson dispatched three management employees to view one shift of video recording for each of the twenty-five employees. According to Ms. Johnson, "[a]n entire shift was reviewed and only the documentation of non-compliant events or suspected theft events were documented on the spreadsheets." Tr. 118. As a result of the review, "there were four individuals that were highly suspicious, that did - - caused events that appear to be theft." Tr. 53; WSF Ex. 8.¹ All four of the individuals initially identified were African American. Having identified these four, the WSF went on to look more closely at the video recordings of additional shifts worked by these four employees.

Mr. Jackson was among the four identified by WSF as having engaged in suspicious activity. Thus, the WSF examined video recordings of additional shifts worked by Mr. Jackson and concluded that theft had occurred four times in the period beginning March 13: March 15, 16, 19 and 20. WSF Ex. 24 – 27. At hearing, the WSF provided excerpts from the videotapes covering each of these transactions along with the POS journal demonstrating the keystrokes made by Mr. Jackson. No other video evidence was introduced.

¹ The results of those reviews are contained, apparently, in seven binders which were not introduced into evidence but which had been made available to the Union. (Tr. 62) A summary of that information was provided to the Union and introduced into evidence as WSF Exhibit 8.

Based on my review of the video recordings and the accompanying POS journal, I make the following findings regarding each transaction.

March 15, 2004 Transaction

This transaction began at approximately 1:05 in the afternoon.² The Bainbridge ferry was scheduled to sail that day at 1:10 pm. (Tr. 254) Thus, this was likely to have been a busy time. The video demonstrates a vehicle pulling up to the booth. At approximately the same time, Mr. Jackson entered “1 Veh/Driver” and “1 Psgr Sr Citizen.” (Ex. 27, pg. 2) Mr. Jackson then immediately entered the same two fares again; these transactions all occurred within the same second according to the POS log. *Id.* He then finalized the transaction for an incorrect total of \$21.70; the correct amount should have been \$10.85. *Id.* At this point the POS system “froze”; the video reflects Mr. Jackson hitting a button, presumably an “escape” key, several times with no effect. Mr. Jackson is then shown to be on the telephone. At about the same time, the customer handed Mr. Jackson two bills, which Mr. Jackson placed on the counter. Mr. Jackson gave the customer coins in change but no receipt. Mr. Jackson then moved the pile of bills from the counter top to a recessed space near the POS device.

Approximately seven minutes later, Mr. Jackson voided the entire transaction. Ex. 27. According to Mr. Wages, the seller would not be able to void out only the two incorrect entries, but would have to void out the entire transaction. Tr. 255-256. Immediately after voiding the transaction, Mr. Jackson picked up the bills and walked toward the back of the booth, out of range of the camera. At the end of his shift on March 15, Mr. Jackson had no variance; that is, his deposited amount matched the amount recorded on the POS device. WSF Ex. 28. Mr.

² There is an approximately five-minute discrepancy between the time as recorded by the video equipment and the time as recorded by the POS device. Neither party disputes the connection between the keystrokes recorded by the POS and the video image contained in Exhibits 24 - 27; therefore, I will rely herein on the time as recorded by the video equipment.

Jackson had no memory of this transaction, but testified that, having viewed the video, “everything I did was according to what I would normally do in a regular transaction on that.”

Tr. 430.

March 16, 2004 Transaction

This transaction began at approximately 3:35 pm. Again, the video recording demonstrates a car pulling up to the booth. According to the POS journal, Mr. Jackson entered a vehicle and driver fare of \$9.50. WSF Ex. 26. At this point, the video demonstrates the driver handing Mr. Jackson a bill. Mr. Jackson placed the bill on his counter top and did not finalize the transaction, and thus, no receipt was generated. The vehicle then moved away from the booth. Three seconds after having entered the fare, he backed out a vehicle and driver fare, and he backed out a vehicle and driver pre-paid fare.³ Another vehicle then pulled up to the window, and Mr. Jackson entered a vehicle and driver fare, and the customer handed Mr. Jackson a credit card. Mr. Jackson finalized the transaction using the credit card. Mr. Jackson then took the bill off of the counter top and moved it out of the camera’s view. On March 16, 2004, Mr. Jackson had an overage of \$.20 at the end of his shift. WSF Ex. 28.

