STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 232, INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, Complainant, vs. BRIGGS & STRATTON CORPORATION, Respondent.	Case XI No. 13570 Ce-1292 Decision No. 9530-A

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Kenneth R. Loebel, appearing on behalf of the Complainant.
Brady, Tyrrell, Cotter & Cutler, Attorneys at Law, by Mr. Fred G. Groiss, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter, and the Commission having authorized John T. Coughlin, a member of the Commission's staff, to act as an Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Employment Peace Act, and a hearing on such complaint having been held at Milwaukee, Wisconsin, on March 25, April 16, May 14 and 15, 1970, before the Examiner, and the Examiner having considered the evidence, arguments and briefs of counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Local 232, International Union, Allied Industrial Workers of America, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization with offices at 9224 West Burleigh Street, Milwaukee, Wisconsin.

2. That Briggs & Stratton Corporation, hereinafter referred to as the Respondent, is a corporation engaged in the manufacturing of engines and other equipment and has offices and plant facilities in Milwaukee, Wisconsin and other locations.

3. That at all times material herein the Respondent has recognized the Complainant as the exclusive bargaining representative of certain of its employes; that in said relationship, the Respondent and the Complainant have been, at all times material herein, parties to a collective bargaining agreement covering the wages, hours and conditions of employment of such employes, which agreement became effective on August 1, 1969 and was effective at all times material herein; that said agreement includes a grievance procedure, but did not provide for final and binding arbitration of grievances at the times relevant in this matter.

4. That the aforesaid collective bargaining agreement, Article V, entitled "Discipline and Discharge" states at Section 1 that, "Any employee who is to be disciplined by a layoff or discharge shall be advised by the Company that he may request and obtain the presence of the Plant Grievance Representative or the steward for his department to discuss the case with him before he is required to leave the plant."

5. That the aforementioned Article V at Section 3 provides in pertinent part that, "Employees will not be discharged without just and sufficient cause."

6. That the Employer had a well established shop rule which provided that, "Employees must be ready and at their proper places at the time set for the beginning of work. They must remain at their work until closing time except during authorized lunch or rest periods."

7. That on January 26, 1968 the Employer sent the following notice to all of its employes, including Margaret Landowski and Othell Willis, which stated that,

> "On December 20, 1967 certain Briggs & Stratton employees belonging to Local 232, testified before the State Employment Relations Commission that Briggs & Stratton piece workers control and limit production.
>
> The Company, subject to the Union's right to challenge, sets piece work rates. The Company and Union through negotiation establish piece work classifications. No matter how high an employee's earnings go on piece work, the rates cannot be changed except for time changes which have taken place on the job since the timing which established the last effective rate. Such changes in rate must be in direct relationship to time changes and have not, will not, and cannot be made just because earnings are high on the job.
>
> To assure everyone fair treatment, honesty and fair dealing are the responsiblity of every Briggs & Stratton employee and it is up to every employee, to management and to the Union, to see that honest efforts are honestly reported.
>
> Employees proved guilty of practices such as using 'kitties', 'banks', or falsified 'employees daily time record', or participation in 'slow downs', or starting and stopping production without punching 'in' and 'out', all of which were mentioned in testimony taken at the hearing, and all of which are against established Company Policy, will be disciplined up to and including discharge."

8. That Margaret Landowski, an employe of the Respondent covered by the aforesaid collective bargaining agreement, was hired on August 24, 1961; that prior to the spring of 1969 said Landowski was compensated on a non-incentive day rate basis; that sometime during May of 1969 she received the job of placing carburetor springs on cardboard and that she was compensated on a piece rate basis for this work.

9. That sometime prior to October 30, 1969, certain unnamed employes complained to Landowski's foreman, Verne Scheel, that said Landowski was not turning in an accurate count as to pieces completed; that fore-

man Scheel then requested that the Internal Audit Department conduct an investigation into the aforesaid complaints.

10. That the Internal Audit Department conducted a check on Landowski's count on October 30, 31 and November 3, 1969; that the aforesaid department made a determination that Landowski falsely claimed that she mounted 6,525 springs on October 30 and 31, respectively, and that she falsely reported that she mounted 6,325 springs on November 3, 1969.

11. That based upon the aforementioned determination that Landowski falsified her count on the aforesaid days Respondent terminated her on November 6, 1969 for cheating; that at all times material herein the Employer did follow the contractually provided for grievance and discharge procedure concerning Landowski.

