Densenberg #1

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

ISSUE

Was the discharge of the Employee just and proper? If not, what then should be the remedy?

REMEDY SOUGHT

Reinstate the Employee to her position with the Employer and make her whole for monies and benefits lost during her period of separation from employment.

BACKGROUND

The dispute between the union and the employer was not resolved during the grievance procedure, and it ultimately came before this system board. A hearing was held at the union office in City 1, during which the parties were afforded an opportunity to present evidence and arguments. Witnesses were sworn. There was also a visit to the site of the incident in question. Subsequently, briefs were filed.

The 1989-1994 Food Services Agreement provides:

ARTICLE XVI
DISCIPLINARY ACTION

> A. An employee who is to be questioned by Employer Representatives in the investigation of an incident which may result in disciplinary action being taken against him may request a Union Representative to be present. Such Union Representative will not interfere with the Employer's questioning of an employee. However, at the conclusion of the Employer's questioning the Union Representative will be free to ask questions or

clarify facts. The above does not apply to inquiries of employees by Supervisors in the normal course of work.

B. No employee shall be discharged without a prompt, fair and impartial investigative hearing at which he may be represented and assisted by Union Representatives. An employee will also be entitled to an investigative review hearing if he so requests upon being advised of a disciplinary suspension. The hearing will be held before any suspension is served. Prior to the actual hearing the Union and employee will be given copies of any previous disciplinary action letters which are to be considered and the Union will be advised in writing of the precise charges against the employee. The Union and employee will have at least forty-eight (48) hours advance notification of the hearing should they so desire. Nothing herein shall be construed as preventing the Employer from holding an employee out of service pending such investigation.
[Joint Exhibit 1)

This matter involves the termination, effective June 16, 1992, of the Employee, a Lead Service Employee on the graveyard shift (10 PM to 6 AM) in the Wide Body Flight Kitchen. At issue were the following Employer rules of conduct:

> Violations of one of more of the following Rules will result in discharge unless mitigating factors are considered applicable:
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> 1. Unauthorized actual or attempted:
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> a) possession
> b) removal
> c) purposeful misplacement of any Employer property including records or confidential or private information, or property of employees or customers.
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> 9. Refusing to permit a search of your person or property during the course of an Employer investigation.

Food Services Supervisor Person 1 testified that she and the Employee had been on the same shift for more than six months:

> The Employee and I got along very well. She was a lead there, and I work very closely with the leads. She was good . . . . She knew a lot. I relied on her for help . . . The leads are responsible for checking the flights, for locking up liquor carts if they are not locked. They are responsible for their group of employees, to be sure that they are doing the work.

The incident began, according to Person 1, around 4:30 AM on June 16, 1992:

> An employee came to me and told me that the Employee had taken lobster and steaks from the kitchen. Then I received an anonymous phone call from another employee, saying to check her car, that she had taken many things.... I went and got a big square flashlight..

Person 1 recognized the Employee's blue Honda Civic, on the flight kitchen side of Stanton Road, where employees usually park:

> I shone the flashlight in the car to see if I could find anything. I saw the bowl of strawberries in the back seat. I looked at it again because I wanted to make sure what it was.... The reason I recognized the lid especially is because [it] has ridges on the side with little indentations. I looked very carefully, and it did have that. Also, the sliced strawberries were pressed up against the opaque[1] lid and ... it appeared to be a bowl of sliced strawberries in an Employer container.

She identified the item as a standard serving of the sliced strawberries that garnish ice cream served in first class; pantry workers are instructed to fill each berry container to the top.

Person 1 said she telephoned company security. Officer Person 2 responded, arriving at about 5:30 AM. Person 1 recalled:

> Terry took a picture of the strawberries that were in the back seat of the car, and [we] decided that we would talk to the Employee and, obviously, search her car.

The supervisor explained that the contents of the container were clearer to the naked eye than would appear from the photograph [Employer Exhibit 16A], which was affected by glare from the flash. Besides the container, Person 1 said, she could see some unidentified white cloth and an Aratex towel, an item that is used in the kitchen.