March 19, 2004 Transaction.

This transaction began at approximately 5:34 pm, a busy time at the Colman Dock. WSF Ex. 24. The video demonstrated that the customer handed Mr. Jackson a coupon. Mr. Jackson did not enter “Veh/Driver Ppd” into the POS. However, Mr. Jackson entered a passenger full fare, but he then backed that out and re-entered a youth passenger fare of \$4.40. WSF Ex. 24, pg. 33. The video demonstrates Mr. Jackson taking bills and coins from the customer and placing them on the counter. Mr. Jackson did not finalize the transaction and, thus, no receipt

³ A pre-paid fare has no monetary value in terms of the POS record. So, it is unclear, and neither party offered an explanation for, why Mr. Jackson would back out a pre-paid vehicle and driver fare.

was generated. The vehicle then drove away. WSF Ex. 24 pg.1. Another vehicle pulled up and Mr. Jackson cleared the youth passenger fare and entered the correct fare for this vehicle. The customer paid with a credit card and Mr. Jackson finalized the transaction, providing the customer with a receipt. A few seconds later, Mr. Jackson took the money from the counter and moved out of view of the camera. On March 19, 2004, Mr. Jackson had an overage of \$.35 at the end of his shift. WSF Ex. 28. Mr. Jackson did not have a memory of this particular transaction, but in response to the question as to why he would leave money on the counter, Mr. Jackson responded that he might have left it there to jog his memory in case the customer returned for a refund. Tr. 427.

March 20, 2004 Transaction.

This transaction begins at approximately 4:19. Again, a vehicle drove up to the booth, and Mr. Jackson entered the fare for a vehicle and driver: \$9.50. The customer handed Mr. Jackson bills and coins, which Mr. Jackson placed on the counter. Mr. Jackson did not finalize the transaction and did not provide any change to the customer. The vehicle pulled away and a new vehicle appeared. Mr. Jackson backed out the former transaction and entered a vehicle/driver and a passenger fare. This customer also paid with cash, which Mr. Jackson also placed on the counter. Mr. Jackson finalized the second transaction, provided a receipt and gave the customer change. Then, Mr. Jackson placed the bills from the second transaction in the till while leaving the cash from the first transaction on the counter.⁴

During the ensuing 15 minutes, Mr. Jackson does not move the bills and coins from the counter into his till, but he paid attention them. On about six occasions, Mr. Jackson touched,

⁴ In the ensuing approximately 15 minutes of video recording, the bills and coins remained on Mr. Jackson's counter while he engaged in other transactions. These transactions demonstrated another feature of Mr. Jackson's practice: he routinely places money on his counter before moving it to his till, but he consistently places the cash in the drawer within a couple of transactions. In addition, during this period Mr. Jackson routinely failed to finalize non-monetary transactions such as pre-paid passes.

moved, or counted the money. At about 4:36, the video shows Mr. Jackson reaching out of view of the camera with his left hand and then shows him holding bills in this hand. He then added one of the bills from his left hand to the pile on his counter, arranged the money so that it was all facing the same way, placed the bills in the till, and took one bill out of the till. The bill that he removed from the till remained in his left hand and, as he moved away from the till, his left hand moved down toward his pants pocket and out of view of the camera. Within seconds, a vehicle appeared at the window, and Mr. Jackson reached his empty left hand toward the new customer.

At the end of his shift on March 20, Mr. Jackson showed a \$9.25 shortage. Mr. Jackson testified that he did remember this transaction:

I remember the \$1 bill transaction where I took my own money out that day making change. I do remember that . . . I remember to a certain extent that I needed to make some change. And because we don't have any - - we didn't have any, what is it? We only had vending machines to a certain extent . . . I don't know specifically if I was going to get something to eat or not, but I was sure that I was making change that day.

Tr. 428.