12. That Othell Willis, an employe of the Respondent covered by the aforementioned collective bargaining agreement, was hired in November of 1966; that in November 1967 he became a die cast operator, which position he held from that time until his termination.

13. That on November 11, 12, 13 and 14, 1969, Robert Gorski, a member of the Internal Audit Department, was in the Die Cast Department checking the accuracy of certain electric counters; that on Friday, November 14, 1969, while checking the accuracy of a machine proximate to Willis', he noted that Willis was either "punching in" or "punching out" while continuing to operate his machine and that Willis was carrying his production card (also referred to as "Employees Daily Time Record") in his pocket, which card is customarily kept in a rack located in the Die Cast Department; that because of the aforementioned Gorski spent the rest of the second shift on November 14, 1969, observing Willis.

14. That on Monday, November 17, 1969, Gorski pulled Willis' November 14, 1969 production card and noted that the "down time" (time when the machine is not running) claimed by Willis on said card did not coincide with his personal observations of Willis on November 14, 1969; that Gorski then reported his findings to Ken Heller, head of the Internal Audit Department; that based on Gorski's observations Respondent determined that the November 14, 1969 production card turned in by Willis did not accurately reflect the amount of time that his machine was not operating and that Willis was away from his machine at unauthorized times on the aforementioned date.

15. That as a consequence of the report filed by Gorski, John Tarantino, another member of the Internal Audit Department, observed Willis while he was working on November 19, 1969; that said Tarantino concluded that Willis falsely represented on his November 19, 1969 production card the amount of time his machine was "down" and that on the same date he was absent from his machine at unauthorized times.

16. That based upon the above mentioned conclusions Tarantino on November 20, 1969, sent a report to the aforementioned Heller suggesting that "the Willis matter" be referred to the Personnel Department for disciplinary action.

17. That on November 20, 1969, Respondent discharged Willis for falsifying his daily time records, for not performing his work as expected, for doubling up on day work and piece work and for not operating his machine for the required amount of time.

18. That Margaret Landowski did in fact falsify her piece rate counts on her October 30, 31 and November 3, 1969 daily time records; that Othell Willis did in fact falsify on his November 14 and 19, 1969 daily time records the amount of time his machine was not running and that said Willis was absent from his machine at unauthorized times on the aforementioned dates.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the aforementioned discharges of Margaret Landowski and Othell Willis were predicated on just and sufficient cause within the meaning of Article V, Section 3 of the aforesaid collective bargaining agreement between Briggs & Stratton Corporation, and Local 232, International Union, Allied Industrial Workers of America, AFL-CIO, and that therefore Briggs & Stratton Corporation has not committed and is not committing an unfair labor practice within the meaning of Section 111.06(1)(f) or any other provision of the Wisconsin Employment Peace Act.

2. That the Appeal Tribunal Decisions of the Unemployment Compensation Division of the Department of Industry, Labor and Human Relations and the affirmance of those decisions by the Industry, Labor and Human Relations Commission concerning Othell Willis and Margaret Landowski does not render the instant case res adjudicata and has no bearing upon the disposition of this case by the Wisconsin Employment Relations Commission.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

IT IS ORDERED that the complaint in the instant matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 30th day of July, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By John T. Coughlin
John T. Coughlin, Examiner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 232, INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, Complainant, vs. BRIGGS & STRATTON CORPORATION, Respondent.	Case XI No. 13570 Ce-1292 Decision No. 9530-A

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The initial complaint in this matter was filed with the Commission on February 26, 1970. The hearing on the matter was held on March 25, April 16, May 14 and 15, 1970. Both parties filed post-hearing briefs, which briefs were received on November 30, 1970.

THE MARGARET LANDOWSKI MATTER

A. General Background

Margaret Landowski was hired on August 24, 1961, and compensated at the regular day rate of pay; in the spring of 1969 she was placed on a piece rate in the carburetor assembly department. Her job was to fasten a very small cap on a carburetor spring and place the assembled spring on a piece of cardboard. Because Landowski was compensated on the basis of the springs she assembled, she was to keep an accurate count as to work completed.