Person 1 and Officer Person 2 were joined by Person 3, a day-shift supervisor. Person 1 said that they:

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[1] Although the witness used the word “opaque,” it was clear from the context that she was referring to a translucent lid, the kind used on the company’s container.

> decided to approach the Employee on the floor where she was working, and ask if we could search her car and tell her we had probable cause to believe there was something in her car.... We said, "Can we talk to you for a second when you are done?" We took her out where Officer Person 2 was, in front of the kitchen ... We said we had reason to believe she had stolen Employer property, and we had to search her car ... [The Employee responded] something like, "This is ridiculous. Absolutely no." She would not budge, would not let us search her car at all…She said something about her car not being on Employer property, and because of that she did not have to allow us to search .... Terry said, "Employee, you have to let us search your car ...She continued to say, 'No, you cannot look in my car."

During this initial confrontation, Person 1 maintained, the Employee never requested a shop steward or police presence, or indicated that she would agree to a search if there were such a presence. Person 1 told the Employee she would be held "out of service pending a hearing, due…to refusing to permit search of her property during an investigation"—a Rule 9 violation. The Employee surrendered her identification badge and left the facility after visiting the toilet in the employee's locker room.

Person 1 and Officer Person 2 separately began writing reports of the incident in the trailer that served as a temporary office during construction. According to Person 1, "Five minutes later, the Employee came up and demanded to see Person 4, committeeman for the union for food service." The Employee also requested a copy of the parties' contract, which was furnished by Person 1.

Person 4 was not at work, but Person 1 summoned Person 5, the day shift shop steward, to the trailer. Person 1 recalled:

> Present also were Person 3, Person 2, the Employee. We told her this is a formal Employer investigation. We told her that we had reason to believe that she had stolen property from Employer, and we were going to talk about it. I asked, "Do you know that misappropriation of Employer property is a dischargeable offense?' She said, "Yes," she knew ... We talked to her for quite a while, and she said "If you want, you can look at my car now."

> During the investigation, I also asked her if she had seen signs in the kitchen about misappropriation being a dischargeable offense, and she said "Yes," she had seen the signs. I asked her if she had anything in her car that was Employer property, and she said, "No." I said, "Employee, tell me, what's in your car?" She started saying a laundry list of packing diagrams and papers. She said, "Garbage"…I said, "Employee, are there strawberries in your car?' She said, "No." I asked her if she had ever taken anything from the kitchen before, and she said, "No."

Person 1 recalled that the car had been moved "probably a half block down. The street had filled out with cars. She didn't have the front spot anymore." Accompanied by the Employee, Person 5, Officer Person 2 and Person 3, Person 1 searched the vehicle for about ten minutes:

> I did search in all the hiding places, such as the trunk. I carefully went through everything in the trunk, the glove compartment, and under the seats, and just in plain view of the whole car.... We put all the things [recovered] into the security vehicle, laid them on the seat, and then took this picture [Employer
> Exhibit 16 D and E].

Person 1 said she found no strawberries or other food; however, there were materials of the kind that are commonly used on Employer property. Person 1 provided this inventory of the recovered items:

• Two rolls of one-quarter inch yellow tape, used to attach Person 2ing diagrams to carts [Employer Exhibit 15 A].

• One Aratex towel, for wiping surfaces in the pantry [Employer Exhibit 15 B].

• One silverware sheath, formerly part of Employer's catering for the airline UTA, containing a pen and a pencil [Employer Exhibit 15 C].

• Two packets (.02 ounce each) of "Mrs. Dash" seasoning, a brand used for passengers with special dietary needs [Employer Exhibit 15 D].

• One Employer table knife, of the kind placed on meal service trays [Employer Exhibit 15 E].

• One U.S. Customs seal (orange plastic, No. 3980286), of the type affixed to liquor aboard international flights (Employer Exhibit 15 F).

• One empty wrapper from an Oreo grab Person 2 of the kind distributed on flights.[2]

After the search of the car, Person 1 also searched the Employee's locker. There she found two unused Employer liquor seals [Employer Exhibit 15 G]. Their presence was unauthorized, according to Person 1, since it was Employer policy to issue seals only to liquor clerks. Even lead employees were not to have them without asking a supervisor, she said, and no one should have seals in a locker. The Employer tracks usage of the seals by their numbers. An unscrupulous employee could open a liquor module, remove liquor and mask any discrepancy by attaching a new seal. Person 1 recalled that she instructed the floor leads to

> no longer go to the liquor room to get seals on their own volition, that they had to go through me from now on. We had to know the reason why.... Employee came to me and said, "What do you mean, we can't get liquor seals from the liquor clerks?" [Manager of Food Service Operations issued a letter on May 22, 1992] saying, go through me, or the liquor clerks had to go and put it on themselves [Employer Exhibit 20].

Person 1 said that the Employer provides food for employees to eat in the building during working hours:

> We have three breaks, one of which is lunch. The first break we always serve rolls and maybe some fruit, sort of a snack. Lunch time is a full meal, and the third break is reserved for beverages that are always available in the cafeteria. Employees are not allowed to leave the building with any food or beverages, and signs are posted saying so…I tell them to leave it here in the kitchen and eat it here. Don't leave the building with anything

The following notice is posted:

FOOD SERVICE EMPLOYEES ARE INSTRUCTED NOT TO GIVE TO OTHERS OR APPROPRIATE FOR PERSONAL USE FOOD, LIQUIDS, EQUIPMENT, SUPPLIES, OR ANY EMPLOYER PROPERTY, OTHER THAN AS AUTHORIZED BY YOUR LOCAL MANAGEMENT. VIOLATORS OF THIS RULE MUST EXPECT THAT DISCIPLINARY ACTION CAN RESULT, INCLUDING POSSIBLE DISMISSAL FROM THE EMPLOYER.

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[2] The wrapper was not entered into evidence.

The Employee's account of the June 16 incident differs at several points from that given by the Employer witnesses. She testified that her grandmother's funeral had taken place just before the shift in question:

> I was upset a lot of the night because of my grandmother passing away. I did want to be alone. I did go out during lunch time [about 2 AM] and sit in my car myself.

When she was approached in the kitchen about four hours later by Person 1 and Person 3, she said, she did not immediately realize that she was the subject of their inquiry:

> I thought they needed a representative for somebody. Nothing was said until we got outside to the front of the door; a security guard was standing there…Person 1 turned around and said, "We would like to search your car." I said, "You are talking about me?" I thought we were talking about someone else. I was kind of in shock. She said, "Yes, we'd like to search your car, and if you refuse, we can hold you out of service."
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> I stated I would like the Police and Person 4 present…I stated my demand three times…They did not respond. They just looked at me like zombies. I was a shop steward. I knew my rights as having a shop steward present in any investigation. At that point then, they said, "We are holding you out of service for refusing to search your car, pending an investigation. Give me your badge." So, I gave her my badge.
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> I was already upset, because of my grandmother. I was not thinking clearly, and all this was coming at me. I kind of got ticked off, I was angry. I went to my car, peeled out and made a U-turn down the block. Then I thought: maybe I shouldn't leave and should demand Person 4 again . . . .
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> I said to myself, "I'm not going to run away from this"…and went back to park…There was a spot on the corner at the end of the street there. I put it in reverse and backed it up, to back into a spot quickly. When I did that my cup of coffee, paperwork, and uniform went flying. Everything moved…I threw my uniform and my Employer jacket into the trunk of the car…
> Then, I walked back to the trailer, which they used as an office, and waited for them to see me standing there. Person 6 walked by me . . . . He said, "Let them search your car"—very angry—and I said, "Give me representation, or the Police." Then finally Person 1 looked out the window and saw me, and came out. They took me into the back part of the trailer into the office. We sat there. She had the union contract book there, reading my rights. Then she said, 'I'm going to get Person 5, the union representative that was here." I asked for Person 4, but we could not get him on the telephone…As she was leaving, she asked me, "Would you like to read the union book?' I said, "I would."

> Then they brought Person 5. At that time, I felt I did nothing wrong, I submitted to letting them search my car because I had my witness, and I felt they couldn't stash something in my car…Person 1 conducted the search…[The security officer] was behind the car, or calling at his truck. Person 5 and me were standing on the passenger side of the car, and we could see right through—the doors were open—watching her search. She did not go under the driver's seat. You cannot physically pull that forward. It's been broken for two years …It cannot move. Also, under the front seat there is a plate. You cannot stick your hand from the front. You have to pull the seat and go from behind…
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> We walked back up towards the trailer. As we got towards the doors entering the restroom or locker room area, I said, "Would you like to search my locker?" They said, "Yes."

The Employee testified that she could not remember if she was asked about strawberries during the on-shift investigation. She now theorizes, however, that Person 1 may have been looking through the car window at a container of strawberry Jell-O, placed on the back seat by her mother, Person 7. Person 7 testified that after the family attended the funeral, she prepared Jell-O for a luncheon at the church. Shown the picture of the container on the back seat of her daughter's car, Person 7 remarked:

> That's the strawberry Jell-O in a Cool Whip container that has a clear top . . . . I gave her that stuff, and I don't know what she done after that. She had two boys she was supposed to take it home to, but she was so upset, she didn't know what she was doing, which all my kids were.

The Employee maintains that her car's abrupt turns and reverses shifted the contents and that the container may have flown off the back seat and come to rest under the front seat by the time she re-parked her car. Person 1 did not find the strawberry Jell-O, the Employee insists, because the supervisor conducted a perfunctory search: "She just felt around under or in front of the seats…She did not go under the driver's seat."

No container was retrieved from the car after the Employee returned home. She recalled making "my boys clean the car because they ... made the mess" but said she never asked them what they found.

The Employee also explained the presence in her car of the items that were discovered during the search. She said that she might have used the table knife to eat lunch in the car on her previous shift; she recalled eating there with the permission of Supervisor Person 8. She also used the knife as a tool for opening module doors. The Aratex towel was there because she had been crying heavily: "Someone in the pantry handed it to me, and I used it as a substitute for a hanky. She used the silverware sheath to protect her pocket from pens: "One of the leads gave me that because they are no longer an item we carry, and he had extra." The Mrs. Dash packets, she said, were from restaurants and were left in the trunk after family camping trips. The used liquor seals were in the car because, "When a flight is going, I don't have time to put [the used seals] in the garbage pail. I put it in my coat pocket. It goes out in my car." She gave the following explanation for the presence in her locker of the new liquor seals:

> I was checking a flight, and a seal broke…I told the liquor clerk I needed to lock the cart up. When I asked for another seal, he handed me five or six. I said, "I only need one." He said, "So you don't have to come back and bother me." Knowing that these are new seals, I had them in my pocket to use during the night on a cart that needed one. When it came time to go home ... I left them [in the locker], figuring the next day I could get them out of there. My grandmother died. I forgot about them over the weekend . . . . Liquor seals are much more important than any other item. I would not take them out of the building.

Person 1 testified that during the on-shift investigation she "listened but didn't rebut" the Employee's explanation because "what she said didn't justify having the property in her possession."

DISCUSSION

Although the Employee was initially held out of service for refusing to allow a search of her car (a Rule 9 violation), the Investigative Review Hearing decision accepted the union's argument that the Employee was not obligated to submit to a search, because the car was parked off Employer property.[3] Nevertheless, the Employer maintains that the discipline should be sustained because of the evidence that the Employee violated Rule 1, which prohibits unauthorized removal or possession of Employer property.

The union argues that if the Employee was not bound to open her vehicle to the supervisor, the material found there should be excluded as evidence of a Rule 1 violation on the ground that the search was wrongly coerced. The union further contends that the items found represented nothing more than a collection of kitchen debris or residue whose possession did not amount to an offense. In the words of Committeeman Person 4:

> There is not a single employee in the company that will steal what is on the table [the exhibits in this case] to be called a thief. In my mind there are only two matters: either she is a red circle employee making $16 an hour, and can be replaced by two employees making $7 each, or the supervisors have a personal feeling towards that employee. In that particular kitchen there are items much [more] valuable that employees can take for her own use, rather than the lousy, dirty roll of tape, or unusable liquor seal, or a piece of rag. I don't believe any of the employees that I represent will take that and be called a thief.

Illustrating the union's point, at the Third-Step Appeal, Assistant General Chairman Person 9 submitted to the Employer's hearing officer used liquor seals that he picked up from the ground outside the building during a recess.

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[3] The IRH hearing officer relied upon the decision in the discharge of J. Abayon, Case No. 71967-SFO (S. Kagel, Chairman) May 22, 1973 [Union Exhibit 9], which was cited by the union. In that case, a supervisor saw the Employee take a package from a EMPLOYER tractor and place it in his car trunk. The employee refused the supervisor's order to open his trunk. In reinstating the employee, the chairman held that the Employer search rule then in effect applied only to personal vehicles on Employer premises. Back pay was denied because the incident occurred "within five minutes of [the Employee's] quitting time at a location right next to Employer property and, if in fact [the Employee] had nothing to hide, he could have, as a matter of cooperation, honored the request of the Supervisor." A detailed dissenting opinion asserted that 'it is patently absurd to vitiate obviously appropriate discipline based on the twin accidents of the location of the employee's automobile and the scope of Employer's lease.' The Employer's brief in the instant matter noted that the rule was changed as a result of the Kagel decision.

Person 4 called attention to a period in 1991-92 when employees were told to use their cars for storage because lockers were unavailable, due to construction. He said, 'This junk is in everybody's lockers, and when she used her car, this junk stayed there." In the Third-Step Appeal decision, Supervisor Person 8 was quoted as agreeing that the yellow tape could properly be kept in an employee's car during the renovation period [Employer Exhibit 3]. Also, as the union brief noted, testimony during the system board hearing, "established that the Employee had a reputation for leaving the interior of her car in a 'messy' condition." The Employee remarked, "I don't clean out my car. It's full of garbage."

Person 1 acknowledged that the locker rooms had closed for renovation in December, 1991, and that "employees were asked to put articles from their lockers into their cars because they had no place to put them.' But she also pointed out that "on April 10, 1992, the lockers were available for move-in by the employees. At this time, we had briefed employees on all shifts that employees should be bringing in all their things from their cars to their lockers." Although the Employee said she had not had time to clean the car in the intervening two months, owing to "family stress," Person 1 insisted that none of the items found in the Employee's car could be kept legitimately in a locker—or in employee cars when they substituted for lockers: "It's all Employer property, and those things are found in the kitchen for their use. They don't have to keep them in their locker."

Even if the union's coercion argument and kitchen-residue argument were accepted, it would remove from consideration only the material found in the Employee's car during the search. The Employer also has presented evidence not derived from the search, evidence that the vehicle had harbored a container of the Employer's strawberries. Although the parties disagree about the disciplinary significance of the items found by the search, there is no dispute that a container of

the Employer's strawberries did not belong in the Employee's car and could not be considered mere residue or detritus. The Employer could, in principle, base Rule 1 discipline upon that offense alone, if the evidence were reliable.

The evidence pertaining to the strawberries comprises the observations of Person 1 and Officer Person 2, as well as the photograph they took-outside the car- of a container on the rear seat of the vehicle. When an object is left in plain view in a car parked on a public street, there can be no legitimate expectation of privacy, since special access is not required in order to observe and photograph the interior of the car. The employer is entitled to take account of what can be seen by any passerby.

The central question is whether the Person 1-Person 2 observations and photography established that the strawberries were actually in the vehicle. The Employee maintains that the object observed and photographed was a Cool Whip container filled with Jell-O by her mother. During the visit to the site, with the parties present, the Employee invited the neutral chairman to inspect her vehicle. The inspection was conducted at about 9:00 PM, when it was dark outside—as it had been during the original incident. A sample container of cut strawberries from the kitchen [Employer Exhibit 19] was placed on the rear seat of the vehicle. With the illumination of an ordinary flashlight, the arbitrator could clearly see the container through the rear passenger-side window. Two aspects of the scene were noteworthy:

> 1. When the neutral chairman compared the sample container on the seat to the container shown in the photograph taken by Officer Person 2 from the same window, the dimensions of the containers were identical, as gauged by the sequence of raised seams in the upholstery. While a union witness opined, in testimony prior to the site visit, that the sample container in evidence seemed smaller than the photographed container, he was apparently speaking of the front-to-back view of the vehicle—a perspective different from that of the photograph. A standard Employer container with a distinctive lid would have been readily distinguishable from a much larger Cool Whip carton.[4]

[4] A Cool Whip container is about eight inches in diameter, the union estimated, while the company container measures less than five inches.

> 2. Although the contents of the photographed container cannot be positively identified from the print, cut strawberries were indeed visible when the neutral chairman peered through the car window during the re-enactment. Irregular pieces of the moist fruit pressed against the translucent lid; Jell-O has an entirely different appearance. There is thus no reason to doubt that a food preparation supervisor would have been able to distinguish strawberries from Jell-O when looking through the car window on the night in question.

This analysis provides compelling support for the Employer's theory that the Employee had strawberries in her car at the time of the Person 1-Person 2 investigation and that the contraband disappeared from the vehicle during her brief absence from the facility[5].

The Employee insists, however, that a container—purportedly holding Jell-O was in the car when it was searched. The container went undiscovered, she maintains, because Person 1 failed to make a thorough search and neglected to look under the driver's seat. It is difficult to believe that in the presence of several observers, representing both parties, a searcher would overlook a hiding place as obvious as the under-seat space, or miss an object approximately eight inches in diameter, particularly when items as small as a Mrs. Dash packet were carefully catalogued. A union witness testified to the thoroughness with which the search was conducted.

According to the credible evidence, furthermore, the Employee was made aware, after returning with her vehicle, that the Employer was looking for a container of strawberries.[6] Therefore, it was in her interest to ensure that the search uncovered the exculpatory Cool Whip container. If Person 1 had missed the under seat space, one would imagine that the Employee would point out the oversight and insist that the space be checked.

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[5] Person 1 reasoned: "She drove off, was gone for ten minutes and came back with no strawberries. So I surmised she probably dumped it someplace. She threw it away."

[6] Shop Steward Person 5, for example, recalled being told by Person 1 that the allegation concerned "strawberries being taken out of the building."

Given the Employer's photographic and visual evidence, crediting the Employee's explanation entails accepting that a container of Jell-O went on a remarkable odyssey inside her car. It would have been placed on the back seat by her mother after lunch, taken to work that night, photographed by the Employer, accidentally rolled into a hidden space in the car during an abrupt motion, and then apparently cleaned out and discarded by her young sons (who somehow managed to find the space where it was hidden). The Employee seems to have shown no interest in retrieving the container, even after she returned home, although it might well have helped her show that the Employer was mistaken. Additionally, it is odd that Person 7's supportive testimony about the Jell-O was presented for the first time at the system board hearing (over the Employer's objection).[7]

Since the Employer had valid reason to conclude that the Employee was in unauthorized possession of Employer strawberries, contrary to Rule 1, the question becomes: does the offense justify a penalty of discharge? The parties submitted a number of prior system board decisions concerning Rule 1 violations. Inasmuch as both parties are quite familiar with the decisions, the neutral chairman need not review them here at length. It is sufficient to observe that at the core of this body of adjudication is the principle that an employee who violates Rule 1, even in regard to items of small value (as in the case of the strawberries), places his or her job in jeopardy unless there are substantial mitigating factors.

Among the cases cited by the union is the decision by Arbitrator David C. Nevins in the matter of a discharged food service employee.[8] The employee was reinstated without back pay, even

[7] The union's notes of the IRH reflect that the grievant mentioned a container, provided by her mother, but was unaware of the contents (Union Exhibit 4). The IRH decision reported that her assertion that her mother "may have given you something in a container similar to a 'Cool Whip' container, which could have been confused with the container allegedly seen" (Employer Exhibit 4). Strawberry Jell-O was not identified by the grievant as the contents, according to the Employer, until the systems board hearing.

[8] Discharge of S. Gafoor (D.C. Nevins, Arbitrator) November 27, 1990 [Union Exhibit 8].

though the arbitrator found that he violated Rule 1 "by possessing [Employer] property without appropriate authorization." He had cooked his own dinner with ingredients, including lobster meat and linguini, from Employer food stocks and then removed it to his truck. The employee contended that he had prepared his own food for a period of three years, because he was precluded by his religious beliefs from eating the meals that were provided by the Employer. The penalty of discharge was held to be inappropriate, in part because

> he acted in an open and forthright manner, more in keeping with someone who does not understand the potential seriousness of his conduct than one who is aware of it and attempts to conceal it…He even chose to take his food to the parking lot which was under camera surveillance and, thus, provided security employees an opportunity to view his conduct.

The arbitrator remained unconvinced "that the Employee was engaged in a knowing, intentional act of thievery or pilferage."

Although the cooking case also involved a long-service employee, the contrast with the instant case is marked. When confronted by supervisors, the Employee reinstated by Arbitrator Nevins "acted forthrightly and not in a manner which conveyed connivance or surreptitiousness." Here, the Employee drove off with a suspect container in plain view and came back without it a few minutes later—a disappearance that she has been unable to explain satisfactorily. Under those circumstances, the Employee can hardly claim credit for being forthright or non-surreptitious. While the union has not directly alleged a contractual violation, it appears to discern several irregularities in the Employer's handling of this case. One is the alleged denial of shop steward representation or local police presence during the initial confrontation by the supervisor. The arbitrator does not find the Employee's testimony on this point convincing. Three credible Employer witnesses maintained that no such request was made until the Employee returned from

her brief vehicular excursion.[9] The three have no reason to jointly fabricate their stories. Officer Person 2, for one, was a candid witness—as he demonstrated by acknowledging his inability to confirm the Employer's ownership of the items found during the car search. (He explained that the subject was not within his area of expertise.) Similarly, he carefully avoided identifying the contents of the container that he photographed as strawberries; he testified only to seeing "red stuff." A witness otherwise so precise would not likely distort his account by obscuring a request for representation. In addition, since Person 1 complied immediately when the Employee returned and asked for representation, there is little reason to doubt that she would have done so a few minutes earlier, had the request been made then.

The union also criticized the IRH and Third Step decisions for omitting exculpatory details mentioned by the Employee at each of those stages. The totality of the evidence suggests, however, that the Employer correctly perceived that the Employee added fresh details to her account as the case progressed through the disciplinary procedure; crucial elements (such as the kilo story) did not fully emerge until the system board hearing.[10] While the union faults the Employer for not adequately investigating the Employee's explanations initially, giving a full account early in the process undoubtedly would have facilitated the employer's evidence-gathering task.

It is sad to contemplate loss of employment by a long-serving employee, especially one as articulate and personable as the Employee, a lead worker and shop official who has been with the Employer for 18 years. Unfortunately, the evidence warrants the Employer's belief that the

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[9] The Employer submitted a sworn written statement by one of them, Person 3 (Employer Exhibit 28). The Union accepted the written statement in this instance, because Person 3 was available at the Third Step Appeal Hearing for questioning by the Union.

[10] Similarly, the Employee's assertion that Supervisor Person 8 granted her permission to eat in the car was not made at the Third Step Appeal Hearing, when he was present, but at the system board hearing, which he did not attend.

Employee violated Rule 1 by misappropriating a container of strawberries. Taking Employer property is almost invariably treated as grounds for discharge. Although the value of an item may seem trivial, as in this instance, the Employer can justifiably claim that it has lost confidence in the trustworthiness of an employee who pilfers.

The discipline does not appear to be the product of animus against the Employee. Person 1 appreciated her work, and there were commendations in her file from other supervisors. Mitigating factors recognized in previous cases are absent. Provision of free food in the cafeteria is not a license to take any item from food stocks, and employees are specifically prohibited from removing food from the premises to their vehicles. While it is true that the Employee was mourning her maternal grandmother, the personal loss cannot in itself excuse a blatant act of misappropriation.

CONCLUSION

For the reasons discussed above, and after considering all arguments and the entire record, the neutral chairman rules that the discharge of Employee was just and proper. Accordingly, the grievance is denied.