Termination

It is not clear from the evidence precisely when the process of reviewing the video recordings was concluded. However, there seems to have been some delay between the conclusion of that process and the discharge of the four employees for the purpose of staging a mass arrest of the four employees. "The State Patrol wanted to have all four individuals at work at the same time because . . . they didn't want one employee calling another employee and then that employee not coming to work, or they didn't want to go to the employee's house and try and track them down." Tr. 55. Thus, on June 6, as Mr. Jackson was removing materials from his safe, he was surrounded and arrested by "about four or five state patrol." Tr. 384. According to Mr. Jackson, the State Patrol officers told Mr. Jackson that he was suspected of theft, placed him

in handcuffs and brought him across the public area of the dock to an office. Once in the office, Mr. Jackson was informed of his rights and he asserted his right to counsel. After this exchange, Steve Rodgers came into the office and gave Mr. Jackson a letter informing him that he would be on paid administrative leave starting that day.

The WSF held a *Loudermill* hearing in October 25, 2004. WSF Ex. 1, 7. At that hearing, Mr. Jackson asserted his right to remain silent. On October 29, 2004, the Washington State Ferries discharged Romaine Jackson from employment as a Ticket Seller. The reasons given for the discharge were as follows:

- Theft
- Neglect of Duties
- Criminal Conduct
- Cash/Check Handling Procedures
- Poor Work Performance

WSF Ex. 2. This grievance and arbitration followed.

STATEMENT OF THE ISSUE

Was there just cause to terminate the employment of Romaine Jackson on October 29, 2004? If not, what is the appropriate remedy?

POSITION OF THE PARTIES

WSF

The Washington State Ferries contends that the standard of just cause was met in this termination; specifically, the WSF presented sufficient proof of theft to justify Mr. Jackson's discharge.

First, the WSF acknowledges that it bears the burden of proving its allegation of theft and argues that, because the allegation is one of criminal conduct, the WSF must prove its allegation of theft by "clear and convincing" evidence. To establish theft, the WSF argues that it must

provide that “Romaine Jackson, with the intent to deprive, secreted, withheld or appropriated to his own use or the use of another, fare revenue, after it came into his possession, custody, or control, as an employee.” WSF Brief at 4. In this case, WSF argues that it has met its burden by demonstrating that in each of the four occasions at issue here cash was brought into the toll booth, the corresponding POS transaction was cleared from the system, and there was no corresponding variance in Mr. Jackson’s total at the end of the shift. The WSF argues that this pattern is demonstrated by the combination of video recordings and POS recordings on March 15, 16, 19 and 20.

The WSF argues that the investigation and disciplinary process was fair and unbiased. WSF asserts that its investigation was set up and approved by the senior management, the Washington State Patrol and the King County Prosecutor’s office and therefore was a “bright shining example” of a proper investigatory process. As to allegations of racial bias, the WSF argues that there is no evidence establishing discriminatory motive in this case.

IBU

The IBU agrees that the burden of proof in the matter properly rests with the WSF. However, the IBU argues that the standard of proof should be “beyond a reasonable doubt” because of the criminal nature of the alleged conduct. To prove theft, the IBU argues, the WSF must show that “Mr. Jackson wrongfully obtained or exerted unauthorized control over state property (revenue) and did so with the intent of depriving the WSF of that property.” IBU Brief at 8.

The IBU argues that the video recordings do not prove theft but, rather, failure to follow cash handling procedures. The IBU suggests that Mr. Jackson, in some instances, was

attempting to rebalance his working fund after making change or he was making change for his own personal use. While a violation of WSF policy, IBU argues, this was not proof of theft.

The IBU argues that the decision to terminate Mr. Jackson demonstrates disparate treatment. First IBU argues that the mere fact that the investigation produced four suspects, all of whom were African American, is itself an indication of a problem. Second, IBU points to other employees who had variances much larger than Mr. Jackson's who were not terminated.

For these reasons, IBU argues that Mr. Jackson should not have been discharge, but rather demoted to a Traffic Attendant position.

DISCUSSION

Burden of Proof

There can be no question that the burden to prove just cause for Mr. Jackson's termination properly rests with the WSF. *Elkouri and Elkouri, How Arbitration Works*, 949 (6th ed. 2003) ("The burden of proof is generally held to be on the employer to prove guilt of wrongdoing.") As to the standard of proof, this Commission has consistently held that in a typical discipline case, just cause must be proven by "a preponderance of the credible evidence." *Shipwrights and Joiners Local 1184 v. WSF*, 113-MEC at 16 (1994) (termination for falsification of time records); *see also MEBA v. WSF*, 119-MEC (1994) (preponderance of the evidence appropriate standard for allegation of bringing a gun and pornography aboard the vessel); *MEBA v. WSF*, 93-MEC (1993) (preponderance of the evidence where employee suspended for insubordination).

Where the allegation is one carrying criminal implications, arbitrators routinely impose a higher standard of proof. The majority of arbitrators in such a case would impose a requirement

that the employer prove its case by “clear and convincing” evidence. *See Elkouri and Elkouri* at 951. This Arbitrator agrees with that standard in most circumstances.⁵

Here, however, the evidence presents a very troubling, and unexplained, pattern. Specifically, the four employees who stand accused of theft as the result of the WSF’s investigation are African American.⁶ While the WSF asserts, and this arbitrator has no reason to question, that the investigation was impartially conducted, the mere fact that the only employees who were closely scrutinized and ultimately charged with theft are African American demands a more searching inquiry into the proof presented. For this reason, the standard of “beyond a reasonable doubt” will be used in this matter.

The concept of reasonable doubt has evaded precise judicial definition in the criminal context, but a jury instruction which has been given judicial approval reads as follows:

[Reasonable doubt is] doubt for which a reason exists. You are not to go beyond the evidence to hunt up doubts, nor must you entertain such doubts as are merely vague, imaginary, or conjectural. A reasonable doubt is such a doubt as exists in the mind of a reasonable man after he has fully, fairly, and carefully compared and considered all of the evidence or lack of evidence introduced at the trial. If, after a careful consideration and comparison of all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.

State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959).

⁵ It is important to acknowledge, however, that this Commission has recently suggested that the criminal “beyond a reasonable doubt” ought to be applied to allegations of theft. *IBU v. WSF (Wells)*, 430-MEC (2004). However, in that decision the Chairman also acknowledged an open debate in this area: “It may be argued that the ‘beyond a reasonable doubt’ test should only be applied as a criminal standard and there is a debate among arbitrators when this test is applied. In this case, there has been no ‘preponderance of the evidence’, no ‘clear and convincing’ evidence and no ‘beyond a reasonable doubt’ standard established by the employer.”

⁶ Indeed, it is statistically likely that this group represents all of the African American ticket sellers among the 25 reviewed. In the 2000 census, 17% of Seattle residents self-identify as African American. If that statistic were applied to the group of 25 sellers at Colman Dock, then one would conclude that 4.25 sellers there would be African American.

Elements of Theft

Both parties defined “theft” with reference to Washington’s criminal code, identifying the elements of that crime as (1) Wrongfully obtaining or exerting control over the property or services of another, (2) With intent to deprive him or her of such property or service. *See* RCW 9A.56.020(1). Here, proof of intent serves the purpose of distinguishing the mere mistake or failure to follow policy from the misappropriation of property.

Because it is not possible to examine the contents of Mr. Jackson’s conscience, the determination of intent must be gleaned from his actions and explanations of those actions at hearing. In the video recordings, Mr. Jackson is shown to have engaged in a series of actions each of which, standing alone, would be insufficient to prove the intention to deprive WSF of fare revenue. However, taken together and in the absence of a plausible explanation, the following actions occurring within the course of a ticket selling transaction are indicia of this type of theft:

- The employee enters a fare into POS;
- The employee receives cash from the customer;
- The employee does not finalize the transaction or issue a receipt;
- The employee backs the transaction out of the POS system; and
- The employee does not place the cash in the till and does not account for the extra money received at this end of his or her shift.

The presence of all of these indicia raises the reasonable inference that embezzlement has occurred. If the employee were able to point to a credible alternate explanation of this behavior, this would raise a reasonable doubt in the mind of this finder of fact. With that in mind, we will examine each transaction.

March 15,2004

In the course of this transaction, Mr. Jackson “double rang” a passenger fare and then the POS system “froze.” About seven minutes later, presumably when the system came back up,

Mr. Jackson voided both transactions. The fact that the POS system was not operational offers an alternative explanation for why Mr. Jackson would fail to finalize the transaction.

Additionally, the fact that a seller may not void out a single part of a transaction offers a credible, alternative explanation for why he backed out both halves of the double ring transaction. Thus, we are left with unexplained behavior related to his leaving bills on the counter top and moving them closer to the POS, but these alone are insufficient to prove theft beyond a reasonable doubt in light of Jackson's pattern of leaving cash out on his counter in between routine transactions.

March 16, 2004

In this transaction, all of the indicia of this type of theft are present. Mr. Jackson entered a vehicle and driver fare and received cash from the customer. He placed the cash on the counter. He did not finalize the transaction but, rather, waited until the customer left the booth and backed out that transaction. Mr. Jackson then entered the next transaction on top of this one and finalized it. Once the second customer left the booth, he took the cash off the counter and moved it out of view. There was no overage at the end of Mr. Jackson's shift. This combination of events raises a reasonable inference of theft.

Although Mr. Jackson had no memory of this transaction, the Union points to Mr. Jackson's poor selling history and argues that "there is no evidence that an error did not take place here." It is indisputable that Mr. Jackson was a poor Ticket Seller and routinely engaged in practices at odds with the WSF policies. However, the combination of these actions within a single transaction suggests much more than negligence. Had Mr. Jackson not demonstrated all of these indicia, it would be possible to conclude that his actions should be attributed to mere error. This was not the case, however. Thus, I find that the WSF proved theft in this transaction.

March 19, 2004

Likewise, in this transaction, the indicia of theft are present. Here, Mr. Jackson entered the cash transaction, took cash from the customer, did not place it in the till and did not finalize the transaction. When the next customer arrived, Mr. Jackson backed out the previous transaction and entered the transaction for that customer. After this transaction was concluded, Mr. Jackson took the cash from the counter and moved out of view. There was no overage at the end of Mr. Jackson's shift.

The Union's arguments to the contrary, while valiantly and sincerely made, consist primarily of speculation and are, therefore, insufficient to raise reasonable doubt in the mind of this arbitrator. The Union argues that Mr. Jackson may have backed out the transaction because he had backed out an earlier portion of the transaction and he "thoughtlessly repeated the same action when the next car pulled up." IBU Brief at 9. This would be more possible had Mr. Jackson not then segregated the money received and taken it out of view. If it were merely a thoughtless reaction, one would expect that he would proceed to place the money in the till. As to this, the Union argues that Mr. Jackson may have moved the four one-dollar bills out of camera view to place them in his tackle box. This, the union argues, may have been Mr. Jackson's method of balancing his working fund after having earlier taken out two rolls of nickels. Though that evidence would have been available on the video recordings, no evidence was presented that Mr. Jackson actually removed rolls of nickels from his working fund at any point during this shift. Additionally, it seems unlikely that Mr. Jackson would choose to balance his working fund at 5:30 p.m., the busiest time of day at Colman Dock. These arguments do not give rise to reasonable doubt.

This is particularly true in light of Mr. Jackson's own testimony, which was at times inconsistent and improbable. When asked why he would place the money on the counter during this transaction, Mr. Jackson said that he might want it there in case the customer came back for it:

If the customer, for instance, didn't make the boat or I didn't give the customer a receipt - - and that's not a purpose thing, on purpose - - that I would feel that I would want that money here for them and I would give it to them. If they made the boat then I would enter it. And that's all that I could say. I don't know why for a fact that I would just leave it on there unless I needed that memory to make sure that they got that money because I mean, to me, that's why I say that.

Tr. 427. First, the video evidence indicates that Mr. Jackson's normal practice is to place money on his counter, and yet he suggests to the contrary. Additionally, there is no indication, nor does the Union argue, that this customer was about to return to the booth for a refund. Mr. Jackson seems to suggest that the customer might return because the customer did not receive a receipt. Even if the customer were to return for a receipt, that customer would not be entitled to a refund. This explanation strikes me as implausible.