Sometime prior to October of 1969 two unnamed employes in Landowski's department complained to her foreman, Verne Scheel, that Landowski was turning in a completed springs count that was greater than the work she had actually produced. Foreman Scheel upon receiving this information contacted the Internal Audit Department. Ken Heller, head of the Internal Audit Department, decided to audit Landowski's count on October 30 and 31 and November 3, 1969. Heller and Frank Ferrise, Sr., also a member of the Internal Audit Department, physically counted and tallied the number of springs completed by Landowski on October 30 and 31, 1969. On both of the aforementioned days Landowski turned in a count of 6,525 completed springs. However, Heller and Frank Ferrise, Sr., for those two days manually counted 5,314 and 5,239 completed springs. On November 3, 1969, Heller and Frank Ferrise, Jr., also a member of the Internal Audit Department, physically counted Landowski's assembled springs. On that day, Landowski claimed she had produced 6,325 springs; however, the auditors' count for that day was 5,181.

Ralph MacDonald, head of the Time Study Department, testified that an incentive piece worker is paid a certain monetary rate for every 1,000 pieces produced, plus a certain amount of money for each hour the individual is working. He went on to state that a piece rate

is determined by timing the job and converting the time to money per thousand pieces. He also said that the rate set for the job performed by Landowski allowed for the actual physical counting of each piece produced.

The job that Landowski performed called for the operator to trip a counter to record the pieces produced. Because of the vast range in mental abilities found in different operators, said operators were not told to trip the counter after mentally counting a certain number of pieces. Basically, as to the counting, the only requirement was that it be accurate so that the individual's pay would be based upon pieces actually produced.

B. Union's Position

The Union contends that the issue is not whether Landowski's counts were right on the days in question, but whether she knowingly intended to receive monies for work not performed. The Union further argues that the element of intent is essential to Respondent's case and that the evidence produced by the Respondent totally fails to establish that she had such a wrongful intent, let alone establish that her counts were in fact erroneous. It further avers that Respondent's method concerning its checking of the validity of Landowski's counts amounted to a denial of "industrial due process" in that the Union was not involved in the actual checking process, but instead was only informed after Respondent had in essence made her discharge a fait accompli. In addition, the Union noted that the time cards Landowski turned in on the days in question were approved by Respondent in that Landowski's supervisor initialed said cards.

Finally, the Union claims that even assuming arguendo that Landowski's counts were in error, this would not in itself be grounds for discharging her for dishonesty, but would at most warrant a warning and some instructions on the part of Respondent so as to enable her to perform her assignment in an acceptable manner.

C. Company's Position

The Respondent argues that the Complainant offered no credible evidence that Landowski did not turn in less pieces than she reported and that her testimony was inconsistent and contradictory concerning her method of counting. Respondent pointed out that in January of 1968 all employes, including Landowski, received a policy statement that stated as noted in Finding of Fact number 7 that employes guilty of falsifying their daily time records would be "disciplined up to and including discharge."

Respondent contends that the fact that one of its supervisors initialed an employe's time record does not in any way serve as a certification that the supervisor himself checked the accuracy of said card but that this procedure merely provides a means of checking that all the information required to be on that card is actually supplied.

Finally, in answer to Complainant's assertion that Landowski had been denied "industrial due process" Respondent points out that it and the Union have a duly bargained for collective bargaining agreement which contains a grievance and discharge procedure and that all aspects of those procedures have been strictly followed.

D. Discussion

There can be no doubt from the evidence that Landowski did in fact turn in a falsified count on the days in question. It is clear that the very basis for the incentive system is that an accurate and honest count must be kept by all individuals. Landowski's disregard for this principle is amply demonstrated by her own testimony when on cross examination by Respondent's attorney, she testified as follows:

"By Mr. Groiss

Q. I am going to ask you to look at Employer's Exhibits 3, 4, and 5 (these are the counts she handed in on October 30, 31 and November 3, 1969). You have just testified that the figures shown on those Exhibits are the amounts that you produced on those days. Is that correct?

A. Yes.

Q. How do you know that?

A. Because I made them out.

Q. You made these cards out? How did you find out how many pieces you produced that day?

A. Because I keep a record. I count each piece on my card on a counter;. . .

Q. So, on this card--on Employer's Exhibit 3 it states you produced six thousand three hundred twenty-five pieces. That's the precise count as to the amount of pieces you produced?

A. Yes.

Q. And the same answer holds true for Exhibits 4 and 5, where it says you produced six thousand five hundred twenty-five. You actually counted six thousand five hundred twenty-five pieces for those days?

