STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS LODGE 34, Complainant, vs. HOLM MANUFACTURING COMPANY, Respondent.	Case V No. 14282 Ce-1334 Decision No. 10073-A

Appearances:

Mr. Gerhard Roemer, Business Representative, Lodge 34, appearing on behalf of Complainant.

Shaufler, Rothrock & Baker, Attorneys at Law, by Mr. Cecil T. Rothrock, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

International Association of Machinists & Aerospace Workers Lodge 34 having on December 9, 1970 filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that Holm Manufacturing Company had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed Marvin L. Schurke, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and pursuant to notice issued by the Examiner on December 22, 1970, hearing on said complaint having been held at Kenosha, Wisconsin, on January 13, 1971 before the Examiner; and the Examiner having considered the evidence, arguments 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 International Association of Machinists & Aerospace Workers Lodge 34, hereinafter referred to as the Complainant, is a labor organization having its principal office at 1010 - 56th Street, Kenosha, Wisconsin; and that at all times pertinent hereto, Gerhard Roemer has been a Business Representative of the Complainant; and that at all times pertinent hereto Joseph Zabrauskis, hereinafter referred to as the grievant, was the duly elected representative of the Complainant at Holm Manufacturing Company.

2. That Holm Manufacturing Company, hereinafter referred to as the Respondent, is a Wisconsin corporation engaged in the manufacture and repair of tools, dies, fixtures and sundry items and maintains a plant and its principal office at 1303 - 35th Street, Kenosha, Wisconsin, 53140; that the Respondent is engaged in a business affecting interstate commerce within the meaning of the Labor Management Relations Act;

and that at all times pertinent hereto Robert Holm was an officer of the Respondent, authorized to represent the Respondent in all matters and relationships involving the Respondent and its employes.

3. That the Complainant and the Respondent are signatory parties to a collective bargaining agreement dated December 17, 1953 which, together with certain amendments to such collective bargaining agreement and its appendices, continues in effect until December 1, 1971; that the collective bargaining agreement in effect between the parties contains a grievance procedure; and that the grievance procedure contained in said agreement has been exhausted.

4. That the collective bargaining agreement in effect between the parties contains the following provision limiting the right of the Respondent to discharge employes:

> "Section 7.11 No employee shall be discharged except for just cause, and on the request of the Shop Committee, the Company will furnish to the Shop Committee, a written statement of the reasons for the discharge of such employee. In case of final determination that discharge was unjust, he shall receive back pay for time lost."

5. That Joseph Zabrauskis was an employe of the Respondent and was discharged by the Respondent on October 28, 1970 following a period of continuous employment of approximately 36 years; and that said grievant was then classified as a tool amd die maker and had been at the top of his classification for pay purposes for approximately 20 years.

6. That each item produced in the Respondent's plant is handled as a separate job; that the Respondent has no established production standards or time allowances covering all jobs produced in its plant; that the labor input on any particular job is composed of procedures and operations which are common in the industry and it is possible for Respondent's management and for Respondent's individual employes to make reasonable advance estimates of the labor time required for a particular job; that the labor time estimates accepted and adopted by the Respondent on certain jobs, and in particular on die work performed by the Respondent for its customer Johnson Motors, are time estimates based on the experience of the Respondent's customers in their own shops or based on previous charges by competitive shops on similar work; that the customer shops and competitive shops on which such estimates are based are not necessarily equipped with the same equipment that is available in the Respondent's plant and, in particular, the Johnson Motors shop is equipped with more modern equipment than is available in the Respondent's plant; and that a decline in the availability of equipment, tools and supplies in the Respondent's plant occurred during a period of approximately one year preceeding hearing in this matter.

