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**ARBITRATION IN THE MATTER****Between****Teamsters****and****Bottled Gas, Inc.**\*  
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\***Grievant: Robert Harvey****Issue: Discharge****Arbitrator: Judy A. Gust**

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**PRELIMINARY STATEMENT**

The hearing in this matter was held on April 2, 2006, at the Teamsters southern California Office. During the course of the hearing the parties presented evidence through exhibits and the sworn testimony of witnesses who were subject to cross-examination. The record of this case was closed the same day following oral argument by the parties. The parties stipulated that the matter was properly before the arbitrator for a final and binding decision.

**APPEARANCES & WITNESSES****For the Company**

Nancy Wells. . . . . Counsel and Spokesperson  
 Janice Berry. . . . . Human Resources Manager  
 Jack Howe . . . . . Sales Service Manager  
 Don Atkins. . . . . Regional Safety Manager

**For the Union**

John Comer . . . . . Counsel and Spokesperson  
 Robert Harvey . . . . . Grievant  
 Rene Maine . . . . . Business Representative  
 Mike Jeffrey . . . . . Driver

**BACKGROUND & FACTS**

The Grievant, Mr. Harvey, was employed by Bottled Gas, Inc. (BGI) as a truck driver who delivered both bulk propane and propane tanks to customers. He started as a driver in 1985

when the company was owned by NewGas, Inc. He continued as a driver throughout his career as the company was subsequently sold several times and finally acquired by BGI who owned the company at the time of the incident giving rise to Harvey's discharge. Mr Harvey had no record of discipline with any of these employers and his last performance evaluation dated May 9, 2002, reflected a "distinguished" rating defined as "Meets and exceeds all the requirements of the position. Consistently demonstrates Performance which approaches outstanding."

On February 10, 2006, Harvey made a delivery to a customer, NeedsGas, in Riverside. He filled the customer's tank and when he tried to disengage the throttle with the remote control device that he carried on his person, the throttle would not disengage. He tried a second time to utilize the remote device and when it still failed to disengage, he went to the back of the truck and manually turned the valve to halt the fill. He then removed the chock blocks, got inside the cab of the truck, completed his paperwork and *pulled away* from the customer's tank with his hose still connected to the tank. The break-away safety valve on the tank did what it was designed to do and broke away from the tank, remaining on the hose. A worker at NeedsGas informed Harvey that his hose was dragging. Harvey then rolled up his hose, checked his nozzle and removed the break away valve from his hose checking to make sure there were no leaks from his hose and then checked the customer's tank and found no leaks at that location. Harvey then called dispatch at BGI to report that he had done a *pull-away* and requested a technician to report to the customer's location to replace the fill valve. Harvey also advised the customer of what occurred and that a service technician would arrive to replace the fill valve. The customer asked for a written report and Harvey told him that he would bring a written report the next day. Harvey then proceeded to his next delivery stop and was later called by dispatch to return to NeedsGas. When Harvey returned to NeedsGas, he told Jack Howe, his manager, what had occurred. Howe directed him back to the yard and suspended him pending investigation. The following day, February 11, 2006, Howe completed his investigation, consulted with the Regional Human Resources Director, and terminated Harvey for the "pull-away incident due to a lack of attention."

#### **ISSUE**

The parties agreed upon the following issue statement: Was Mr. Harvey terminated for just cause? If not, what shall be the remedy?

## **RELEVANT CONTRACT PROVISIONS**

### **ARTICLE 6 - MANAGEMENT RIGHTS**

**Section 2.** It is further recognized that it is the sole responsibility of the management of the Company for the selection, direction, size and makeup of the workforce, including the right to hire, discharge for cause, lay off, promote, demote, assign, reassign, or transfer; to discipline and suspend; to relieve employees from duties and assignments because of the lack of work; to determine the number of employees within a given classification; *to establish and modify reasonable work rules*; . . . (emphasis added)

### **ARTICLE 7 – DISCIPLINE**

**Section 4.** The Employer shall not discipline, suspend or discharge employee without just cause. It is agreed that the following will be just cause for immediate dismissal: theft, sabotage, *creating hazards of fire, safety or health*, reporting for work intoxicated or under the influence of a controlled substance, gambling, sale or use of intoxicants on the premises or contiguous thereto, smoking on the premises except where expressly permitted, *carelessness*, incompetence, insubordination. (emphasis added)

### **ARTICLE 8 – GRIEVANCE AND ARBITRATION**

**Section 5.** The arbitrator will have the authority to interpret and enforce this Agreement, but he/she will not have authority to add to, detract from, or modify and (sic) provisions of this Agreement for any reason.

