BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between NORTHWEST UNITED EDUCATORS and CAMERON SCHOOL DISTRICT	Case 30 No. 52255 MA-8892

Appearances:

Northwest United Educators, by Mr. Michael J. Burke, Executive Director, appearing on behalf of the Union.

Weld, Riley, Prenn and Ricci, S.C., by Ms. Kathryn J. Prenn, appearing on behalf of the District.

ARBITRATION AWARD

The Employer and Union above are parties to a 1994-97 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve the discharge grievance of Dixie McIntyre.

The undersigned was appointed and held a hearing on April 24, 1995 in Cameron, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the Employer filed a reply brief. The record was closed on August 14, 1995.

Stipulated Issues:

1. Did the District have just cause to terminate the grievant?

2. If not, what is the appropriate remedy?

Relevant Contractual Provisions:

ARTICLE IX - JUST CAUSE

> No employee shall be disciplined, discharged, suspended, or reduced in compensation for disciplinary reasons, without just cause.

Discussion:

Grievant Dixie McIntyre was first employed by the District in 1977, and worked until October, 1994 primarily as the study hall supervisor in the junior high school. In the 1993-94 school year, McIntyre began to work each day for a short period in the cafeteria which serves the junior high school and the high school, operating the "accuscan" machine which registers sales, and making change. The grievance arises because on November 16, 1994 the District suspended, and on November 29 terminated, the grievant allegedly for skimming cash from the lunch sales.

Superintendent Howard Hanson testified without contradiction that about October 27, 1994 two food service workers came to him to report a discrepancy between the "plate count" and the "accuscan". The employes, Peggy Hansen and Carolyn Crotteau, work in the high school cafeteria; Crotteau is "unit director", i.e., local president, of the Union. Hansen is one of two cooks at the cafeteria, while Crotteau worked as accuscan operator following McIntyre each day, taking over as the high school students arrived. Crotteau and Hansen told Superintendent Hanson that since October 7, they had generated separate accuscan tapes for the junior high and senior high school lunch periods. Superintendent Hanson told them to continue running the two separate tapes, and proceeded to engage in several other forms of checking.

Hanson's testimony concerning the verification which the District then engaged in was supported by other witnesses, and substantially unrebutted. This included checking the accuscan tape count following the junior high lunch period for the following 22 days after October 7, 1994. On 21 of the 22 days, the tape counts showed fewer meals served than the "plate counts" for those days. It is undisputed that the cooks have a system of distributing plates to students which includes counting the number of clean plates issued, by stacking them to a marked line on the wall, and then counting the remainder at the end of the lunch period involved. Hansen testified without contradiction that when a student has occasionally dropped a plate, that plate has been replaced from a different stack, thus ensuring the integrity of the plate count. Most students pay by debiting an account via the accuscan machine; each day, a fluctuating number of students and teachers pay in cash. It is undisputed that the number of meals recorded in both cash and accounts totalled in the accuscan machine matched the cash receipts at the end of each day.

On the one day during the applicable period when the grievant's accuscan count matched the plate count, November 14, 1994, Superintendent Hanson was standing behind the grievant during the entire junior high lunch period, at a distance of two to three feet.

The accuscan tape tallies for the lunch periods staffed by the grievant showed an average of 5.5 fewer cash sales to students and .8 fewer cash sales to adults than during the same period of time for lunch periods staffed by employes other than the grievant, but with the same number

of students. 1/ On October 18 and November 3, 1994, however, the grievant filled in for Crotteau and thus worked all three lunch periods. The discrepancies between the plate count totals and the accuscan tape totals on those days were 11 and 10 respectively.

An accuscan machine is used in the elementary school, handling three times as many meals as in the junior high lunch period, but operated by a different employe. Uncontradicted testimony established that the tallies from the elementary school matched the plate counts exactly, with a single (explained) exception totalling one plate.

High School Principal Mike Schoch testified without contradiction that Superintendent Hanson instructed him on two occasions during the 22-day investigation to stand inconspicuously in the lunch room counting students as they emerged from the junior high lunch line, using a clicker. Schoch testified that he turned in the numbers without knowing what the plate count had been on each occasion, and was later informed by Hanson that the plate count and clicker counts were identical.

Hanson testified that based on the checking done during this 22 day period, he concluded that no other explanation was possible than that the grievant was skimming cash from the cash receipts at the junior high lunches, and making the tape match the cash by not entering in the accuscan machine a certain number of lunches sold for cash each day. Several witnesses testified, including the grievant, that the grievant alone of all employes handling the accuscan machine did not use the cash drawer in the machine, but placed cash temporarily in a small box beside the machine, transferring the total to the cash drawer only at the end of the shift. There is, however, no dispute that cash totals have not been counted until the end of the lunch period for all three groups together, because there was insufficient time between the departure of the junior high and the arrival of the two groups of senior high school students.

The grievant testified that at no time did she skim cash from the cash receipts. But like other employes testifying, the grievant also testified that it is almost impossible for a student to get two plates, because the plates are trays with sections and are bulky. The grievant also testified, like other employes, that it is possible for a student to sneak through the line, but uncommon. (The other employes testifying indicated that it was still less likely than that). The grievant testified that she had told Crotteau sometimes that she was not sure if she got all the students on the accuscan machine, but stated she had no idea why she would miss some kids, and she did not have an explanation why two other employes filling in for her had exact accuscan/plate count

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1/ The District continued to tally these numbers for some weeks after the grievant's suspension, and submitted the results in Exhibits E5 and E6.

matches with the junior high school students. The grievant stated that she had no explanation for why the plate count and accuscan machine would not agree when she was working.