Indeed, Mr. Jackson's credibility is further undermined by his explanation for why, on March 31, he taped a piece of paper towel over the speaker containing the video camera. This arbitrator would have been perfectly willing to accept the explanation that Mr. Jackson had come to know that the speakers contained hidden cameras, and, feeling his privacy invaded, he covered the camera. I would have found this not to prove his intention one way or the other. Instead, however, Mr. Jackson testified that there was a loud noise being emitted from the speaker and he was attempting to muffle it with a paper towel. The Union's witness, Diane Sumis a ticket seller who worked at Colman Dock in March of 2004 testified on redirect examination that, apart from one announcement, she never heard loud sounds emitted from the speaker. Tr. 402. Second, if one seeks to muffle noise, generally one would not use a single thickness of paper towel.

March 20, 2004

This is the most disturbing of the three transactions. Here, all of the indicia are satisfied: Mr. Jackson received money, did not finalize the transaction, backed out the transaction and did not place the money in the till. Instead, the cash consisting of several bills, remained on the counter top. After the passage of about 15 minutes, Mr. Jackson appears to have added one of his own dollar bills to the pile, placed the cash in the till and pulled out, presumably, a 10-dollar bill. Mr. Jackson held the bill in his left hand and dropped that hand out of view of the camera. When his hand reappeared, it was empty.

When asked whether he remembered this transaction, Mr. Jackson responded that he did and offered the explanation that he was making change for the vending machine. Again, this simply does not make sense; generally if an employee were using his or her cash drawer to make change for a vending machine, the employee would take a larger bill and exchange it for smaller bill and, perhaps, coins. Here, the transaction was the opposite.

Nonetheless, the union argues heroically that Mr. Jackson may have placed the ten-dollar bill in his pocket so that he could purchase a roll of quarters sometime later in his shift. No evidence was presented that such a purchase occurred, though the union points out that Mr. Jackson opened a \$10 roll of quarters during the course of this video excerpt. The fact that these explanations are theoretically possible do not establish reasonable doubt in light of the fact that the grievant himself professed to remember a different set of explanations.

Thus, I find that the WSF has proven theft occurred on March 16, 19 and 20 for a total amount of \$23.40. The Union raises the very legitimate question of why an employee with 12 years of service, and a single father, would risk his livelihood for this small amount of money. I am perplexed by this also but cannot escape the conclusion that theft has been proven. As such,

the question must be posed to Mr. Jackson. For our purposes, it is axiomatic that proof of theft, regardless of the amount, amounts to just cause for discharge.

Disparate Treatment

The Union argues that other employees engaging in conduct that resulted in missing funds were not discharged but, rather demoted or not punished at all. Most of these examples are cases in which the WSF, correctly or incorrectly, concluded that negligence, not theft, was the cause of the missing funds. WSF Exhibit 65 demonstrates that in every other case in which the WSF concluded theft had occurred, termination or resignation resulted. Thus, I do not find disparate treatment in this case.

Enforcement

The Union presents a compelling argument that the WSF enforcement conduct here was over zealous. The WSF waited a period of months to discharge the four employees so that it could coordinate a mass, public arrest. On June 6, the four employees were handcuffed and walked through a public area of Colman Dock. The WSF may have been more concerned about demonstrating that it “meant business” than in the dignity of its employees. Mr. Jackson has made a very serious mistake; however, this does not obviate the employer’s duty to administer discipline in a compassionate manner. In this case, as remedy for this treatment and in light of the small amount of money at issue and the substantial passage of time, I will order the WSF to consider Mr. Jackson eligible to apply for an open Traffic Attendant position should he desire to.

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AWARD

1. The WSF has established just cause for the discharge of Romaine Jackson.
2. As the result of the over zealous enforcement, the small amount at issue and the substantial passage of time, the WSF is ordered to consider Mr. Jackson eligible to apply for an open Traffic Attendant position.

DATED this 14th day of June 2007.

MARINE EMPLOYEES' COMMISSION

/s/ ELIZABETH FORD, Arbitrator

Approved by:

/s/ JOHN SWANSON, Chairman

/s/ JOHN SULLIVAN, Commissioner