## **POSITION OF THE COMPANY**

The Company's position is that it had no choice but to terminate Mr. Harvey's employment for the pull-away, consistent with its practice to uniformly discharge anyone with a pull-away incident. The facts are not in dispute. The severity and seriousness of a pull-away are not in dispute. And, according to the Company, Mr. Harvey knew that a pull-away could result in termination for the first offense.

The Company pointed out that Mr. Harvey failed to perform the post-fueling walk-around. Had he done so, he literally would have tripped over the hose and been able to

disengage it from the customer's tank. Further, the Company argued that Harvey made multiple mistakes. Not only did he fail to perform the final walk-around, he also failed in his responsibility to inspect his truck and assure that the air brake interlock system was working properly.

The Company argued that the testimony regarding other employees who experienced a pull-away and were not terminated was hearsay and should not be credited for the truth of the matter. It also questioned the credibility of both Mr. Harvey and Union witness, Mike Jeffrey regarding that testimony. The Company asserted that Harvey was less than truthful when he testified that the letter he wrote to Rene Maine on February 11, 2006, contained his exact words, thereby failing to acknowledge the directions set apart by the asterisks and instructions in the brackets. (JX 3)<sup>1</sup> The Company also challenged Harvey's truthfulness when he could not recall a written 1985 Safety Examination that was found in his personnel file. As to Mr. Jeffrey's credibility, it is the Company's position that his testimony about never performing a walk-around after completing a fill was incredulous. According to the Company, BGI has always terminated any employee involved in a pull-away.

Finally, the Company argued that for such a potentially catastrophic incident, there can be no second chance. It pointed to the collective bargaining agreement where the Union agreed to a definition of just cause and the resulting consequence – immediate dismissal – for creating hazards of fire, safety or health or carelessness. There is no doubt, the Company argued, that the pull-away created a hazard of fire and safety and the failure to perform the walk-around was careless. The one mistake consequence is provided for in the Agreement and should be upheld.

### **POSITION OF THE UNION**

The Union's position is that Mr. Harvey's career is at stake and his reaction to the incident was exactly the kind of reaction the Company should want. The Union does not disagree that the pull-away occurred but it pointed out that following the incident Harvey checked the valve and hose to assure no further risk of leaking product, called in and reported truthfully what occurred

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<sup>1</sup> Exhibits will be referenced as follows: JX – Joint Exhibit, CX – Company Exhibit, UX – Union Exhibit

and went to the customer to explain and apologize for what happened. Where the Union and the Company disagree is over the lack of consideration of Harvey's seniority – 21 years – and his lack of any prior disciplinary history. According to the Union, this case merits a second chance.

As to the language of the collective bargaining agreement that sets forth the definition of just cause and its consequence for the acts set forth therein, the Union argued that there are gradations, degrees and circumstances that should be considered when deciding upon the consequence. It pointed to the disciplinary guidelines prepared by the Company's counsel, Kovac, that suggest that termination for a single incident is discretionary and should consider all of the circumstances of each accident or driver error. (UX 1)

The next Union position concerned the alleged training that Mr. Harvey received on the interlock safety brake system. It asserted that the training that occurred in June 2002 did not include training on the interlock safety brake system but rather addressed the emergency safety valve on the older, propane-powered vehicles. Mr. Harvey did not drive that kind of vehicle; rather, he drove a diesel truck. The more recent training, in September 2005, also did not include training on the interlock safety brake system as attested by Mr. Harvey and Union witness, Rene Maine. As the Union pointed out, common sense would suggest that it was in Mr. Harvey's best interest to check the interlock brake safety system if he knew how because he would be the closest, most vulnerable person to a catastrophic incident. The Union argued that there was no policy, practice or requirement at the time of this incident for drivers to check the interlock brake system.

Another argument advanced by the Union was that of other employees who reportedly had pull-aways and were not terminated from employment. Admittedly not the best evidence, the Union argued that it should give pause about the level of discipline meted out to Mr. Harvey especially in light of the Company's own disciplinary guidelines contained in Union exhibit one.

Finally, the Union proffered a common sense argument by asking how likely it would be for Mr. Harvey to have a repeat incident. Given his experience so far, the Union asserted that

Mr. Harvey would be the last person the Company should have concern about failing to do a walk-around or again pulling away without disconnecting the hose.