Several witnesses testified to the effect that the junior high school students are better behaved than the older high school students, and less likely to cause a disruption in the line which might lead to students being able to sneak past.

The District contends that the key facts are not in dispute, that the District mounted an elaborate and careful investigation of the facts before taking action against the grievant, and that the grievant's testimony is not credible. The District contends that in the November 14, 1994 pre-discipline meeting with the grievant and the Board hearing on November 28, 1994, the grievant did not allege that she had told Crotteau that she had missed some students, and that the grievant is not known to be sloppy or careless in other respects in her work as an aide. The District contends that while the standard to be applied to the disciplinary action is the just cause standard, the basic standards of fairness are what should apply, not the more complex rules devised by Arbitrator Carroll R. Daugherty. The District contends that the penalty of discharge for repeated theft is not excessive or unreasonable, or an abuse of the District's discretion, and that certain offenses including theft have been found by many arbitrators to be so basic that the employe must be deemed to have been aware of the consequences even if there is no prior record of discipline. The District requests that the discharge decision be upheld and the grievance denied. In its reply brief, the District cites several arbitrators' decisions distinguishing discharge for dishonesty or theft from criminal proceedings requiring the "beyond a reasonable doubt" standard of proof. The District further contends that even if the Arbitrator were to believe that the grievant's actions were not intentional, they would certainly constitute a gross dereliction of duties and warrant discharge for that reason.

The Union contends that the appropriate standard for determining a discharge for theft under the just cause provision of a labor agreement is whether there is a high standard of proof, equivalent to that required to prove a criminal offense in court. The Union cites several arbitrators' opinions in support of this view. The Union contends that the evidence available here is solely circumstantial, because the District has no evidence that the grievant was ever observed removing any cash from the cash drawer, and because separate accountings of the cash in the drawer were not made until after another employe had also worked that drawer. The Union further contends that the cash key on the accuscan machine could have been hit by the grievant without hitting the "enter" key, which would have the effect of creating a variation between the plate count and accuscan count totals. Further, the Union contends, there were moments before and after the grievant's lunchroom duties when the machine was unattended, and other employes might have had access to it; and finally, the Union points out that the grievant testified that she told Crotteau that she was not sure she was recording all of the lunch transactions. The Union contends that the most that this evidence can show is possible negligence by the grievant, and that this is not proof of theft or conduct independently warranting discharge. The Union requests that the grievance be upheld, and the grievant returned to work with full backpay and benefits.

I find that the evidence against the grievant is strong enough that the distinction between standards of proof, which has occupied a number of arbitrators under different circumstances, becomes irrelevant in this case. While the cash drawer and machine were apparently left

unattended for a short period each day, the evidence in the record is that the door proximate to the machine was locked by the grievant immediately after the last student had left. The cooks were certain that they would have seen anyone entering from the opposite side as such a person passed their field of view. For anyone other than one of the cooks to have succeeded in removing money from the cash drawer on each of 22 successive days (with a single exception), would therefore, have been extremely improbable. Simultaneously, the cooks themselves are very busy at that time and the absence of any of them consistently from the space behind the counter where they are preparing the next group's meals could hardly pass unnoticed for so many days.

The Union's theory (that the grievant could have been the victim of a combination of students sneaking past and undercounting of cash sales by forgetting to hit the "enter" key) is highly improbable. If the grievant undercounted cash sales, the only way for the cash in the till to balance at the end of each day -- which it did every day except one -- was if someone else subtracted, each day of 21, exactly enough from the till to match the unregistered sales. Not only is there no evidence to support such an assertion, but for another employe to have done this for three weeks running *when management and other kitchen employes were already paying close attention to the problem* would have required remarkable nerve. Two of the three employes apparently in a position to do such a thing, moreover, were those who had notified management of the shortfalls in the first place.

Additional convincing evidence is that the plate counts consistently exceeded the accuscan counts for the grievant on many days in succession, and were off by a larger number on the days in which the grievant worked three shifts of students. The accuscan totals and their relationship to the plate counts would be completely inexplicable in the Union's terms, particularly on the dates when Schoch used a clicker to check the number of students coming through the line, unless it is to be assumed that the students sneaking past the grievant were both very numerous and very consistent from day to day, that no students ever sneaked past any other employe working that line, and that on average slightly less than one teacher a day also elected to sneak past the grievant -- but not past anyone else working that machine. Finally, there is the fact that the single day on which the grievant's accuscan counts matched the plate totals was the day on which Superintendent Hanson stood immediately behind her. I note that there is testimony to the effect that the grievant stayed at this post each day for a period after she ceased to work, thus being in proximity of the machine while she ate her own lunch.

Based on all of the evidence, I find it extremely hard to believe that the grievant could have achieved these results, with such consistency over 22 days, by sheer negligence. I accordingly

conclude that the District has presented sufficient evidence to justify its conclusion that the grievant was skimming cash. I am aware of no arbitrator who would regard repeated theft as an offense not sufficiently severe to warrant discharge, and I am disinclined to disturb the District's judgment in this respect. The grievance is therefore denied.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the District had just cause to terminate the grievant.

2. That the grievance is denied.

Dated at Madison, Wisconsin this 19th day of October, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator