BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
NORTHWEST UNITED EDUCATORS - WEYERHAEUSER ESP	Case 19 No. 46985 MA-7123
and	
WEYERHAEUSER AREA SCHOOL DISTRICT	

Appearances:

Mr. Michael J. Burke, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 56868, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 715 South Barstow Street, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, by Mr. Richard J. Ricci, appearing on behalf of the Employer.

ARBITRATION AWARD

Northwest United Educators - Weyerhaeuser ESP, hereafter the Union, and Weyerhaeuser Area School District, hereafter the District or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission, hereafter the Commission, to appoint a staff member as single, impartial arbitrator to resolve the instant grievance. On November 4, 1991, the Commission appointed Coleen A. Burns, a member of its staff, as Arbitrator. Hearing was held on April 14, 1992, in Weyerhaeuser, Wisconsin. The hearing was not transcribed and the record was closed on May 22, 1992, upon receipt of posthearing written argument.

ISSUE:

The parties stipulated to the following statement of the issue:

Was the Grievant discharged for just cause?

If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE VII - PROBATIONARY PERIOD/DISCIPLINE

A. All new employees shall serve a one calendar year probation - any period upon initial employment in the District.

B. Following the one calendar year probationary period, no employee shall be disciplined, discharged, or suspended without just cause.

BACKGROUND

Pat Willson, hereafter the Grievant, began employment with the District as a full-time bus driver in November of 1984. During the 1991-92 school year, the Grievant drove a modified van, which accommodated twelve to sixteen

passengers, on a Special Ed run. The Grievant transported five students, who ranged in age from 4-14 years old. Four of the children were exceptional education needs (EEN) students and the remaining child, Mary Kay Krupa, was a four year old pre-school student. Mary Kay rode the van every Monday, Wednesday and Friday. On a normal morning, the Grievant would pick up the children in Weyerhaeuser and drive to Bruce. In Bruce, four of the children, including Mary Kay, would transfer onto another bus for transport to schools in Ladysmith.

On Wednesday, January 29, 1992, the Grievant began the Special Ed run as usual. As usual, there were five children on the van, including four year old Mary Kay. While in route to Bruce, the Grievant received a call over the van's two-way radio from Principal Lorkowski who told the Grievant that the connecting bus that usually picked up the children in Bruce would be 20 minutes late. Rather than cause a delay by waiting for that bus, Lorkowski directed the Grievant to take the children all the way to their respective destinations in Ladysmith.

Upon her arrival at Bruce, the Grievant dropped off the first child, as she regularly did. She then proceeded to Ladysmith where she dropped off one child at the elementary school and two children at the middle school. The Grievant then made her way back to Weyerhaeuser and, at approximately 8:45 a.m., parked the van in the District garage until the afternoon route.

At a little after noon on that day, Mary Kay's mother, Carol Krupa, received a phone call from a co-worker who was to transport Mary Kay from St. John's Pre-School in Ladysmith to her babysitter. The co-worker told Ms. Krupa that Mary Kay was not at pre-school. Ms. Krupa immediately phoned her husband to determine if Mary Kay had come home early from school. Upon learning that Mary Kay was not at home, Ms. Krupa called the Weyerhaeuser School District, and was informed that Mary Kay was not at school, but that perhaps the bus driver, the Grievant, would know where she was. Ms. Krupa then called the Grievant at her home. The Grievant indicated that she did not remember Mary Kay getting off the Special Ed van and believed that Mary Kay was still on the van at the bus garage. The Grievant then offered to call the school to dispatch someone to look for Mary Kay.

At approximately 12:40 p.m., following the Grievant's telephone call to the District, the District's Bus Mechanic, Ben Loda, found Mary Kay seated in the front seat of the van which the Grievant had parked in the bus garage. Mary Kay was embarrassed because she had wet herself.

Mary Kay refused to ride the van on the following Friday. Thereafter, Mary Kay would only ride the van if she were accompanied by an adult. Beginning February 3, 1991, the District assigned a District employe to accompany Mary Kay on the van. Following the incident of January 29, 1992, Mary Kay suffered from nightmares of being locked in an elevator and had an aversion to being left alone.

On or about February 3, 1992, District Administrator Marcia Hochhalter provided the Union and the Grievant with a copy of the following:

> Please be advised that your failure to account for and properly care for a child you were transporting from Weyerhaeuser to Bruce on January 29, 1992, and your leaving the child on your bus unattended, appears to constitute a substantial breach of your duties as a bus driver for the District.
>
> Accordingly, I suspended you with pay effective after our conference on Thursday, January 30, 1992 pending a hearing by the Board of Education on Wednesday,

> February 5, 1992, at 12:30 p.m. in the Administration office. At that time, the board will consider my recommendation that you be given either one final warning or that in the alternative, you be discharged.
>
> The reasons for my recommendation are as follows:
>
> 1. You left a four-year old child on your bus unattended for over four hours in below freezing temperatures and failed to account for that child.
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> 2. This action was against all policies, the bus driver job description, and procedures of the District with respect to transportation.
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> 3. This action was a serious breach of your duties as a bus driver.
>
> 4. Your failure to account for the child may have serious long-term emotional effects of which we are not yet aware.
>
> The Board will hold the February 5 meeting in executive session pursuant to Section 1985[1][b], Wisconsin Statutes, unless you request that it be open. You will be given an opportunity to present your position, to be represented by counsel of your choice, and to cross-examine the administration's witness[es].
>
> It is our opinion that, should the Board accept the administration's recommendation that you be either warned or discharged; this hearing should also be treated as the Board step of the grievance procedure. If the Board then approves my recommendation and you choose to grieve it, the grievance would be processed by Step 4.
>
> If you have any questions regarding this, please contact me.

On or about February 5, 1992, the District Administrator provided the Union and the Grievant with a copy of the following:

> The Board of Education determination as a result of the due process hearing on February 5, 1992, is that you be discharged as a bus driver effective immediately. This decision resulted from your failure to account for and properly care for a child you were transporting from Weyerhaeuser to Ladysmith on January 29, 1992. The board determined that this was a substantial breach of your duties as a bus driver for the District, and against all policies and procedures of the District as outlined in my letter of February 3, 1992.
>
> Please understand that this official notification is required, and that your grievance, should you decide to file, would be processed at Step 4.

Thereafter, a grievance was filed, denied by the District, and submitted to arbitration.

POSITIONS OF THE PARTIES

Union

Any analysis of the just cause standard includes a determination of whether the disciplinary action in question is consistent with the seriousness of the particular offense. In the present case, the District's decision to discharge the Grievant was too severe.

On the date in question, the Grievant was not driving her regular bus route. The day that the Grievant failed to drop Mary Kay Krupa off at school was the first time she had ever transported Mary Kay from Bruce to Ladysmith. Moreover, it was only the second time she had ever driven the Bruce to Ladysmith leg of the trip. As Ms. Willson testified at hearing, there was a great deal of confusion on January 29, 1992, due to the disruption in the bus schedule. In fact, when the children were boarding the bus in Weyerhaeuser, the Grievant was on her two-way radio attempting to coordinate the bus route with the various parties involved.

The Grievant has been a bus driver for eight years in the Weyerhaeuser District. While Mr. Schuchardt did issue a letter to Ms. Willson regarding her prior driving record, the Grievant was never reprimanded at the time of any of these occurrences. Schuchardt's letter was basically a letter for the "file" as he was preparing to leave the Weyerhaeuser School District. More importantly, as the District Administrator testified, the Board's decision to discharge was based entirely on the January 29th incident and was not related to Ms. Willson's past driving record. Given the Grievant's length of service and the change in routes on the day in question, the District's decision to discharge is overly harsh.

Ben Loda, bus mechanic for the District for over 40 years, stated that, in his opinion, discharge was too severe given the Grievant's service to the District and the fact that this mistake could happen to any bus driver. Unfortunately, Ben Loda passed away prior to the arbitration hearing. Mr. Schuchardt did testify, however, that as District Administrator, he often deferred to Mr. Loda on matters involving school transportation. Ms. Hochhalter also acknowledged that Mr. Loda did support the Grievant's continued employment at the Board level. While he was a fellow bargaining unit member with the Grievant, Mr. Loda's length of service with the District lends enormous credibility to his opinion.

As set forth in Board Exhibit 8, the District Administrator indicated that her recommendation was for either final warning or discharge. It is clear therefore, that the Chief Administrative Officer of the District is willing to accept a lessor form of discipline.

St. John's Pre-School in Ladysmith failed to inquire why Mary Kay was not in school on Wednesday, January 29th. The failure of St. John's Pre-School to act responsibly clearly mitigates the seriousness of the Grievant's mistake. Had the pre-school acted responsibly, Mary Kay would have been discovered on the bus or in the bus garage much earlier.