The Union asked that the arbitrator find for the Grievant and give him something less than termination as a consequence for this one-time incident.

## **DISCUSSION**

Generally a determination of just cause flows from a consideration of two elements – first, was the alleged wrongdoing of the employee proven and secondly, was the discipline imposed appropriate under the circumstances? In this case, there is no doubt that the employee was responsible for the pull-away incident. Mr. Harvey readily admitted that he failed to do a walk-around following the fill and subsequently pulled away from the customer's tank without disconnecting the fill hose.

There were other circumstances that normally would mitigate against such a harsh punishment as termination for the first offense.

First, Mr. Harvey was distracted from his routine when completing the fill at NeedsGas. He testified that the remote device that is normally used to disengage the fill throttle did not operate properly the first two times he tried it which necessitated his physical movement elsewhere around the truck to manually close the fill valve. This fact may explain why he failed to perform the required walk-around during which he would have discovered that the hose was still connected.

The second mitigating factor was the fact that the back-up interlock brake safety system was not operational on Mr. Harvey's truck. There was no convincing evidence that the responsibility for checking the operational effectiveness of the interlock brake system fell upon the Mr. Harvey. There was evidence in the Company's operational policies, that are not distributed to drivers but kept in the office, that the safety brake system must be checked frequently (at least once a month) for proper operation and that any defects must be repaired immediately. (CX 4) The policy does not state who is to check for proper operation but Sales

Service Manager Howe testified that Harvey failed to do his job to assure that the safety brake system was operational on all vehicles. Following this incident, at least one other truck was found to have its safety brake system inoperative as well. Harvey and Union witness Jeffrey both testified that the only time that they were involved with checking the safety brake system was under the supervision of a previous manager, Phyllis, who required that the system be checked following periodic safety meetings. At that time, a service technician was made available to check the system while the driver was in the cab of the truck. Clearly, in order to check the safety brake system, the assistance of another person was necessary. The failure of this back-up safety system did not contribute to Mr. Harvey's failure to do a walk-around but it did permit the pull-away to occur.

Finally Mr. Harvey's 21-year work history without discipline and his most recent performance evaluation reflected distinguished performance. The Union's argument suggesting a common sense review of these circumstances would support a finding that the imposition of termination in this case was too harsh a penalty. It was certainly in Mr. Harvey's best interest to have an operational safety brake system as he would be the one most likely to be seriously injured or killed should a pull-away result in a fire or explosion. Additionally, it is also reasonable to conclude that following this incident and in consideration of Mr. Harvey's long, unblemished safety record, that he would likely be one of, if not the most, conscientious drivers the Company could hope for.

The Union argued that the Company had the discretion to impose discipline short of termination in its management rights clause, in the guidelines emailed by Ms. Kovac, and in the Company's predecessor's policy. (CX 9) However, the Company is the only one that can exercise that discretion and/or waive the clear language of the collective bargaining agreement that defines just cause leading to immediate dismissal. Ms. Berry testified that the discipline guidelines set forth in Ms. Kovac's email are superseded in those plants that have a collective bargaining agreement. She also testified that in her four and one-half year tenure, each incident of a pull-away resulted in termination regardless of service length or performance history. Similarly, Regional Safety Manager Atkins and Sales Service Manager Howe testified that every pull-away that they had knowledge of had resulted in termination. The incidents of past pull-

always alleged by the Union that did not result in termination were insufficiently clear as to circumstance, timeframe and BGI's participation to be credited. Although the Company may have the right to choose other than termination, it chose not to exercise that right in this case and there was no substantive evidence that it had done so in the past that would suggest disparate treatment.

Although the doctrine of just cause calls for consideration of mitigating facts in determining the appropriate level of discipline, on balance with the clear, unambiguous language of the collective bargaining agreement, the Company's practice of always terminating regardless of performance history or seniority, and the fact that Mr. Harvey did fail in his responsibility to perform a walk-around and disconnect the hose, the Company's decision must be upheld. Mr. Harvey's pull-away at NeedsGas did create a fire and safety hazard and was a careless act. The Company pointed out that the language of Article 7, Section 4. of the collective bargaining agreement was bargained by the Company and agreed to by the Union. That section defines not only the types of conduct that would be considered just cause but also sets forth the level of discipline for such infractions – immediate dismissal. Accordingly, just cause for immediate dismissal is found.

### **AWARD**

Based upon the foregoing facts and reasoning, the grievance is denied.

Judy A. Gust, Arbitrator, Ramona, California  
May 14, 2006