7. That situations where an employe of the Respondent exceeded the time estimate on a particular job were common in the Respondent's plant; that as a result of a decline in business and a reduction of the Respondent's work force, the Respondent's cost accounting procedures were brought into closer focus on the work of individual employes during a period of approximately one year preceeding hearing in this matter than had been the practice in previous periods when the Respondent employed a larger work force; and that when an employe of the Respondent exceeded the time estimate on a particular job it

was common practice that the situation be made a subject of a conversation between Robert Holm and the employe involved, wherein Holm would typically inquire in terms such as "Why is the job taking so long?", and the employe would respond with an appropriate answer.

8. That on no less than two occasions during a period of approximately one year preceeding the discharge of Zabrauskis, Holm held discussions with the grievant regarding his work pace; that such discussions were held on Company premises but away from the grievant's work station; that such discussions were more general and more disciplinary in nature than the conversations or inquiries into time on a job which were common in the Respondent's plant; that following such discussions Holm noted an acceptable improvement in the work pace of the grievant; and that at no time was the grievant specifically warned or put on notice, either orally or in writing, that the next action to be taken by the Respondent in response to an occasion on which the grievant's time on a job was unacceptable to the Respondent would be to discharge the grievant.

9. That on Tuesday, October 22, 1970, Holm assigned the grievant to a job known as the Johnson Motors Core Pull Die; that on the same day Holm advised the grievant that the job carried a time allowance of 30 hours; that the grievant protested to Holm that the 30 hour allowance was insufficient; that Holm concurred with the grievant's estimate that 30 hours was insufficient; and that Holm arranged for a change of the time allowance on the job to 40 hours and notified the grievant of that change.

10. That the grievant worked on the Johnson Motors Core Pull Die job on Thursday, October 22, 1970, on Friday, October 23, 1970, on Monday, October 26, 1970, and on Tuesday, October 27, 1970; that at the end of his regular shift on October 27, 1970, the grievant had charged 32 hours to that job, including approximately 3 hours representing time lost due to inadequate equipment and mechanical failures beyond the control of the grievant; that the Respondent's cost accounting practices did not call for the inclusion of lost time in the time charged to a particular job, but the Respondent was not aware that the grievant was charging lost time in this manner; and that the grievant's actual time input on the Johnson Motors Core Pull Die job was 29 hours.

11. That at the beginning of the grievant's regular shift on October 28, 1970, Holm questioned the grievant regarding the Johnson Motors Core Pull Die job and advised the grievant to look for another job; that the term "another job" in this context was intended to mean and was interpreted by the grievant to mean 'other employment'; and that the Respondent intended to and did discharge the grievant.

12. That on some of the jobs assigned to him, the grievant exceeded the labor time estimates acceptable to the Respondent; but that, taking the examples specifically discussed in the Record and taking the record as a whole, the evidence does not provide a basis for finding that the Respondent had just cause to discharge the grievant under the circumstances.

13. That the Respondent has previously used suspension as a disciplinary measure and has previously used a written warning as a disciplinary measure, but the practice of the Respondent has generally omitted any use of written warnings.

14. That the collective bargaining agreement in effect between the parties contains provisions for the selection and recognition of a Shop Committee and Shop Stewards and states in Section 9.1, in pertinent part, as follows:

> "There shall be no discrimination either for or against any member selected by the Union to serve as a Shop Steward or on the Shop Committee."

15. That the assignment of the Johnson Motors Core Pull Die job to the grievant by Holm was not motivated by any discriminatory intent with respect to the status of the grievant as a representative of the Union in the Respondent's plant; and that any feeling on the part of the grievant that he was being discriminated against on the basis of his union activity was wholly without basis in the actions of the Respondent.

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

CONCLUSIONS OF LAW

1. That Holm Manufacturing Company, by its discharge of Joseph Zabrauskis without just cause, has violated and is violating the terms of the collective bargaining agreement which exists between it and International Association of Machinists and Aerospace Workers Lodge 34, and by such violation has committed and is committing an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

2. That Holm Manufacturing Company, by its discharge of Joseph Zabrauskis, did not discriminate either for or against said employe because of the Union office held by said employe in violation of the terms of the collective bargaining agreement between it and International Association of Machinists and Aerospace Workers Lodge 34, and in this allegation of the Complaint has not committed an unfair labor practice within the meaning of the Wisconsin Employment Peace Act.

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 Holm Manufacturing Company, its officers and agents shall immediately take the following affirmative action which will effectuate the policies of the Wisconsin Employment Peace Act:

> Offer to Joseph Zabrauskis immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of his discharge, by payment to him the sum of money equal to that which he would normally have earned as an employe, from the date of his discharge to the date of the unconditional offer of reinstatement made pursuant to this Order, less any earnings he may have received during said period, and less the amount of unemployment compensation, if any, received by him during said period, and in the event that he received unemployment compensation benefits, reimburse the Unemployment Compensation Division of the Wisconsin

Department of Industry, Labor and Human Relations in such amount.

IT IS FURTHER ORDERED that the charge in Paragraph 6 of the Complaint filed in the instant matter, insofar as it relates to the alleged discrimination against Joseph Zabrauskis for being a union representative, be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 11th day of March, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS LODGE 34, Complainant, vs. HOLM MANUFACTURING COMPANY, Respondent.	Case V No. 14282 Ce-1334 Decision No. 10073-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On December 9, 1970, the union filed a complaint with the Commission alleging that Holm Manufacturing Company had committed an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Statutes by discharging Joseph Zabrauskis without just cause, in violation of Section 7.11 of the collective bargaining agreement existing between the parties, and further, that the discharge was an act of discrimination against Joseph Zabrauskis for being a union representative, in violation of Section 9.1 of the collective bargaining agreement. In its answer filed on January 5, 1971, the Respondent denies the allegations of lack of just cause for discharge and discrimination and asserts an affirmative defense which, in summary, is as follows: that Joseph Zabrauskis was discharged because of poor work stride and inability to produce within reasonable standards of the Respondent. Hearing was held in said matter on January 13, 1971, in Kenosha, Wisconsin, at which time the Complainant called Joseph Zabrauskis, fellow employes Clem Sepanski and Marland Steilow, and its Business Agent, Gerhard Roemer as witnesses and the Respondent called its Secretary-Treasurer and Plant Manager, Robert Holm as a witness. Hearing was closed on the same date. Final briefs were submitted on March 5, 1971.

Exhaustion of the Grievance Procedure

Joseph Zabrauskis was discharged by the Respondent on October 28, 1970. A pre-printed grievance form was filled out and signed on October 29, 1970 by Zabrauskis as the aggrieved employe and was countersigned by Zabrauskis in his capacity as union representative. A meeting was held on October 29, 1970 with Zabrauskis and Gerhard Roemer present for the union and Robert Holm and Art Earl, company president, present for the company, at which time the grievance was stated orally in the first step of the grievance procedure specified in Section 9.2 (a) of the collective bargaining agreement. The document prepared and dated by Zabrauskis on October 29, 1970 was presented to the company at a second grievance meeting held on November 2, 1970, pursuant to Section 9.2 (b) of the collective bargaining agreement. Additional meetings were held on December 3, 1970 and on January 5, 1971, at which times the parties discussed the discharge of Joseph Zabrauskis but failed to arrive at a satisfactory settlement. The collective bargaining agreement contains

no provision for the submission of unsettled grievances to final and binding arbitration. In the instant proceeding the issues raised by the grievance were heard on the merits.

The Positions of the Parties

The union claims that the collective bargaining agreement places the employer under an obligation not to discharge employes except for just cause, and that the employer did not sustain its burden of proof that the discharge of Joseph Zabrauskis was for just cause. The union introduced evidence to contradict some of the evidence introduced by the employer and argues in its brief that the examples introduced by the employer constitute an insufficient record on which to base the discharge. The union also claims that the circumstances of the discharge should lead to finding that the discharge involved the fact that Joseph Zabrauskis was the sole union representative in the employer's plant at the time he was discharged.