There is no Board policy requiring bus drivers to check their busses after every run. As the Grievant testified, it is common for the bus drivers to inspect and clean their busses after the afternoon run and bus drivers typically inspect/clean their busses following their last route. Morning inspection is not a standard operating procedure, nor a Board policy, in the Weyerhaeuser School District.

There is no proof that Mary Kay will suffer long range effects from this ordeal. In a strangely similar situation, the St. Paul Head Start Program imposed a three-day suspension on a veteran bus driver.

No one feels worse about this incident than the Grievant. The Grievant's job should not be terminated based on this one mistake. Recognizing her fault, the Union and the Grievant waive any request for backpay in this matter. The reinstatement of the Grievant for 1993-94 will allow for a fresh start and a lesson learned.

Employer

The Grievant's infraction was so serious and so grave in nature that the widely accepted seven just cause standard is not applicable here. Rather, the burden is on the Union to show that the District's discipline was arbitrary or capricious. If the Union fails this burden of proof, the discipline may not be set aside.

The District's decision was in no way arbitrary, made in bad faith or clearly wrong. The Grievant failed to carry out the most basic and fundamental of her bus driving duties, that of providing for the safe transport of a child under her care. The Grievant's neglect resulted in a potential life and death situation for a four year old child, the full psychological effects of which are still unknown. The failure of the District to have a specific written policy stating that "bus drivers must inspect their busses after each and every run" does not relieve the Grievant of her duty to provide for the safe transport of a child under her care.

If Mary Kay had been able to open up the outside door and leave the bus garage as her mother testified she tried to do, she could have had a serious accident or exposure to sub-freezing January cold. As it is, she suffered the terror of being left cold and alone for four hours and the embarrassment of wetting her pants after failing to find a bathroom.

Mary Kay continues to have difficulty in her normal every day activities. She has persistent nightmares of being locked in an elevator and becomes visibly upset when her parents are out of eyesight. She pleads not to be left alone. She still requires District personnel to accompany her on the van. The District has incurred a loss of productive time by using District personnel to accompany Mary Kay on the Special Ed van.

The Employer is not required to have specific policies and procedures covering every conceivable situation and cannot possibly do so. The District's expectations of the Grievant are consistent with the duties and responsibilities of her bus driving position, which include supervising the loading and unloading of the children, exercising good judgement and most importantly, practicing good safety.

The reasonableness of the District's position is further supported by the fact that the route was a Special Ed route with special needs children who, if anything, require more attention, more supervision and more care than other school bus riders. Moreover, there were only five children on the entire vehicle, which vehicle was a small converted van and not a regular 54 or 55 passenger school bus.

The Grievant stated at hearing that the route in question was confusing, various school district personnel were radioing back and forth regarding where children were to be dropped off, and the Grievant was trying to concentrate on the unfamiliar drive to Ladysmith. In addition, for whatever reason, Mary Kay did not sit in her regular seat, but sat in the seat directly behind the Grievant. The District believes that, rather than mitigating the Grievant's action, these two factors weigh in favor of the District's decision. Common sense would dictate that, on an unusual day, a day filled with commotion and confusion of an unfamiliar route, one would take extra care and ensure that every child who boarded the bus was delivered safely to his or her destination.

The Grievant has admitted that the situation was entirely her fault and subsequently wrote a letter of apology to Mr. and Mrs. Krupa. The District does not assert the Grievant acted out of malice or wilful wrongdoing. It does contend, however, that no matter how much she regrets her actions, the Grievant failed to carry out the most fundamental duty of her position of a bus driver. Because of the Grievant's neglect, a four year old child was left alone for four hours in a bus garage in sub-freezing temperatures. The Grievant's discharge was appropriate even though her action was not intentional.

The District's action in discharging the Grievant was consistent with the severity of the offense and with the District's legitimate desire to reinforce its policy that all children receive the utmost care and safety while on District busses. Indeed, failure to impose discharge in such a case as this could very well subject the District to serious liability.

Even if the Arbitrator views the seven just cause standards to be appropriate in this proceeding, the District's discharge of the Grievant was consistent with the just cause test. The District's discharge of the Grievant was for just cause and, therefore, the grievance must be denied.

DISCUSSION

There is little, if any, dispute as to the Grievant's conduct on January 29, 1992. The Grievant left a four year old child unattended on a District vehicle for approximately four hours at a time when the vehicle was parked in the District's bus garage. While the temperature in the bus garage may have been in the fifties, the outside temperature was below freezing. When the four year old, who had apparently fallen asleep, awoke, she tried unsuccessfully to leave the garage. When she was found by the District, she was embarrassed because she had wet her pants.

The event traumatized the child to the extent that she had nightmares, developed an aversion to being left alone, and would not ride the District's van unless accompanied by an adult. The District responded by assigning a District employe to accompany the child while the child was on the van. At issue, is whether the Grievant's conduct in leaving the child in the bus on January 29, 1992, provided the District with just cause to discharge the Grievant.

On the morning in question, the Grievant was driving the van that she normally drove. She began her morning route by picking up the five children who normally rode her van on that day of the week. The Union does not claim, and the record does not establish, that the Grievant did not know that she had picked up the five children.

It is true that, after picking up the children, she did not end her trip at Bruce, as she normally did, but rather, continued on to Ladysmith. It is also true that Mary Kay did not sit in her regular seat on that day. Undoubtedly the change in the route, as well as the radio communications which lead to the route change, created confusion. The undersigned, however, does not consider any of these events to have created conditions so chaotic that the Grievant, an experienced bus driver, had a reasonable basis to overlook the fact she had delivered only four of her five regular passengers.

As the Union argues, the District does not have a policy requiring District bus drivers to check their buses after every run. However, as the District argues, the District is not required to promulgate policies to cover all aspects of employment with the District. The safe transport of children is a fundamental duty of a bus driver, such as the Grievant. The District has the right to require bus drivers, such as the Grievant, to use reasonable care in transporting children without defining all of the conduct which constitutes reasonable care.

At the time that the District's Board of Education made the decision to discharge the Grievant, the Board was aware that Ben Loda, the District's Bus Mechanic for forty years, thought that discharge was too severe. The District's Board of Education was also aware that the District Administrator considered a final warning to be appropriate. While the District's Board of Education was certainly entitled to give consideration to the opinions of Loda and the District Administrator, the District's Board of Education was not bound by those opinions. 1/

In a similar factual situation, the St. Paul Head Start Program suspended, rather than discharged, an employe bus driver. 2/ The fact that another employer may have made a decision which differed from that of the District's Board of Education does not demonstrate that the District's decision to discharge the Grievant was without just cause.

On March 22, 1991, the Grievant received a letter from former District Administrator Schuchardt regarding "numerous accidents" with District busses involving the 1988-89, 1989-90, and 1990-1991 school years. Regardless of whether or not this letter is a written reprimand, it is evident that the Board of Education did not consider the March 22, 1991 letter when making the determination to discharge the Grievant. Rather, this determination was based solely on the January 29, 1992 incident.

As both parties recognize, the Grievant did not intentionally abandon the child. As both parties also recognize, the Grievant was greatly distressed by the incident and immediately apologized to the parents of the child. The Grievant's remorse, however, does not alter the fact that the Grievant did not exercise reasonable care in transporting Mary Kay when she left Mary Kay on the van which the Grievant had parked in the District's garage. Not only did the Grievant's conduct seriously endanger the health and safety of a four year old

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1/ Of course, the District Administrator's recommendation to the District's Board of Education also indicated that it would be appropriate to discharge the Grievant, which recommendation the Board did follow.

2/ The conduct giving rise to the suspension occurred after the District's Board of Education decided to discharge the Grievant.

child, but it provided the public with a reasonable basis to question the District's ability to safeguard the health and safety of other students which have been placed in the District's care. 3/

St. John's Pre-School was not one of the District's schools and it is not evident that the District had any control over St. John's policies and procedures. Despite the Union's argument to the contrary, the failure of St. John's to inquire why Mary Kay did not arrive at school on January 29, 1992, does not mitigate the seriousness of the Grievant's conduct.

Prior to the time that the District's Board of Education made the decision to discharge the Grievant, the Grievant and the Union were provided with the opportunity to respond to the District's charge that the Grievant failed to account for and properly care for a child she was transporting. Presumably, the Union argued, and the District rejected, the same" mitigating factors" which are argued herein.

Despite the Union's argument to the contrary, the "mitigating factors" relied upon by the Union, including the Grievant's length of service with the District, do not warrant a finding that discharge is too severe a penalty for the Grievant's conduct on January 29, 1992. The undersigned is satisfied that the District's Board of Education had just cause to discharge the Grievant.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The Grievant was discharged for just cause.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 13th day of August, 1992.

By _____
Coleen A. Burns, Arbitrator

3/ While the Board of Education may not have been aware of all of Mary Kay's problems, it was aware that Mary Kay would not ride the van unless accompanied by an adult and that she had been emotionally affected by the incident of January 29, 1992.