A. Yes.

Q. Mrs. Landowski, haven't you previously testified in another proceeding that you stoppped counting as of October 25?

A. Yes, I did stop counting. (emphasis supplied) 1/

. . ."

Later on, again under cross examination, Landowski admitted that she estimated the number of pieces she produced. Thus, by her own testimony, Landowski confessed that she did not count the number of pieces she produced on the job but instead devised a method of estimating her production. When asked to explain how she estimated pieces completed Landowski testified that, "I don't remember no more; I am so confused." 2/

1/ Page 154, Transcript.

2/ Page 168, Transcript.

Without passing on the Union's contention that the Employer must prove intent in a case of this type, the Examiner finds that Respondent did in fact demonstrate that Landowski intended to cheat on her piece rate counts. It is fanciful to believe that even the most unsophisticated employe is going to admit that they intended to cheat their employer. However, intention can and is inferred from the actions taken by an individual. In the instant case Landowski as a piece rate worker knew that she was paid for the pieces she completed and that she was required to keep an accurate count. When she deliberately decided to stop counting her production but instead estimate pieces completed, she chose to deviate from accepted procedure and therefore she must be held to have intended the consequences of her actions. The concept of counting the number of springs produced is of such a fundamental and basic nature, that a deviation from it cannot be explained away by ignorance or misunderstanding.

The Examiner finds Complainant's argument that Landowski's responsibility for keeping an accurate count to be somehow mitigated by the fact that a supervisor placed his initials on the production card to be otiose. It is the individual employe's responsibility to turn in an honest and accurate count and that responsibility is in no way influenced by a supervisor's cursory examination of the production card.

The Examiner rejects the Union's argument that Landowski was denied "industrial due process" in that it was not involved in the actual checking of Landowski's count. The contract clearly provides under Article V, Section 1, that "Any employee who is to be disciplined by a layoff or discharge should be advised by the Company that he may request and obtain the presence of the Plant Grievance Representative or the steward for his department to discuss the case with him before he is required to leave the plant." When Landowski was called into the Personnel office and notified of her discharge she was offered, in compliance with the collective bargaining agreement, Union representation. However, she declined that offer. Therefore, the Employer complied with its contractual obligation by offering Landowski the due process provided for in said contract. To require Respondent to do more would be to reform the contract bargained for and voluntarily agreed upon by both Respondent and the Union.

Finally the Examiner rejects the Union's argument that even assuming Landowski's counts were in error this would not be grounds for discharge but that instead she should have been given some sort of warning. Respondent had clearly alerted all of its employes that cheating on a count thereby falsifying their daily time record would be a basis for disciplinary action up to and including discharge (see Finding of Fact number 7). Thus, even though Landowski's employment record was otherwise untarnished, her offense is of a type that mitigation of the Employer's action would not be proper. 3/

THE OTHELL WILLIS MATTER

A. Background

Othell Willis commenced working for Respondent in November of 1966. He initially started working in the Die Cast Department as a "pot man" (an individual who hauls metal). In November of 1967 he became a die cast operator, which position he held until his termination on Novmeber 20, 1969.

3/ See Briggs & Stratton Corp., Dec. No. 8343-D, 10/68.

B. Union's Position

The Union contends that Willis' production cards which indicated his "down time" (the time his machine was not running) must have been correct for Willis' foreman, Earl Messman, initialed the cards in question, thereby signifying that the representations found on said cards were correct. In addition, the Union argues that if anyone were in a position to know if Willis was cheating it would have been his immediate foreman, Messman. Therefore, the Union contends that Messman would not have hesitated to impose discipline on Willis if the facts warranted it and since he did not take any action in this regard, Willis' performance on the job must have been satisfactory. 4/ Finally, the Union argues that it was totally unwarranted to permanently discharge Willis without giving him some warning about alleged shortcomings in his work. 5/

C. Respondent's Position

Respondent claims that on November 14, 1969 a member of the Internal Audit Department was checking electric counters near the machine operated by Willis and that while performing the aforementioned task this individual observed that Willis had either "punched in" or "punched out" while he continued to operate his machine. Respondent takes exception to the entries contained in Willis' November 14, 1969 production card as reflected in the following afternoon and evening events:

1. Willis claimed that his machine was "down" for machine trouble from 3:00 to 3:36, whereas the auditor claimed he saw Willis operating during this period.

2. Willis claimed "down time" from 5:00 to 5:18 in connection with a "pulled fin", whereas the auditor saw nothing being done during this time on the machine and that Willis did not return to his machine until 5:25.

3. Willis claimed "down time" from 7:18 to 8:00 for "oiler trouble", whereas the auditor observed him running the machine during this period and later taking a 42 minute "lunch break."

4. Willis quit work and left his work station at 10:00 although the shift did not end until 11:00.

5. The auditor observed Willis sitting in a bench area near the vending machines at 10:45.

On November 19, 1969, according to Respondent, a second auditor observed the following afternoon and evening events:

1. Willis claimed "down time" from 3:30 to 4:00 for a funnel repair, whereas the set-up man required only five minutes for the job.

4/ The Examiner rejects these contentions on the same basis as was done in the Landowski matter (see page 8, second paragraph).

5/ The Examiner rejects this contention on the same basis as was done in the Landowski matter (see page 8, fourth paragraph).

2. Willis claimed "down time" from 5:24 to 6:00 for "oiler trouble", whereas the auditor saw him begin to operate at 5:27 after a 27 minute break.

3. Willis claimed to be "down" from 6:06 to 6:30 and from 6:54 to 7:18 due to a lack of metal, whereas the auditor saw him operating until 7:12 when he left for a break.

4. Willis claimed "down time" to repair a ladle from 7:54 to 8:30, whereas the auditor observed that he was absent from his machine at this time.

5. Willis was observed "visiting" from 9:20 to 9:31 during which time he claimed "down time" to clean the pot on his machine from 9:12 to 10:00.

6. Finally, that the auditor observed that Willis quit work at 10:20.

Respondent, based upon the observations summarized above, discharged Willis on November 20, 1969 for spending too much time away from his machine, for quitting work prematurely and claiming "down time" on his daily time records when in fact his machine was operating thereby receiving both the day rate which one receives when not operating and the incentive rate received while operating. 6/

D. Discussion

The central problem involved in the instant matter is to resolve the many contradictions existing between the conflicting contentions of the parties. An analysis of the record reveals the following noteworthy fabrications in Willis' testimony.

First, on November 14, 1969 Willis claimed that he had trouble with a fin. 7/ In conjunction with this problem, Willis claims that he had to locate a repairman, get tools from said repairman and "knock the fin out." Willis claimed that it took him 18 minutes (from 5:00 to 5:18 p.m.) to do the aforementioned. However, Willis himself testified that it only takes a minute or two to "knock a fin out" of the die. The question then becomes how to account for the other 16 minutes that Willis claimed his machine was not operating. O'Neil Gissel, the repairman from who Willis received the tools, testified that Willis contacted him concerning the aforementioned fin trouble at the time he was going on break. Gissel testified that he always takes his break at 5:00 p.m. Consequently Willis must have located Gissel by 5:02 p.m. at the latest. By thus adding up the lapsed time spent in securing the tools and "knocking out the fin", you arrive at a figure of four minutes. The question then becomes whether Willis returned the tools to Gissel during the time in question. Willis' testimony on direct examination by his attorney is both confusing and inexplicit and reads as follows:

"By Mr. Loebel

Q. Did you return the tools to him?

6/ Willis by his own testimony, admitted that he consistently quit work 20 to 25 minutes prior to the end of his shift.

7/ A fin is a fish-like cylinder that protrudes out of the die.

A. Well, at night, I don't know--right away. Sometimes I keep them and as he (Gissel) passes by I give them to him." 8/

. . .

Then again on direct examination Attorney Loebel in a very leading manner asked the following question:

"Q. Did you take 18 minutes for finding the repairman, getting his tools, coming back, knocking out the fin and returning the tools?

A. That's what I did. The time he was on break I went to find his tool box and I went and got him and he gave them to me. Otherwise, I probably would have just caught him passing by to some other machine." 9/

The question asked Willis was very simple; did you return the tools to him? It merely called for an equally simple "yes" or "no". The Examiner finds Willis' responses to that question deliberately evasive and the Examiner is forced to conclude that Willis did not leave his work station during the time in question on November 14, 1969, after having "knocked out the fin", in order to return the tools he had used to repairman Gissel. In addition, it should be noted that Gissel estimated that it would only take five minutes to go up and down all the aisles in the Die Cast Department. Even if the Examiner concluded that Willis' disjointed testimony amounted to a "yes" to the question as to whether he returned the tools to Gissel, the Examiner would be forced to conclude by crediting Gissel's testimony that it would not take 14 minutes to do so. Therefore, based upon the above, the Examiner is discrediting Willis' testimony concerning the "down time" he claimed from 5:00 to 5:18 p.m. on November 14, 1969.

On November 19, 1969, Willis claimed that his machine was "down" for 36 minutes, from 5:24 to 6:00 p.m. Willis testified that he "punched out" because he was having trouble with the strainer in the "oiler." Willis also testified that he asked Gissel, the repairman, to help him but that Gissel told him "he'd be on it as soon as he could." Willis concluded by saying that after the repairman finished he "took a couple of practice shots" to see if his machine was operating properly. However, Gissel under direct examination by Complainant's attorney testified as follows:

"By Mr. Loebel:

Q. Do you recall how you were informed that he had an oiler problem?

A. Well, yah. He told me that his oiler wasn't working.

. . .

Q. Did you have to tell him to wait until you were finished setting that die?

A. No, for setting a die, we go away right away.

Q. So, when he came over and he told you he had oiler problems, did you go right over with him?

8/ Page 251, Transcript.

9/ Ibid.

A. Yah, I went right away and finished that thing on his machine there." 10/

Furthermore, Gissel, on direct examination, stated that it took him 15 minutes to correct the problem that Willis had with his "oiler" on the date in question. In addition, it should be carefully noted that Gissel is not a party to this matter. Therefore the Examiner credits Gissel's testimony that he immediately went to Willis' machine and discredits Willis' claim that he had to wait for Gissel to finish working on another machine. Finally, the only other time consuming element remaining concerning this incident was Willis' statement that after his machine was repaired he "took a couple of practice shots" before resuming operation. However, as noted previously, Willis testified that at most such an exercise only took a minute or two. Consequently, the Examiner finds Willis' claim of 36 minutes of "down time" for "oiler trouble" to be incredible.

Willis testified that on November 19, 1969, his machine was "down" for 24 minutes from 6:06 to 6:30 p.m. because it was out of metal. He stated that he told the "pot man" (metal hauler) to, "be sure and come to me first when you come back." Willis indicated that he could not operate his machine until the metal hauler, Priser, returned with the needed metal. Priser testified on direct examination by Complainant's attorney as follows. .

"By Mr. Loebel

Q. And how far is it where you have to get your materials to put into your truck from where Willis' machine was?

A. I'd say about three-quarters of a block.

Q. And how long does it take to fill your truck?

A. It takes about 3 minutes--maybe not that much to fill it." 11/

On cross examination Priser testified that he was the only "pot man" that Willis came to and that it took "maybe a minute" to fill Willis' machine.

The above quoted uncontroverted testimony definitively accounts for the passage of 4 minutes; 3 minutes for Priser to fill his own truck and one minute to fill Willis' machine. As to the remaining 20 minutes the Examiner is unconvinced that it took that amount of time for Priser to twice traverse 3/4 of a block; once to fill his truck and once to return to Willis' machine. Willis' own testimony was that Priser was to fill his (Willis') machine first upon replenishing his (Priser's) metal supply. It should be noted that there is no direct evidence as to how long it took Priser to twice traverse the 3/4 of a block on November 19, 1969. 12/ However, Gissel, the repairman, testified that he could walk up

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10/ Page 294, Transcript.

11/ Page 284, Transcript.

12/ There was no evidence presented at the hearing that indicated that on November 19, 1969 Priser experienced any sort of difficulties, usual or unusual, in traversing the distance in question.

and down all the aisles in the Die Cast Department in 5 minutes, which aisles he estimated to total 1800 feet. Consequently, the Examiner is forced to conclude that it did not take Priser 20 minutes to travel the distance referred to above.

Willis on November 19, 1969 again claimed his machine was "down" for 24 minutes from 6:54 to 7:18 p.m. due to a shortage of metal. Willis on direct examination by Attorney Loebel stated that he contacted the metal hauler (Priser) and was told by Priser, "I'll bring you some more as soon as I get through with this one." This indicates that Priser was filling another machine, but as was stated previously Priser testified that it only took a minute to fill a machine. Again, even if one assumes it took a certain amount of time to go from the machine that Priser was filling to Willis' machine, it still would not take the remaining 23 minutes to do so. Nor would this differential be made up by the fact that Willis most probably had to locate the "pot man", for as stated before, Gissel's uncontradicted testimony was that an individual could walk through the entire department in five minutes.

Therefore, based upon the above, the Examiner is discrediting Willis' testimony concerning the above-described two occasions that his machine was "down" because it was out of metal on November 19, 1969.

In addition, the Examiner is forced to conclude that because of the fabrications noted above when compared to the testimony of individuals not a party to this proceeding, which individuals were called as witnesses by Complainant, that said fabrications stain the very substance of all of Willis' testimony and hence said testimony is not credited.

PROCEDURAL QUESTION

At the outset of the hearing the attorney for Complainant rested his case in chief on the pleadings. Complainant in its pleading alleged that there was a collective bargaining agreement in effect between the parties during the time in question in this matter, that said contract contained a clause which stated that, "Employees will not be discharged without just and sufficient cause" and that Respondent did discharge Landowski and Willis without just and sufficient cause. Respondent, in its answer admitted all but the last allegation. Respondent, after Complainant rested its case in chief, then proceeded without making any procedural motion of any sort to put in its case. Complainant argued that once it established the facts admitted to by Respondent, the burden of going forward and establishing that there existed "just and sufficient cause" shifted to said Respondent.

However, the Examiner finds that because he has decided that Respondent demonstrated that the discharges in question were for just and sufficient cause and additionally because Respondent made no sort of procedural motion after Complainant had rested its case in chief, that it is not necessary to reach the question of whether the burden to prove same shifted to Respondent at that time.

RES ADJUDICATA

Respondent during the course of the hearing moved that the Appeal Tribunal decisions of the Unemployment Compensation Division of the Department of Industry, Labor and Human Relations and the affirmance of those decisions by the Industry, Labor and Human Relations Commisison concerning Margaret Landowski and Othell Willis be accepted into evidence. Complainant objected to their admission and the Examiner reserved his decision on the matter.

The Examiner rejects Respondent's argument that the findings of the aforementioned agency should be conclusive in the instant case before the Wisconsin Employment Relations Commission because the interests of the parties and the issues are identical. The Wisconsin Supreme Court in Milwaukee Transformer Co., Inc. v. Industrial Commission, 22 Wis. (2d) 502, 511, noted with approval that,

> "The general standard for determining whether an employee's course of conduct is misconduct is whether such behavior reflects an 'intentional and substantial disregard of the employer's interests or the employee's duties.' 5/ ...This standard must be interpreted and applied in the light of the basic social and economic objectives of unemployment compensation and the statutory mechanisms designed to achieve such objectives (emphasis supplied). 6/
> 5/ Cheese v. Industrial Comm. (1963) 21 Wis. (2d) 8, at page 17
> 6/ Boynton Cab Co. v. Neubeck (1941), 237, Wis. 249, at page 260."

The Court then stated at page 512 of Milwaukee Transformer Co., Inc., supra, that, "In considering whether a breach of company work rules or collective-agreement provisions is misconduct, the 'reasonableness' of the company rule must be assessed in light of the purpose of unemployment compensation rather than solely in terms of efficient industrial relations (footnote deleted)."

Therefore, the Examiner concludes that the Industry, Labor and Human Relations Commission and the courts exclusively apply a statutorily provided for standard defined in terms of unemployment compensation in cases of that species, whereas in the instant case the standard is that which is provided for in the collective bargaining agreement. However, in labor relations cases, vis-à-vis unemployment compensation matters, it is only when a violation of the collective bargaining agreement is initially found that there secondarily exists a correlative statutory violation. 13/

Therefore, based upon the above, the Examiner is sustaining Complainant's objections to the reception of the aforementioned decisions concerning Margaret Landowski and Othell Willis into evidence.

Dated at Madison, Wisconsin, this 30th day of July, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By John T. Coughlin
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13/ Sections 111.06(1) (f) and (2) (c), respectively, provide that it is an unfair labor practice for an employer or union to violate the terms of a collective bargaining agreement. In addition, it should be noted that the Wisconsin Supreme Court in Milwaukee Transformer Co., Inc., supra, stated at page 512 that, "The unemployment compensation statute is not a 'little' labor relations law."