The employer takes the position that the discharge of Joseph Zabrauskis was due solely to economic reasons, that is, his slow work pace; that the employer should not be required to retain on its payroll an employe who consistently cannot carry his own weight; and that under these circumstances the employer acted properly in discharging the employe. With respect to the allegation of discrimination against Joseph Zabrauskis because of his activity as a union steward, the employer introduced evidence to show that the parties have had a long and peaceful history of collective bargaining and that the status of Zabrauskis as a union representative was not taken into consideration in making the decision to discharge him.

Just Cause for Discharge

Taking the record as a whole, the Examiner finds that two major issues have been developed by the parties going to the question of whether there was just cause for the discharge of Joseph Zabrauskis on October 28, 1970, to wit: 1) the adequacy of the warnings or previous disciplinary action taken against Zabrauskis to put him on notice of the possibility of discharge; and 2) the adequacy of the cost accounting records and testimony of the employer's witness to form a basis for discharge, taking into consideration the circumstances prevailing in the employer's plant up to October 28, 1970.

Adequacy of Warnings

Both at the hearing and in its brief, the union laid emphasis on the failure of the employer to give Zabrauskis written notice or written warning of his impending discharge. Although it is not so stated in its complaint, the union made an effort at the hearing to raise a procedural defect in the action taken by the employer and to lay the foundation from which it argues that the discharge should be overturned for what it in effect claims is lack of procedural due process under the collective bargaining agreement.

The union points to Section 11.1 of the collective bargaining agreement, which reads:

> "Section 11.1 Shop Discipline It is agreed that personal physical fights between employees, horse-play, practical jokes and rought (sic) house acts, endanger the safety of employees and interfere with production in the plant. Such conduct will not be tolerated.
>
> The Union agrees that reasonable shop rules are necessary for the efficient operations of the plant and urges all employees to abide by all such Company shop rules. Repeated violations of the shop rules committed after written warning by the Company to the violators and Chairman of the Shop Committee, will result in the perpetrators being penalized."

The union's argument, based on the second paragraph of the above-cited provision of the collective bargaining agreement, depends on the premise that the ability of an employe to do his job or his productivity on his job falls under the same category of "shop rules" as physical fights between employes and horseplay. The Examiner finds this interpretation to be strained and untenable, and finds that the reasons given for the discharge of Zabrauskis do not fall within the shop rules section of the collective bargaining agreement. There has been no allegation that the grievant was discharged for taking excessive coffee breaks, engaging in personal business on company time or any of numerous other activities which might be found to be violations of a set of "reasonable shop rules".

Under Section 7.11 of the agreement the employer is obligated to give the union a written statement of the reasons for the discharge of an employe, in the event that such a statement of reasons is requested by the union's shop committee. The union did not receive such a statement regarding previous discharges made by the employer, and nothing in the record indicates that the Shop Committee ever made a request or demand that the employer provide written statement of its reasons for the discharge of Joseph Zabrauskis. Under Section 9.2 (b) the foreman representing the employer in the second step of the grievance procedure is obligated to write his decision of the issue presented by a written grievance. The record contains no indication that a written answer to the grievance was given. However, the union alleged in paragraph 5 of the complaint that the grievance was properly processed through the grievance procedure. The record contains ample evidence to indicate that the parties had several full discussions of the issues involved in this case, that the union was fully aware of the reasons claimed by the employer for the discharge of Zabrauskis, and that the union was not prejudiced by the failure or refusal of the employer to give written notice of the reasons for the discharge.

The Examiner finds nothing in the agreement which dictates that a pattern of progressive discipline, beginning with written warnings, is to be applied to all discipline and discharge cases arising in the plant operated by the Respondent. The employer's witness testified that he could not remember ever using a written warning against any employe. This testimony was contradicted by the union, and a document identified by the union as a written warning received by the union from the company regarding another employe was introduced into evidence to impeach the testimony of the employer's witness. On cross examination of the union's witness it was made clear, however,

that the use of written warnings was limited to the one instance shown by the union during the 4-1/2 year period that the present management has been in control of the Respondent, and that this written warning was in fact the exception to the general rule or practice followed by the employer. In its brief, the union cites the Memorandum Accompanying Findings of Fact, Conclusion of Law and Order in John Oster Manufacturing Company, Case XI, No. 9818, before this Commission, wherein the Commission stated:

> "In making this determination the Board must not only consider the applicable provisions of the collective bargaining agreement, but also the practice of the parties in applying said pertinent provisions." 1/

The collective bargaining agreement and the evidence presented as to the practice of the parties provide no basis on which to rule that the failure of the employer to give the grievant a written warning, in and of itself, invalidates the employer's action of discharging the employe. While the issue of notice of discipline or warning that discharge was being considered bears significant weight in the decision of the instant case, the Examiner is satisfied that effective warnings could have been given by means other than written warnings.

There is no dispute as to the nature and extent of the majority of the discussions which were had between Holm and Joseph Zabrauskis prior to the discharge. Those discussions were held at the grievant's work station and were not unlike the many discussions which were held from time to time between Holm and other employes in the plant, including Sepanski and Steilow, when progress on a job fell behind the estimated time schedule for that job. Such discussions were expected by the employes, and were not taken by the employes as threats to their employment, but rather as part of their employment environment. The specific nature of those discussions and the fact that such discussions are common talk in the employer's plant operate to reduce their effectiveness as warnings of discipline.

Zabrauskis and Holm also engaged in at least two additional discussions previous to the discharge, during which the work stride and productivity of the grievant were discussed in general terms. No exact dates were established in the record and no written records were kept of those meetings. Zabrauskis testified that one such meeting occurred in the company offices approximately one year before the hearing in this matter. Holm also testified concerning a meeting held in the company offices, but placed it at a date approximately six months earlier than the date suggested by Zabrauskis. Zabrauskis testified that the second such meeting occurred at the time clock at the end of a work day approximately seven months prior to the hearing. Holm placed the time of that discussion as August, 1970, or approximately five months before the hearing.

The record indicates that at no time, either during the course of one of the discussions held at the grievant's bench or during one of the two general discussions of his productivity, did the employer threaten this grievant with suspension or discharge if his productivity did not improve. Holm testified that he did not spell out the action which the management was then contemplating or might expect to take, but urged the employe that there had to be some improvement. Holm intended his statements to carry an inference that any action taken would be unfavorable to the grievant, but he neither specified the nature of the action nor the time limitation before the situation would pass beyond the warning stage and action would be taken. The

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1/ John Oster Mfg. Co. (7045) 2/65

testimony of Zabrauskis on the issue of discrimination against him because of his union office reveals that the more recent of the two general discussions had in fact made him aware that he was being watched by the management to a greater degree than other employes. However, it is equally apparent that Zabrauskis had misinterpreted the thrust of that general discussion of his productivity and did not fully appreciate that his job itself was in jeopardy if his work stride did not improve. In its brief, the employer cites a decision of the National Labor Relations Board in a Complaint proceeding 2/ under Section 8 (a)(3) of the Labor-Management Relations Act in which that agency found that the statement to an employe that his job was "on a pile of banana peelings" could be construed to mean that the employe's job was in jeopardy because he was holding up production. There is no evidence in this record that a warning even in such ambiguous terms was given. Respondent also submits explanation in its brief to excuse the lack of clear threats of discharge because of the fact that this was a small shop in which everybody knew everyone else, and because of the unfavorable effects of "actually saying the nasty word discharge" among friends. Taking into consideration that this employe had worked for the same company for 36 years and had occupied the same job classification for 20 years, it would be difficult to arrive at any conclusion that two discussions held, respectively, ten to sixteen months and two to four months prior to the discharge, put this employe on notice that his job was in jeopardy. If anything, the length of the employment relationship and the closeness of the group would tend to lull individual employes into a comfortable feeling of employment security, and would dictate that a warning that the employment was in jeopardy should be clear and distinct. The record shows that Zabrauskis did improve his productivity following previous discussions with Holm. Although the employe did actually revert to slowness following the periods of improved work, there was no evidence whatever that the employe was in any way foreclosed from again making improvement upon prompting from his employer. This employe was not uncooperative in his relations with his employer, and there is no evidence that the favorable effects achieved by previous discussions would not or could not be achieved on a more lasting basis by further discussions, specific warnings of future disciplinary action, or by suspension without pay, all of which were available to the employer short of taking the ultimate step taken in this case.

Adequacy of the Cause Put Forth for Discharge

The employer's witness testified that Zabrauskis did not "make out" on 85 to 90 percent of his jobs. In its brief, the union argues that, in effect, the employer thereby established the standard for discharge and was obligated to come forth with records to show that the employe was in fact slow on that proportion of its jobs. The union also sets forth calculations derived from the examples specifically mentioned by the employer, and their projection over the 4-1/2 year tenure of the present management, to arrive at the standard of proof which the union urges should be required to sustain this discharge. The standard the union urges would require the presentation of an extremely long and repetitive record in any discharge case, and the Examiner is satisfied that the employer could support its allegation by examples selected from the whole history, rather than by the presentation of every example going back to the first job performed by the employe. The adequacy of the examples, the evidence of standards presented by the employer, any evidence of the work pace of other employes, and any rebuttal evidence submitted by the union should be taken together in considering whether just cause was present for the discharge.

2/ Bush Hog, Inc., 176 NLRB 112

The record clearly indicates that the employer has no written or posted production standards. Few jobs in the employer's shop are exactly alike and there are no production runs from which industrial engineering principals could derive exact job time standards. However, witnesses for both the union and the employer indicated that they were able, by virtue of their experience in the industry, to make a reasonable advance estimate of the labor time input that would be required on a job. The employer therefore relies on its time estimates as the basis for argument that Zabrauskis was slow and was unable to produce within reasonable standards.

Accepting that a "reasonable standard" could be present in the employer's plant, the evidence in this record is insufficient to show that Zabrauskis was discharged for just cause. The record clearly indicates that on some proportion of the work done in the employer's plant, the time estimates accepted and adopted by the employer were not estimates of the time required in its own plant, and were customer estimates of the time which would be required in the customer's own plant. Customer plants and competitive plants are not identical to the Holm Manufacturing Company plant, and in particular there is Robert Holm's statement with respect to Johnson Motors jobs that: "Most of these times are let out of that factory on their records, and they have every bit of the most modern equipment in the world to do it". Under such circumstances, the failure of a particular employe at Holm's plant to complete a job in the allotted time provides no valid basis for comparison with other employes in the Holm plant. The comparison, if any, would be with the employe at Johnson Motors, and there is insufficient information in this record to identify what part of the difference is properly attributable to the difference in equipment availability between the two shops. There is undisputed evidence in the record to indicate that hand tools have been less available and machine tools have been on breakdown status more during the last year at the Holm plant than was experienced previously, and this fact compels the conclusion that evidence that Zabrauskis did not meet times established by Johnson Motors or other customers of the Respondent cannot, in and of itself, provide just cause for discharge.

The employer has made the claim that Zabrauskis was the slowest tool and die maker in its plant. However, both Sepanski and Steilow testified that they too ran over on jobs, and that such time overruns were a common and expected experience in their line of work. The employer did not adduce any evidence at the hearing which would indicate the amount of time overrun or the frequency of time overrun which was average or acceptable in its plant, and directed its questioning on cross examination of the union's witnesses to the question of whether the lack of tools and equipment affected all employes in the shop equally. It is apparent that productivity in this shop cannot be measured exclusively against the advance estimates accepted by management, and the employer has completely failed to establish any comparison between the productivity of Zabrauskis and the productivity of other employes in the shop, either against the standard based on estimates or comparative performance.

The evidence introduced by the employer goes to a number of specific examples of jobs in which Zabrauskis ran over the time estimate made or accepted by the employer. On certain of those jobs there is no rebuttal evidence to the accounting records which indicate that Zabrauskis ran over on the job. Thus, on the basis of the Lincoln Tool job represented by Exhibit 3, where 26 hours were devoted to a job that should have taken 19 hours, the Eaton, Yale and Towne job represented by Exhibit 4, where 7 hours were devoted to a job that

should have taken 5 hours, and the Condes Corporation job represented by Exhibit 6, where 11 hours were devoted to a job that should have taken 6 hours, the Examiner has made the finding that Zabrauskis was slow on some of his work. However, the inability of Holm to testify as to the real reasons why Zabrauskis has a poor productivity record, together with the change of the employer's cost accounting practices, and the lack of credibility in certain other example jobs cited by the employer, satisfies the Examiner that the employer did not have just cause to discharge Zabrauskis.

Holm testified at R.46 regarding his review of a number of cost accounting records which had been brought to the Hearing in this matter. He concluded from his review that there were a number of jobs on which Zabrauskis had worked along with other employes, wherein Zabrauskis had the most time on the job but the job nevertheless made a normal profit. He was unable to state that the other employes who worked on those jobs carried Zabrauskis along, and he did not testify as to the proportion of the work which Zabrauskis had to do on those jobs. In other testimony, Holm was unable to state that Zabrauskis was actually known to kill time at his bench, engage in excessive breaks or use methods which were slower or otherwise unacceptable. It was, rather, on the basis of the employer's cost accounting records that the determination was made that Zabrauskis should be discharged. Robert Holm repeatedly testified that the decline in the work force in the employer's plant made each man's individual work stand out. Holm was unable to testify with any authority about the work of this employe prior to the decline of the employer's work force and the resulting change of accounting practice so as to actually focus on the work of individuals. If Zabrauskis had been working at the same pace for many years and his work was acceptable to the employer during those times, it would not be just to discharge the employe when the sole reason for doing so was that bad times had permitted the employer's cost accountant to determine the employe's real work pace and conclude that productivity which was acceptable during good times was unacceptable during bad times.

The employer cited several examples which draw serious doubts as to the credibility of its cost accounting records. Holm testified that Zabrauskis took 62 hours to do a job for Gateway Tool on a "bar" which had previously taken another employe 40 hours. He claimed the hours were excessive and were disputed by the customer, and that the employer lost money because it had to give the customer a credit of $160 on the price of the job. Holm also testified that Zabrauskis was not a "complete" bar operator and that in recognition of that fact his time was billed at his usual rate of $10 per hour rather than at the previous billing rate of $15 per hour for a bar expert. The simple mathematics of this case indicate that Zabrauskis should not be held accountable for the bulk of the loss on the job. The charges for the previous job should have been $600 ($15 x 40 hours) and the charges for Zabrauskis' job should have been $620 ($10 x 62 hours). A credit of $160 reduced the bill on the job done by Zabrauskis to $460 and carries the implication that the job should have been done in 46 hours. This is rejected as a basis for discharge, in that the application by Holm of the usual $10 billing rate for work done by Zabrauskis indicates that 60 hours would be in the appropriate ratio. The Johnson Motors "bridge bar" job introduced as Exhibit 5 is also unconvincing, in that Holm was unable to state what proportion of the work was actually within the responsibility of Zabrauskis, and was only able to conclude from looking at the document that Zabrauskis had the most hours on the job.

The job which precipitated the discharge was referred to in the record as the Johnson Motors Core Pull Die, and there is disputed testimony regarding this job and the time estimate that was assigned to it. It becomes clear that the employer's cost accounting figures cannot be given the full credibility which the employer would have us give them. Holm stated categorically that the cost accounting figures contained in the company records did not include time which the employe lost due to breakdown of machine tools or the lack of other tools and equipment, and that if such time was included in a cost accounting record of hours, it should not have been. Zabrauskis testified equally strenuously that he included such time in the Johnson Motors Core Pull Die job, with the implication that he had done so all along. While not conclusive in the issue, this conflict and Holm's complete unawareness of the practices being actually followed by the employe, cast further doubt on the credibility of the employer's cost accounting data.

At the time the Johnson Motors Core Pull Die job was assigned to Zabrauskis he was notified that the time allowance was 30 hours. It was not the practice in the employer's shop to give the individual employe an advance estimate on his time, but Holm did so in this case knowing that the time estimated by Johnson Motors for the job was inadequate. Holm later obtained an additional 10 hours on the job from Johnson Motors, but the time on the job, including 29 hours by Zabrauskis, up to 3 hours by Holm, 24 hours by Sepanski and up to 8 hours by another employe amounted to as much as 64 hours. Holm first testified that the contribution by Zabrauskis was entirely in roughing work. He then revised his testimony and detailed a number of procedures which Zabrauskis performed on the job and revised his allegation so as to say that Zabrauskis was slow on that part of the job which was performed between the time it was assigned on Thursday and end of the work week on Friday afternoon. The Examiner will not venture to make an estimate of the time which the job should have taken or whether Zabrauskis was slow on all or any of the work he performed. The Examiner does conclude, however, that the facts related regarding this job are not persuasive towards the claim by the employer that the employe's performance on this job justified his discharge.

Violation of contractual protection of Union Representative

At the opening of the hearing, as a preliminary matter, the Examiner requested the Complainant to clarify its allegation with respect to discrimination against the employe for being a union representative. The Union representative at the Hearing stated that the allegation was brought under the language of Section 9.1 of the collective bargaining agreement and was before the Wisconsin Employment Relations Commission, sitting as a "Section 301 tribunal" under Section 111.06 (1)(f) of the Wisconsin Employment Peace Act, and that the union was not urging a violation of Section 8(a)(3) of the L.M.R.A. On that basis, the Examiner permitted the Complainant to proceed with its presentation of evidence on this issue.

The evidence presented by the union was limited to the feelings which Zabrauskis himself had about his relationship with his employer. No other witness testified on behalf of the union and no documentary

evidence was presented in support of the allegation. On cross examination of Zabrauskis and on direct and cross examination of Holm the record was expanded to include evidence of a long and peaceful history of labor relations between the parties to this action. No specific acts, other than the assignment of the Johnson Motors Core Pull job to Zabrauskis, were alleged which would point to any course of conduct directed against Zabrauskis or any other union member by the employer on the basis of the union affiliation of the employe. The Examiner is persuaded that there is no basis in fact for a finding that the discharge of Zabrauskis was motivated other than by the economic situation of the employer. The fact that the discharge is found to be without just cause does not raise an inference in this case that the discharge was a pretext to reach the employe in discrimination against his union activity.

Remedy

The Examiner is not free in this case to fashion a remedy. The collective bargaining agreement dictates that the dischargee should receive back pay for time lost, and whether or not this would necessarily be the award on the basis of the facts in the record, the contract leaves no other choice. The fact that there has been an order for reinstatement with full back pay should not be interpreted by the union or the employe involved as a full victory. The employe is entitled to a full and fair opportunity to return to his former job and to prove his ability to fulfill his part of the employment relationship with respect to his productivity. This decision will not insulate the employe from further action, either in the form of discipline or demotion, to the extent that such action is then taken for just cause in conformity with the contract. The employe and the union should interpret this decision in light of the fact that if free to fashion a remedy, an arbitrator hearing this case under an arbitration provision or an Examiner in this proceeding would have been free to award a reinstatement to a lower job, a layoff until work was available which the employe was capable of performing, or a reinstatement with partial or no back pay.

Dated at Madison, Wisconsin, this 11th day of March, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner