

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 THE CITY OF BROOKFIELD PUBLIC : Case 81
 EMPLOYEES UNION, LOCAL 20, AFSCME, : No. 45594
 AFL-CIO : MA-6659
 :
 and :
 :
 THE CITY OF BROOKFIELD :
 :

Appearances:

Mr. Roger E. Walsh, Attorney at Law, Davis & Kuelthau, S.C., 111 East
Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME,

Kilbou
 AFL-CI

ARBITRATION AWARD

On April 22, 1991, the Wisconsin Employment Relations Commission received a request from the City of Brookfield Public Employees Union, Local 20, AFSCME, AFL-CIO to provide a member of its staff to hear and decide a grievance pending between it and the City of Brookfield. Following jurisdictional concurrence from the employer, the Commission, on June 4, 1991 appointed William C. Houlihan, a member of its staff, to hear and decide the matter. A hearing was conducted on September 30, December 2, December 9, 1991 and April 2, 1992, in Brookfield, Wisconsin. Post-hearing briefs and reply briefs were filed and exchanged by July 8, 1992.

This Arbitration Award addresses the December 4, 1990 discharge of employe Ricky Flood for "curbing" and for falsifying information submitted in his employment application.

BACKGROUND AND FACTS

The Grievant, Ricky Lee Flood, was hired by the City of Brookfield as a Maintenance Specialist in its Wastewater Treatment plant on November 30, 1987. On January 30, 1989, he transferred to the water department as an Operator/Laborer, where he worked until the date of his discharge, December 14, 1990. It is the water meter reading portion of the job that ultimately led to Mr. Flood's discharge.

The City of Brookfield reads water meters four times a year, in March, June, September and December. The meters are read and the data is entered into a hand-held computer called a "DataCap", manufactured by a company named ITRON. The hand-held computers are frequently referred to as ITRONS. A route is loaded into the hand-held computer, and the meter reader then proceeds to walk that route, going from house to house to read each water meter and enter the number corresponding to the water usage, that is displayed on the outside register into the hand-held computer. While the routes are programmed in, the reader is not required to follow the programmed route. Upon arrival at any given house, the DataCap screen displays a register number for that location which should correspond to an identification number on the water meter. Additionally, each house is identified by street address. The meter reader then reads the number displayed on the outside register, measuring water use and inputs that number into the DataCap. When the meter reader finishes his route for the day, the data in the DataCap is transferred to and stored in a computer at the water utility office. Water bills are prepared from this information. The DataCap also records the hour of the day that any particular meter reading was input. In addition to the identification number and household address, the computer stores a considerable amount of data, including

the last meter reading for the house, and the amount of water used in the last quarter. The computer is pre-programmed to anticipate a reading for each house in question. It has a range of acceptable readings that anticipates the reading for any individual house. If the reading falls within the prescribed range the computer has been programmed to accept as tolerable, it accepts the reading. If the reading falls outside the scope of that range, the computer so indicates. This is intended as a method to avoid operator error. Mr. Flood had read meters at least twice a year, in March and June, in 1989 and 1990.

Prior to his discharge, Mr. Flood had not been previously disciplined.

In March of 1990, William Carnell, the operations supervisor, was preparing a number of reports from the data entered into the system from the March meter readings. Carnell became perplexed at some of the data produced by Mr. Flood's readings. Specifically, the read order numbers did not correspond with the meter sequence numbers. The read order numbers are a sequential listing of addresses arranged in the order in which they are read. The meter sequence numbers list the times at which the corresponding address was read. Carnell's confusion was that the two orders did not correspond to one another.

Logically, reasoned Carnell, they should. Carnell decided to contact the DataCap maker, ITRON, to request assistance. He forwarded the route reports to ITRON and ITRON replied that they needed further information to perform an analysis. Carnell, busy at the time, did not pursue the matter. Instead, he decided to wait until the June meter reading to see what, if anything, it would bring. It was his intent if the June readings also proved confusing, to forward that data to ITRON.

Shortly after the June water meter readings, Doug Repta, a water utility operator, and co-worker of Mr. Flood's, approached Carnell and indicated that Ricky Flood had been in the White Hen Pantry talking to employees numerous times on June 4, 1990. Repta advised Carnell that those employees had indicated to him that Flood had indicated to them that he was able to read meters while in the store. Repta suggested that it was appropriate for Carnell to talk to those employees.

The next morning, Carnell stopped into the White Hen Pantry, to talk to the employees. Those individuals advised him that Flood had been in there a "large number of times" and while he was in there he had bragged that he could "beat this system and he would show them how". It was the testimony of Stephanie Tripoli, owner/operator of the White Hen Pantry, that "Ricky came in at the times that other City employees did not come in. Times that weren't breaks, there weren't lunches, things like that. Most of the other City employees came in on their breaks, lunches, or before work." She indicated that on June 4th, Flood came into her establishment six times. It was her testimony that she asked Flood if he wasn't afraid of getting fired by coming in all the time. According to Ms. Tripoli, Flood replied that he wasn't worried about it, and that he was reading meters and that he could make it look like he was out reading meters when he wasn't actually. She indicated that he held up his ITRON and began to show her by punching buttons that he could do so. "He punched in some numbers, the machine beeped and he said 'You know, now they think I read a meter, basically.'" On cross-examination, Tripoli was asked if it was possible that Flood had indicated that he wasn't able to make the machine work. Her response: "No, that was absolutely not." Tripoli's testimony was corroborated by a co-worker, Bonnie Kirnbauer. Kirnbauer corroborated Tripoli's testimony that Flood visited the White Hen Pantry six times on June 4th and also the details of the conversation between Flood and Tripoli and further the demonstration of how to read a meter while in the store.

Carnell talked to a number of Flood's co-workers. Doug Repta testified that he overheard a conversation between Flood and Randy Demmitt. According to Repta, he heard Flood indicate on several occasions that "he had the ITRON

beat". Repta testified that Flood had advised co-workers that he could make the computer do what he wanted it to do. 1/ Randy Demmitt testified. According to Mr. Demmitt, Flood advised him that "he could fix, beat, or something with the ITRON." Michael Terry, a water department employe, testified. It was his testimony that he had two separate discussions with Flood relative to operating the ITRON. In approximately March or April, 1990, Flood indicated to Terry that "he knew how to change the time in ITRON, in the unit." Terry indicated that all employes that use the unit know how to do that, but "the thing that stuck in my mind was that he said to me that he could really screw them up if he wanted to." On a second occasion, near the June meter reading, the two men were sitting in a truck. According to Terry, Flood indicated "that he knew how to read meters from in the truck without actually going out to read the meter."

Reduced to its basics, "curbing" is a practice of using the capabilities of the hand-held DataCap computer to project water meter readings without actually physically viewing the meter. It essentially operates like this. The operator programs a projected reading into the system. If the computer rejects that number, it indicates whether the number is higher or lower than the tolerance zone that has been programmed in. By pushing a second button, the operator is then able to call up the last meter reading and the last quarterly water usage. By doing some simple arithmetic, and re-entering a reading, the projected or anticipated water usage number can be input into the system without ever going to the house. The computer itself indicates by either accepting or rejecting the programmed number, whether the input number falls within the range of tolerance. This practice is a bit of a "hit or miss" practice, leaving a record or entries and re-entries into the system. Evidence of curbing can be found by scanning the print-out sheet for a series of re-entries, signifying a period of time which the operator was located in a single site doing a series of "readings". The unit's clock also provides evidence of "curbing". The clock registers the time at which each entry is made. Out-of-sequence time entries suggest either confusion or curbing. Entries where there are protracted delays from one house to another followed by a rapid series of entries and re-entries suggests the possibility the operator took a break and then came back and punched in a series of houses. That, or that the operator took fifteen to twenty minutes to walk from one house to another and thereafter made it from house to house in a period of anywhere from ten to twenty seconds.

Carnell reviewed Flood's June readings. He found a series of sequential re-enters within those readings. He also found that the clock times did not correlate to the reads. He found that at least one sequence of re-enters was near the White Hen Pantry. He found that the time clock on the ITRON had been changed twice in one day. There was an explanation for the first but not the second change. He found on one occasion that it had taken two hours to read ten meters. That included a one-half hour lunch break.

Carnell reviewed the number of re-entries submitted by all City meter readers in June. He found that Flood had 80. There were a total of 116. The other employes reading meters had 9, 12, 10, 2, 3, and 0 re-entries. Mr. Flood accounted for 69% of all re-entries in June, 1990. Carnell regarded these statistics coupled with the data from his other sources as highly suspicious.

1/ The record reflects that Repta and Flood bore a good deal of animosity toward one another. The two men had engaged in an altercation for which Repta was given a disciplinary suspension.

He believed that a pattern of abuse existed, particularly since Flood had read the same routes in prior years with relatively few re-entries.

In March, 1989, Mr. Flood had made 742 readings with a total of one re-
enter. In June, 1989, Flood made 793 readings with a total of 6 re-entries.
In March, 1990, he had 795 readings with a total of 23 re-entries. Flood had
read the same route in 1989 and had only one re-entry in 156 readings at that
time.

On July 23, 1990, Mark Simon, the superintendent of the water utility,
sent a letter to Debbie Gofton, the customer services representative for ITRON,
wherein Simon presented Gofton with the readings taken by Flood in June. Simon
indicated to Gofton that he had concerns that Flood was abusing the system.
Gofton replied by letter dated August 9, 1990, which letter analyzed in five-
page detail the data submitted. It indicates the existence of discrepancies,
indicated that the reader was having a problem reading the meter or entering a
correct read, characterized a number of hi-low reads attempts as "excessive",
explains one sequence of entries as "an attempt to confuse the DataCap", makes
other similar comments and directs Mr. Simon to an investigator in Texas. That
letter evidently prompted a telephone call from Simon and Carnell to Gofton.
Gofton replied by letter dated September 7, 1990, the contents of which are set
forth below in their entirety:

September 7, 1990

Mr. Mark D. Simon
Mr. Bill Carnell
City of Brookfield
2000 North Calhoun Road
Brookfield, WI 53005

Re: Analysis of Meter Reader/Route Statistics

Dear Mark and Bill:

Per our telephone conversation on this date, I am
writing this additional letter for clarification of my
interpretation of the Meter Reader/Route Statistics
reports. Itron does stand behind my analysis as
follows:

There is a definite opportunity for a meter reader to
"Curb" readings while utilizing the Itron DataCap.
"Curbing" is a term utilized by the meter reading
industry and simply means that a meter reader is
entering readings, but is not actually going to each
meter's location to get those reads. In other words,
the meter reader could be sitting on a curb or
restaurant somewhere, for example, and entering
readings which he feels could be accurate reads.

Curbing can be simplified for a meter reader, by allowing
the meter readers to view previous usage and the
previous reading on the DataCap. This allowance can be
controlled by parameters in the Itron system software.

A meter reader could potentially view the previous
reading and the previous usage and then calculate what

an accurate reading could be, based upon the previous month's data.

An analysis of the Detailed Route Report and the DataCap H Output and Input Reports for Route 01001, indicates that there is a definite and deliberate manipulation of the data and the time. The time is "stamped" in the CLOCK column of the Detailed Route Report. This time indicates the last time the meter was read. Therefore, if a meter was read twice, the time it was last read would be the time entered on the report. The READ ORDER column on the Detailed Route Report is the read order which a meter was first read.

A second read would not "restamp" a new read order number in this column. Another thing to remember is the "ELAPSED" column on the Detailed Route Report. This column is the elapsed time between each meter reading. This is an accumulative column. This means that if a meter was read twice, the elapsed time from the first read and the elapsed time from the second read would be added, for a total elapsed time.

The DataCap H Output Report shows the amount of reading reenters under the RE-CNT column. It also indicates the amount of time a reading failed hi-low calculations. This is displayed under the H/L ATT column. There is an extremely high amount of hi-low attempts and reenters for Route 01001. Route 01001 was read on June 4 and 5, 1990, per the Meter Reader Statistics report. There are a total of 32 reenters and 13 hi-low attempts. The Meter Reader Statistics report also indicates the amount of Exceptions for this route. Exceptions are the number of Elapsed times which are 15-30 minutes long, 30-45 minutes long and 45 minutes or greater long, which would indicate the number of "breaks" taken. There are a total of 2-15 minute breaks, 1 30-minute break and 2 45-minute breaks for the two days total. An example of how reading reenters, without getting a hi-low attempt on the report, can be accomplished is by entering a can't read and then clearing that can't read out and entering a reading.

There is no possibility of DataCap error which would cause these types of conditions on the reports indicated above.

I hope that this information will be useful to you in your endeavors. If you have any further questions, please do not hesitate to contact me.

Best regards,

Debra S. Gofton /s/
Debra S. Gofton
Client Account Analyst

Carnell and Simon brought their concerns relative to Mr. Flood to James

Toby, the City's Director of Human Resources. The two men asked Toby, the newly-hired Human Resources Director, to begin a review of Flood's employment files. Toby did so during the late summer and fall of 1990. Toby utilized the services of the City's police department in reviewing Flood's background. It was Toby's conclusion following his review that Flood had falsified his employment application by falsifying his high school records, his Navy record, his college and other educational records, and by masking his prior criminal record.

On September 12, 1990, Mark Simon and Bill Carnell met with Ricky Flood and two union representatives, William Winget and Daryle Fiene, to discuss the City's belief that Flood was curbing water meter readings on June 4 and 5, 1990. At that meeting, Simon indicated to Flood that it had been reported to the utility that Flood had claimed that he could fool the DataCap to make it appear that he was reading meters when he was not. Flood denied making such a statement. Flood indicated during the course of a lengthy conversation that he had been at the White Hen Pantry on two occasions to get coffee. He denied being there six times. He advised those in attendance that he had gone in to the White Hen when the DataCap was not working to get coffee. He indicated that it was 100 degrees out that day, and subsequently indicated that he may have been there five times. He denied manipulating the instrument.

On December 7, 1990, Simon and Carnell met with Flood and union representatives Gerald Wold and Ray Putchinski, to discuss the City's ongoing concerns regarding Flood's use of the DataCap. During the course of the discussion, Flood and Wold requested a postponement to permit Flood to consult with an attorney. The discussion was thereafter terminated. The parties met again on December 11, 1990 with Simon and Carnell present for the City and Flood represented by union representative David White and local union representatives Wold and Putchinski. On December 14, 1990, Simon issued the following notice of discharge:

Ricky Flood
221 Randall Street
Waukesha, WI 52186

NOTICE OF DISCHARGE

As a result of the City's investigation and my discussions with you on September 12, 1990, December 7, 1990, and December 11, 1990, I have come to the following conclusions:

You falsified meter readings on June 4th and 5th, 1990 which allowed you to spend an excessive amount of non-working time at the White Hen Pantry at 18330 Capital Drive during regular working hours.

In addition, in order to gain employment with the City of Brookfield, you falsified your application and resume for employment in several areas: education, military record and service, and criminal conviction record.

Further, your refusal to fully cooperate in the investigations regarding these matters convinces me that you are still unwilling to provide the City with a true and accurate record of your activities since grade school, although I postponed these proceedings from

December 7, 1990 to December 11, 1990 to give you time to reconstruct these key events in your life.

These falsifications will not be tolerated. Therefore, you are hereby notified that effective immediately, you are discharged from employment with the City of Brookfield.

Mark D. Simon
Mark D. Simon
Water Utility Superintendent

I have received a copy of this notice on 14 December, 1990.

Ricky Flood /s/
Ricky L. Flood

During the processing of this grievance, in September of 1991, union representative White and Human Resources Director Toby had a discussion relative to proceeding. According to Toby, White advised him that unless he (White) heard from Flood on or before September 20, he would drop the grievance. White indicates that he and Toby discussed the matter and that he (White) advised Toby that unless he heard from Flood prior to September 20 he would request that grievance arbitration be postponed.

The initial grievance was filed on December 14, 1990 and was denied on December 21, 1990. The union appealed the grievance to Step Two on January 16, 1991, and the grievance was again denied at Step Two on January 29, 1991. The Union appealed the grievance to Step Three on January 31, 1991 and the grievance was again denied at the Step Three level on March 8, 1991. On March 8, 1991, Toby wrote White requesting that the union advise the employer how it intended to proceed on the matter. On April 16, 1991, Toby sent White yet another letter regarding the union's failure to process the Flood grievance and set April 23, 1991 as a deadline for the union. White submitted a request to initiate grievance arbitration to the Wisconsin Employment Relations Commission on April 19, 1991.

On June 14, 1991, the Wisconsin Employment Relations Commission formally designated the undersigned as arbitrator in this matter. On that same date, I sent the parties a letter confirming arrangements to schedule the hearing on this grievance on July 1 and 2, 1991. On June 15, 1991, White wrote seeking a postponement of the hearing date and indicated "there are some unexpected scheduling conflicts that render it impossible for the union to proceed on July 1 and 2." The July 1 and 2 hearings were cancelled at White's request. The parties established new hearing dates through a telephone conference and on June 20, 1991, I sent a letter to the parties confirming August 6 and 7 as the new hearing dates. It was White's testimony that shortly after receipt of this letter he received a phone call from Mr. Walsh's office indicating that August 6 and 7 were not good for the City. White thereafter gave those dates away. Mr. Walsh subsequently called White to indicate that the City was ready to proceed on August 6 and 7 and White replied that he no longer was available August 6 and 7. A new hearing date was established for September 30 and October 1, 1991. Those dates were eventually cancelled when Mr. Flood failed to contact the union in response to its certified letter as previously discussed. New hearing dates were then scheduled for December 2 and 12, 1991.

ISSUE

The Union believes the issue to be:

Did the Employer have just cause to discharge the grievant?

The City believes there to exist three issues. The City advances the following:

1. Is this grievance barred because of an agreement between the Union and the City that the Union would withdraw the grievance if the Union had not been contacted by the grievant on or before September 30, 1991?
2. Is this grievance barred because it has been untimely appealed to arbitration by the Union and/or because of the delaying tactics of the Union?
3. Did the City have proper cause to discharge the grievant, Ricky Flood, on December 14, 1991? If not, what is the appropriate remedy, taking into consideration the Union's delay in appealing the grievance to arbitration and the Union's delaying tactics in setting the hearing for this grievance?

I believe the issue to be:

1. Is the Union procedurally barred from proceeding to a hearing and decision on the merits? If not,
2. Did the City have just cause to discharge the grievant? If not, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE I - MANAGEMENT RIGHTS

1.01. Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested in the Employer. The Employer may discharge an employee serving the initial probationary period pursuant to Article III without regard to proper cause.

1.02. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him for such period of time involved in the matter, except as may be modified in the grievance and arbitration procedure established hereunder.

1.03. The Employer may adopt reasonable rules and amend the same from time to time.

1.04. Any rights or privileges not specifically delegated or modified herein shall be deemed to be retained by the Employer.

ARTICLE XXVII - GRIEVANCE PROCEDURE

27.01. A grievance is defined as a violation of the terms or conditions of this Agreement or as to its application.

27.02. A grievance shall be handled as follows:

Step One: The aggrieved employee, the Union Committee, and/or the Union representative shall present the grievance to the immediate supervisor.

Step Two: If a satisfactory settlement is not reached as outlined in Step One within one (1) week, the Union Committee and/or the Union steward shall present the grievance in writing to the head of the department. Such a meeting as outlined in this Section shall be held within one (1) week of receipt of written request from the other party.

Step Three: If a satisfactory settlement is not reached as outlined in Step Two, the grievance may be appealed to the Common Council or its designated representative. If the appeal is not answered by the Council or its designated representative within fourteen (14) days, the grievance shall be deemed denied.

Step Four: If a satisfactory settlement is not reached as outlined in Step Three, the grievance may be further appealed to final and binding arbitration. The arbitrator shall be named by the Wisconsin Employment Relations Commission. The costs for such arbitrator shall be borne equally by the Employer and the Union.

27.03. The time limits mentioned in Section 27.02 above may be extended by mutual consent of the parties involved.

ARTICLE XXVIII - TERMINATION

28.01. Termination reports shall be in triplicate and signed by the Employer and employee (if he is available) when an employee is separated from employment for any reason, or is granted a leave of absence.

28.02. When an employee is to be discharged or disciplined for an alleged act or omission which is not contemporaneous, such discharge or discipline shall be withheld until a Union steward or officer is present, providing his presence can be obtained within a

reasonable period. If such Union steward or officer cannot be located within a reasonable period of time, or if the act or omission of the discharged employee occurs concurrently with consideration of discharge or discipline, the allegedly offending employee may be discharged or disciplined forthwith, providing that if nothing in the alleged acts or omission or in the conduct or consideration of the allegedly offending employee represents a present danger to other employees or citizens, a risk to the property of the City, or a reflection upon the reputation or services of the City, the proposed discharge or discipline shall be deferred until the Union steward or officer is present if his presence can be obtained within a reasonable time.

28.03. One (1) copy of the termination report shall be retained by the Employer, one (1) filed with the Union, and one (1) given to the terminated employee.

POSITIONS OF THE PARTIES

The Employer contends that this grievance is barred because of an agreement between the Union and the City that the Union would withdraw the grievance if it had not been contacted by the grievant on or before September 20, 1991. Relying upon the testimony of James Toby, the Employer contends that the parties had essentially agreed that the grievance would be dropped if the Union did not hear from Flood by that date. The date passed. The Employer believes there was a commitment that the grievance be dropped. The Employer argues that I should hold the Union to that commitment.

The Employer contends that this grievance is barred because it has been untimely appealed to arbitration by the Union, and/or because the Union has engaged in delaying tactics. The Employer holds the Union responsible for the extreme delay witnessed in this proceeding. This delay, the Employer characterizes, is an unreasonable abuse of the grievance procedure that should not be tolerated. For this reason alone, the Employer contends that the grievance ought be dismissed.

The Employer argues that it had proper cause to discharge Ricky Flood on December 14, 1990. The Employer argues that Flood falsified his meter readings on June 4 and 5, 1990, which allowed him to spend an excessive amount of non-working time at the White Hen Pantry on Capitol Drive during regular working hours. The Employer relies upon the statements taken from and testimony provided by the White Hen Pantry workers, Tripoli and Kirnbauer. Additionally, the Employer relies upon the testimony of Repta, Terry, and Demmitt.

Kimberly Dolan was called as an expert witness. Dolan testified that the ITRON readings produced by Mr. Flood's meter reading fit the classic description of "curbing". Dolan testified as to the technical aspects of "curbing", and indicated that Flood's data input was consistent with "curbing".

The Employer points out that when first confronted with an allegation that he had been in the White Hen Pantry, Flood indicated that he had been there on two occasions and subsequently said he was there on five instances. Flood initially indicated that he had gone there because the temperature was in excess of 100 degrees on that day. Carnell subsequently found the temperature ranged between a low of 37 to a high of 65 degrees on that date.

The Employer's background check of Mr. Flood's employment application revealed that Mr. Flood had falsified his high school records, his Navy record, his college and other educational records and had concealed the existence of a prior criminal record.

The Employer cites arbitral authority supporting discharge on the basis of dishonesty. He took excessive break time and thus stole production time from the Employer. The Employer cites further authority for the propriety of a discharge for falsifying employment applications.

It is the position of the Union that the Employer offered no proof that Flood was in fact engaged in "curbing". Neither Tripoli nor Kirnbauer knew what Flood was doing with the ITRON that day in the White Hen Pantry. Their testimony cannot thus be viewed as proof the grievant was engaged in curb reading. The Union attacks the testimony of Repta as being too vague and notes the personal animosity that Repta bears toward Flood. The Union contends that Repta's testimony must be discarded. Similarly, the Union attacks the testimony of Terry and Demmitt as too vague. The Union notes that the grievant registered high readings on three occasions and two "cannot locate" readings for two others. The Union contends that if he were "curbing" this would not have happened. The Union notes that the grievant explains the out-of-time sequence by his own testimony that he got lost.

The Union notes that the Employer did follow-up rechecks of allegedly curbed readings and could not expose the grievant as having curbed on a single instance. The actual follow-up readings were consistent with Mr. Flood's readings. The Union engaged in an interesting statistical analysis of the possibility of having four re-checked reads, all alleged to have been the product of curbing, verified if Flood was actually curbing. It concludes the possibility to be less than one-tenth of one percent. The Union argues this inferentially proves that Flood could not have been so engaged. The Union points its finger at the City's investigation of this matter. Had the City truly been interested in whether or not Flood was "curbing", it could have followed up in June, but failed to do so. By the time it did follow up, whatever evidence existed either to convict or exonerate Flood was stale.

The Union points out that a number of employes were having difficulty with their ITRON units on June 4. All employes had time changes recorded. The Union points out that the units were not working properly, and that explains the time change. The Union notes that Carnell actually changed the tape and battery on one occasion.

The Union argues that the job application issue is a phony one. The Union believes the City is trying to buttress its weak "curbing" claim. The two are unrelated. The City had three years to investigate Mr. Flood's application and failed to do so. The Union believes that much of what the City objects to is either erroneous, dated or constitutes a difference of interpretation of employment questions asked.

Finally, the Union argues that discharge is too severe a penalty. Flood has never been disciplined before. The City took six months to invoke this discipline against Mr. Flood. The Union believes the delay compromised the grievant's ability to formulate an effective defense.

In its reply brief, the Union notes that if the two store witnesses are to be believed, then Mr. Carnell knew of the allegations of "curbing" in June and did nothing about it. The Union believes that the protracted delay was an effort on the part of the City to unearth dirt, and what at least may have started out as an investigation became a persecution.

In its reply brief, the City explains the entry of three high readings and two "cannot locate" in Mr. Flood's database. The City points out the area was a new development. There was thus no data base upon which Mr. Flood could build in order to curb. All six of the entries in that development show re-enters, even though ultimately, two of the sites were identified as "cannot locate". The City points to one time lapse of eleven minutes between adjacent homes and twenty-eight seconds between the readings of subsequently adjacent homes and says this time lapse makes no sense.

DISCUSSION

The Employer argues that an agreement between Toby and White to drop this grievance bars this proceeding. Toby and White testified to conflicting versions of their pre-September 20 conversation. I do not know what Toby and White said to one another, or what they agreed to, if anything. The testimony conflicts, and conflicts meaningfully. I will not bar access to a hearing on the merits in a discharge case on the basis of such an uncertain record.

In essence, the Employer contends that the Union is guilty of "latches". Unquestionably, this case has witnessed a good deal of delay. The Union is responsible for a considerable amount of the delay. However, it is true that the City took six months to investigate Mr. Flood. The City can hardly claim that it has moved forward expeditiously given its own delay in that investigation. It may well be that the City initiated the phone call cancelling the August hearing dates. While it quickly attempted to confirm, or re-confirm those dates, the dates were subsequently lost. One set of dates were cancelled when I came down with the flu. I am unwilling to deny Mr. Flood a decision on the merits of his discharge because of this delay. No one's hands are entirely clean on this issue.

I believe the Employer had just cause to discharge Mr. Flood. The physical evidence suggests "curbing". There exists a high number of entries/re-entries which cannot otherwise be explained. I do not believe that on those various occasions, Mr. Flood was lost. He had read the same routes in prior years, seemingly without difficulty. The high number of entries/re-entries is unexplained in either relative or absolute terms. On a relative basis, he accounted for over two-thirds of all re-entries among seven workers. It was Gofton's testimony that his number of re-entries suggested an investigation into "curbing". That is, the number of re-entries submitted by Mr. Flood were high as an absolute measure. Flood's testimony does nothing to meaningfully explain the numbers of re-entries. The same is true of the out-of-time sequencing. That is, there is no explanation, other than "curbing", to explain why sequential data entries frequently lacked corresponding sequential time entries. Similarly, there are time lapses which were not explained on the record. There were extremely lengthy time lapses between certain houses and incomprehensibly short time lapses between others. The second clock change on June 4 is also not adequately explained in the record.

The expert testimony of Ms. Gofton convinced me that the data submitted by Mr. Flood was consistent with curbing. It was her testimony that machine malfunctioning could not explain the rather curious and perplexing data submitted by Mr. Flood. I was persuaded that the data submitted by Flood was consistent with curbing, absent some convincing explanation to the contrary.

I believe the testimony of Mr. Flood's co-workers was to the effect that he bragged of his ability to beat the system. I would be prepared to disregard Mr. Repta's testimony, given the relationship between Flood and Repta. However, in my view, Mr. Terry's testimony was by far the most damaging. According to Terry, Flood indicated that he could read meters from the truck. The Union attacks the testimony of these co-workers as too vague. I disagree.

There was nothing at all vague about Mr. Terry's testimony.

There is the further testimony of the employes of the White Hen Pantry. Their testimony made clear two facts. The first was that Mr. Flood spent an inordinate amount of work time in the store on June 4. He came in on numerous occasions and those occasions were not traditional employe break periods. The second aspect of their testimony I found compelling was that according to both employes, Flood bragged that he could make them think he was reading meters while in the store. While I agree with the Union's contention that neither of these employes were in any position to know precisely what Mr. Flood was doing with the ITRON while in the store, I believe that they testified as to what they saw and heard. I believe they were accurate in their testimony with respect to the number and frequency of visits and also with respect to the comment made by Mr. Flood.

In summary, given the testimony of the three co-workers and two White Hen store employes, I believe it is fair to conclude that Mr. Flood took considerable time away from his job and bragged that he could beat the ITRON system. I am not willing to simply disregard all of this testimony.

It is my conclusion, based upon an explanation of the physical evidence, the expert testimony of Gofton, and the corroborating testimony of three different employes and two store employes, that Mr. Flood was engaged in the practice of "curbing". I am further convinced that Mr. Flood has categorically denied engaging in any of this behavior. He denies making the comments attributed to him in the store. He denies engaging in the "curbing". He offers no meaningful explanation for the hard data that seems to point toward "curbing". He denies making the statements attributed to him by his co-workers. He denied any and all of this behavior through the various stages of the grievance procedure. I do not find Mr. Flood's testimony credible.

Based upon his actions, and his subsequent denials, I believe the City has just cause for his discharge.

In light of the foregoing, I do not believe it is necessary to comment on the second basis for Mr. Flood's discharge.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 22nd day of January, 1993.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator