STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ALLIED INDUSTRIAL WORKERS OF AMERICA, LOCAL NO. 579, AFL-CIO, Complainant, vs. GEHL COMPANY, Respondent.	Case V No. 15456 Ce-1416 Decision No. 10891-A

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Thomas P. Krukowski, for the Complainant.
Foley & Lardner, Attorneys at Law, by Mr. Paul E. Prentiss, for the Respondent.

FINDINGS OF FACT, CONCLUSION 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 Robert M. McCormick, a member of the Commission's staff, to act as an 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 a hearing on such complaint having been held at West Bend, Wisconsin, on April 19, 1972, before the Examiner; and the Examiner having considered the evidence, arguments and briefs of counsel and being full advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Allied Industrial Workers of America, Local No. 579, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization with a mailing address Box 501, West Bend, Wisconsin.

2. That Gehl Company, hereinafter referred to as the Respondent, is a corporation engaged in the manufacturing of farm machinery and has offices and plant facilities at 143 Water Street, West Bend, Wisconsin.

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 May 3, 1971 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.

4. That the aforesaid collective bargaining agreement contains among its provisions the following:

"ARTICLE II - COLLECTIVE BARGAINING

. . .

Section 3. The parties shall utilize the following system of presenting and adjusting complaints and grievances and any other topic of collective bargaining:

(a) A grievance shall be defined to be any controversy between the parties, or between the Company and any employees, as to any matter involving working conditions not covered by this Agreement or to interpretation or application of one or more of the provisions of this Agreement. The parties shall utilize the following system of presenting and adjusting complaints and grievances and any other topic of collective bargaining.

Step 1. An employee who has a complaint may present such complaint orally to his foreman. The employee may have the department steward present for such discussion if he so desires.

. . .

Step 2. If no satisfactory settlement is reached, the complaint may become a grievance and shall be reduced to writing on triplicate blanks furnished by the Union. The department steward shall present the grievance to the shift chief steward who shall attempt to make a settlement with the shift superintendent (or his designated representative). Two (2) copies of the written grievance shall be submitted to the shift superintendent (or his designated representative) and one (1) retained by the Union. The shift superintendent (or his designated representative) shall submit his disposition of the grievance in writing within forty-eight (48) hours and return one (1) copy of the grievance to the Union. Such grievance shall not be considered if it is not presented by the shift chief steward to the shift superintendent (or his designated representative) within five (5) working days after receipt of the foreman's answer in Step 1.

. . .

Step 3. In the event a settlement is not reached, the grievance shall be turned over to the chief steward who shall present the grievance to the general superintendent (or his designated representative). The general superintendent (or his designated representative) shall present his disposition of the grievance in writing within forty-eight (48) hours. The president of the local Union may, upon request, be present at this stage. Such grievance shall not be considered if it is not presented by the

chief steward to the general superintendent (or his designated representative) within five (5) working days after receipt of the superintendent's (or his designated representative) written answer in Step 2.

Step 4. In the event a settlement is still not reached, the matter is then referred to the Union bargaining committee, who will request a meeting with the Company's bargaining committee to attempt to arrive at a satisfactory settlement. Both parties have the right to call in their outside chosen representatives to be present at this stage to assist in arriving at a mutual agreement.

If a grievance is not submitted to the Company's bargaining committee within ten (10) working days after receipt of the general superintendent's (or his designated representative) written answer in Step 3, then the grievance will be considered settled. The Company shall give the Union its final answer within five (5) working days following any Step 4 meeting and shall reduce its answer to writing within ten (10) working days of the Step 4 meeting.

(b) Any grievance concerning a discharge of disciplinary layoff shall bypass the first two (2) steps of the grievance procedure and shall be presented in Step 3.

(c) It is recognized that some complaints or grievances may require investigations which, of necessity, will prevent the parties from complying with the time periods specified in the various steps of the grievance procedure. In such event, an extension of time may be mutually agreed upon.

. . .

ARTICLE IV - SENIORITY

. . .

Section 7. An employee shall lose his seniority for the following reasons only:

. . .

(b) If he shall have been discharged for just cause.

. . .

ARTICLE XI - GENERAL

Section 1. Except as otherwise herein provided, the Management of the plant and the sole direction of its working forces, such as, the right to hire, discharge for just cause, discipline for just cause. . .

Section 2. In accordance with Section 1 above the Company and the Union agree on the following plan to be used by the Company wherever practical:

(a) Prior to a written warning being issued, the Department Foreman shall discuss the matter with the employes in the presence of the Union Steward.

(b) Whenever an employee by his actions or failure to act shall be subject to discipline or discharge, the Factory Superintendent or Department Foreman shall hand him a Warning notice in writing, calling his attention to such unsatisfactory condition. One copy of such notice shall be given to the employee, one to the Department Steward, one to the Department Foreman and one to the Factory Superintendent.

(c) If the condition is not corrected within a reasonable time, a second warning shall be given thy employee in the same manner.

(d) Failure to heed the second warning on the part of the employee within a reasonable time shall result in his subsequent discharge or discipline, whatever the case may warrant.

(e) A written warning notice shall become void one year from the date of its issuance, provided the employee has not received additional written warnings for the same type of infraction during that year. Should an employee receive additional written warnings for the same type of infraction during the period of one (1) year from the date of issuance of the initial written warning, all such written warnings shall remain in effect until one (1) year from the date of the last written warning at which time they all shall be voided.

Section 3. A copy of the work rules in force at the time of the signing of the Agreement is hereto attached and marked Exhibit D. The Company shall have the right to enforce all work rules and any additions or amendments to the work rules shall be by mutual agreement of the parties. Any question arising under this section shall be subject to the grievance procedure.

. . ."

5. That the Respondent had a well established set of work rules which the parties set forth in said collective bargaining agreement which reads in material part as follows:

"EXHIBIT D

WORK RULES

. . .

9. Intentionally giving false or misleading information in applying for employment.

10. Inattention to duties; deliberate 'soldiering' on the job.

11. Loitering in washrooms, locker rooms, or elsewhere during working hours. Writing or drawing on walls in washrooms and locker rooms is definitely prohibited.

. . .

21. Repeatedly leaving employee's regular working place to wash up prior to wash-up periods provided.

. . .

24. Abusing the privilege of purchasing items dispensed by vending machines such as loitering around vending machines, too frequent use of vending machines and purchasing items shortly after shift starting times and shortly before and shortly after the end of lunch and dinner periods.

. . ."

6. That Thomas Dickmann, hereinafter referred to as the grievant, was first employed for Respondent in 1965, and after 1968 performed the job of a production arc-welder; that on June 5, 1970, a foreman for the Respondent issued grievant a written warning notice charging the grievant with loitering; that on April 7, 1971, a foreman, Eugene Averill, issued a written warning notice to grievant, charging him with loitering in a different department and with making "uncalled for remarks" in the face of reprimands; that a grievance challenging said action was filed by grievant sometime in April 1971 and thereafter not pressed beyond the third step of the contractual procedure by the grievant and/or Complainant.

7. That on August 5, 1971, Foreman Ronald Hartman issued a written warning notice charging grievant with loitering on the job, while grievant was temporarily assigned to Department A; that Hartman observed and recorded the fact of grievant's successive absences from his work station, which time amounted to at least 164 minutes over his eight (8) hour shift; that as of August 5, 1971 Respondent's supervisor in the East Plant were unaware of the prior written warnings in grievant's file; that on or near August 6, 1971 Hartman's observations and the issuance of the August 5 warning were called to the attention of Ira Weber, Superintendent of the East Plant and also to Respondent's personnel department.

8. That on August 9, 1971, Plant Superintendent Weber placed the grievant on a five (5) day disciplinary layoff as of August 10, 1971, on the basis of grievant having received two prior warning slips for related conduct violative of Respondent's rules; that grievant filed a grievance on or near August 10, 1971, which was processed by Complainant's steward and chief steward; that said grievance was rejected by the Respondent's representatives through the second step of the grievance procedure; that subsequently the Respondent's Director of Industrial Relations discussed the grievance with the chief steward, outside of the structured steps of the grievance procedure, and agreed to meet with the grievant and his East Plant supervision; that no such meeting proximate to August 11, 1971 was ever arranged; that several months subsequent to August of 1971, but prior to January 1972, representatives of the Complainant arranged for a meeting between the grievant, the Union and the Respondent's East Plant Superintendent; and that the grievant declined the opportunity to attend such a meeting.

9. That with respect to the grievance filed by the grievant challenging the warning notice issued by Respondent on April 7, 1971, the Complainant and the Respondent by their conduct treated such grievance as having been denied and settled within the meaning of Section 3, Step 4 of Article II of their collective bargaining agreement; that with respect to the grievance filed on behalf of the grievant, challenging the disciplinary layoff of August 10, 1971, the Complainant and Respondent by their conduct treated said grievance as having been denied and settled within the meaning of the aforementioned provision of the parties' collective bargaining agreement.

10. That for all times material herein the schedule of hours for the night shift at Respondent's West plant, given a two (2) shift operation, reflected a 3:12 P.M. start of shift, relief period at 5:24 P.M. ending at 5:30 P.M., second relief period--wash-up at 7:55 P.M. (5 minutes), the dinner break at 8:00 P.M. ending at 8:18 P.M. and end of shift at 11:30 P.M.; that on or near January 13, 1972 the Respondent posted a notice and delivered copies of same to production-unit employes, reciting therein that as of January 17, 1972 "special emphasis would be given to enforcing. . .work rules", Numbers 9, 10, 11, 16, 20, 21 and 24 from Exhibit of the Agreement (supra, Finding #5), which notice reads in remaining material part as follows:

> "Employees breaking for coffee or other personal requirements will not be allowed to form groups or loiter with other employees.
>
> Employees on break must return to their work area as soon as they have completed their purpose at the vending machines, water fountains, restrooms, etc.
>
> Failure to follow the above rules will result in a warning notice. Continued violation will result in disciplinary suspension and/or termination.
>
> The '52 minute' hour referenced in the Contract applies only to the establishing of job standards and is not to be construed as a right to utilize eight minutes per hour for personal time."

11. That on or near January 16, 1972, after the aforesaid notice had been posted regarding enforcement of certain rules, Francis L. Braun, second shift Superintendent West Plant, had occasion to observe the grievant some twelve (12) minutes after grievant would have normally returned to his work station after the first lunch-relief period, at which time Braun observed that grievant was leaving the washroom and moving towards the vending machines; that Braun reprimanded grievant for being away from his work station and "purchasing items shortly after the end of lunch period", contrary to the newly posted rule #24.

12. That on January 20, 1972, at or near 5:00 P.M., the second-shift Superintendent was walking through the frame-work production area, proximate to grievant's work table, where Braun observed grievant unoccupied for approximately twelve (12) minutes; that later into the evening shift, at 7:15 P.M. Braun observed the grievant leave his work station; that grievant returned from the washroom at 7:25 P.M.; that from a position across the aisle from grievant's table, Braun continued

to observe grievant between 7:25 P.M. and 7:40 P.M. some fifteen (15) minutes, standing or leaning near his work table chipping slag from a welded frame piece for short intervals, but otherwise performing no production work up to 7:40 P.M.; that for several minutes between 7:40 P.M. and 7:50 P.M. two or three other employes gathered near grievant's work station and conversed with the grievant; that shortly after 7:40 P.M. Braun dispatched a foreman moving through the area to summon grievant's foreman; that Donald Werkmeister responded to the Superintendent's call and joined Braun and that both supervisors continued to observe grievant substantially unoccupied for the period between 7:45 P.M. and 7:54 P.M.; that at 7:54 P.M., just before the wash-up bell, Braun instructed the foreman to take the grievant off the job-site and request him to meet with Braun, the foreman and the department steward; that Braun, in the presence of grievant, advised the steward, Mr. Laasch, of the details of the supervisor's observations, that grievant was asked to comment; that grievant offered no explanation but only uttered a mildly profane remark, possibly in surprise, but directed at no one in particular; that Bruan advised the grievant to punch out and that "he (grievant) was done as far as I am concerned."

13. That on January 21, 1972, the Superintendent-West Plant issued a notice of termination of employment and confirmed to the Complainant and to grievant that he had been discharged for violation of Company rules after having failed to make correction following previous warnings.

14. That the Respondent's action on August 5 and 9, 1971, in effectuating a disciplinary lay-off of the grievant based upon its issue of a third warning for related actions of the grievant, violative of Respondent's rules, constituted a disciplinary lay-off within the meaning of Section 2(c), Article XI of the collective bargaining agreement.

15. That the Respondent's act of constructively discharging the grievant on the night of January 20, 1972 and later officially discharging grievant on January 21, 1972, was an action taken after Respondent had effectuated progressive discipline within the meaning of Article XI, Section 2 of the agreement.

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

CONCLUSION OF LAW

1. That the aforementioned discharge of Thomas Dickmann was predicated upon just cause, and after justifiable progressive discipline within the meaning of Article XI, Section 1 and 2, and of Article IV, Section 7(b) of the existing collective bargaining agreement between Gehl Company and Allied Industrial Workers of America, Local No. 579, AFL-CIO and that, therefore, Gehl Company has not committed and is not committing any unfair labor practices within the meaning of Section 111.06(1)(f) or any other provision of the Wisconsin Employment Peace Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusion 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 23rd day of March, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Complainant-Union on March 23, 1972, filed a complaint with the Commission alleging that Gehl Company committed an unfair labor practice within the meaning of Section 111.06(1)(f) of the Employment Peace Act by discharging Thomas Dickmann on January 21, 1972 in violation of the "just cause" provision contained in the collective bargaining agreement existing between the parties. Respondent, in its answer, denied making such a violative discharge. Hearing in the matter was conducted on April 19, 1972. Both parties filed post-hearing briefs by June 20, 1972.

POSITION OF THE PARTIES

The Complainant-Union argues that the grievant was substantially occupied with tasks related to his production work both on August 5, 1971 when grievant was observed by management to be repeatedly absent from his work place and on January 20, 1972 for the periods of time that the Superintendent of West Plant had observed and believed that grievant was idle. The Complainant suggests from its cross examination of Respondent's witnesses and from the testimony of the grievant that forced idleness was a product of the production system at times, because arc-welders were obliged to wait for lift-truck operators to remove their filled baskets of fixtures. The Complainant also contends in effect that the record indicates that the Company tolerated fifteen (15) minute trips to the lavatory.

In summary, the Complainant urges that the progressive discipline given to grievant on August 9, 1971 should be put to the just cause test in this action, in the course of disposing of the challenged-discharge under the just cause standard of the labor agreement; that the time periods audited in Foreman Hartman's summary of August 5, 1971, can be satisfactorily explained by grievant's forced absence from his work station because of repeated equipment failures, long waits at the tool crib and legitimate movement (journey) to the washroom; and that the apparent interruptions in grievant's welding, on January 20, 1972, are either explained by management's inaccurate assessment that pounding slag from the welded pieces is unproductive, or because grievant experienced legitimate but necessary delays in waiting for a new supply of containers.

The Complainant-Union urges that Respondent has failed to prove the "just cause" character of Dickmann's discharge, and requests his reinstatement and a make whole remedy.

The Respondent points to the recorded incidents of grievant's prior rule violations, the viability of the written warnings which were never modified or extinguished in grievance negotiations and the uncontroverted testimony which describes more than isolated loitering, namely a pattern of grievant's malingering and repeated failure to respond to progressive discipline. The Respondent points out that the observed periods of idleness occurring on January 20, 1972, cannot reasonably be explained by grievant's inconsistent claims that chipping slag could have constituted productive work from 7:25 P.M. to 7:50 P.M., when compared to his production and corresponding chipping during the first portion of his shift. Similarly, the Respondent urges that the record discloses that a fellow employe and witness continued his welding and apparent floor-stacking of welded fixtures after his baskets were full; and that there exists no probative evidence to support the proposition that a welder may stand idle at his bench waiting for the trucker to supply empty baskets.

The Respondent requests that the discharge be adjudged to be one for just cause under the agreement and that the complaint be dismissed.

DISCUSSION

It is patently clear from the evidence that the Respondent effectuated progressive discipline in conformity with the labor agreement, for grievant's rule violations in 1970 and 1971. Both the provisions of Article XI and the conduct of the parties to the agreement, persuade the Examiner that the disciplinary layoff with written warning in August of 1971 should be deemed outstanding for purposes of later possible discipline of the grievant, and that the grievance challenging the Respondent's action was constructively settled. In the alternative, the record discloses that said discipline was effectuated for just cause within the meaning of the agreement.

Examining the evidence with regard to the events leading to grievant's discharge on January 20, 1972, there can be no doubt that the grievant took it upon himself to abandon production at his work bench on the premise that he could wait at his leisure for the supplier of empty baskets. The record supports no such recognized practice of welders waiting for prolonged periods of time. The grievant himself, in explaining his painfully long trips to the washroom on both August 5, 1971 and the day of discharge, described time spans of ten (10) to fifteen (15) minutes as being typical in his case. The Examiner credits the testimony of the witnesses for Respondent and with regard to grievant's testimony, he also substantially confirms the time intervals away from his work station on the days in question. With regard to grievant's claim of chipping slag over a substantial portion of the remaining minutes of apparent non-production, the Examiner does not credit grievant's assertions, and we further conclude that grievant used the time, after 7:25 P.M., January 20, 1972, to ostensibly pound slag to "stretch" the work while he waited for the basket containers at his leisure. Therefore, the Examiner, as indicated in the attached Findings and Conclusion of Law, concludes that Dickmann's discharge was one made for just cause.

BURDEN OF PROOF (PERSUASION) UNDER 111.07(3), STATS.

The Findings of Fact and Conclusion of Law, supra, reflect the proposition that the Company discharged Thomas Dickmann for just cause within the meaning of the existing collective bargaining agreement. Even assuming that Section 111.07(3) and the standard in the labor agreement were to be construed together so as to impose the burden of proof upon the Respondent as advocated by the Complainant, the undersigned concludes that the Company discharged Dickmann for just cause. Though it is not determinative of the issue joined herein, some comment is in order with respect to the arguments raised by Counsel for the parties in their scholarly briefs on the question as to whether Section 111.07(3) imposes the burden of proof upon a respondent-employer in an unfair labor practice proceeding, wherein a complainant alleges the discharge of an employe in violation of a contract [111.06(1)(f)] and where the contract contains a just cause standard.

The Union in brief discusses AIW, Local 232, AFL-CIO, vs. WERC and Briggs & Stratton Corp., Circuit Court (Milwaukee), Case No. 367-059 (1971) (affirming WERC Decision No. 8570-C, 3/69), and contends that said court overstated the rule of the cited Supreme Court cases, Century Building vs. WERB (1940), 235 Wis. 376, 382; and Kenosha Teachers Union vs. WERC (1967), 39 Wis. 2d 196, 203. In those two cases, one involving an

unfair labor practice proceeding under the Employment Peace Act and the other a prohibited practice proceeding under Subchapter IV Section 111.70, Right of Municipal Employes to Organize-bargaining in Municipal Employment, the Court held that the language of 111.07(3) ". . .the party on whom the burden rests", means the party who seeks to arouse the action of the Commission. (Emphasis supplied.)

The Complainant argues that neither of the two Supreme Court cases cited in Briggs & Stratton actually involved questions as to whether a respondent employer had effectuated a discharge contrary to a "just cause" provision of a collective bargaining agreement. Both cases it argues, dealt with allegations of discriminitory discharges claimed violative of Sections 111.06(1)(c) and 111.70(3)(c) of the Statutes, and a complainant understandably has the burden of persuasion in such cases just as the General Counsel of the NLRB has the burden under the Labor Management Relations Act, to prove 8(a)3 discriminatory discharges.

The Complainant urges that in proceedings such as the instant controversy, the parties themselves have affixed the ultimate burden of persuasion on the employer to prove that it discharged the employe for "just cause" within the meaning of the contract. It points out that arbitrators generally impose the burden of proof on an employer where the contract provides for a "cause" or "just cause" standard. The Union contends that the language of 111.07(3) ". . .and the party on whom the burden rests. . .", is a flexible enough proscription so as to give effect to the parties' own contractual levying of the burden, namely, affixing the burden of persuasion upon the employer where he has agreed to a just cause standard for discharges under his contract.

The Respondent contends that both the Court and the Commission have consistently held that all proceedings under 111.70(3) and 111.06(1) are governed by Section 111.07, irrespective of the nature of the prohibited practice, so that "the party seeking to arouse the action of the Commission" is the one upon whom the burden rests under 111.07(3).

The undersigned agrees that logically there would appear to be no reason to treat violation of contract claims, where discharge for "cause" is the question for disposition in determining 111.06(1)(f) or 111.70 (3)(a)(5) violations, any differently than would an arbitrator with respect to affixing the burden of persuasion. Apart from the difference among arbitrators regarding the quantum of proof that should apply given a contractual "just cause" standard, arbitrators generally affix the burden of persuasion upon the employer. 1/ It is true, however, that many times arbitrators make a finding of ultimate fact that a discharge was not one for cause within the meaning of the contract without delineating the respective burdens of going forward and of persuasion, which may have been controlling. If we were to isolate the language of 111.07(3), "and the party on whom the burden rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence", from the remaining language of said sub-section and from 111.07(1), it may very well be that said provision is broad enough to allow for placement of the burden upon a respondent, where the parties by contract have provided a just cause standard. However, the Supreme Court and Milwaukee County Circuit Court have apparently discussed the all inclusive coverage of the procedural provisions of 111.07 to all actions filed under 111.06

1/ Elkouri & Elkouri, How Arbitration Works (1967 ed.), Chapt. 15, Discharge and Disciplina, p. 417.

and 111.70(3). The breadth of 111.07(3) is further confirmed by both the verbiage of 111.07(1) and by the second sentence of 111.07(3) "any such proceedings shall be governed by the rules of evidence . . . ." (Emphasis supplied.)

Therefore, the Examiner concludes that the Court in Briggs & Stratton has correctly described the burden of proof rule under 111.07 (3) by its holding that the statute affixes the burden of proof in prohibited practice cases [111.70(3)], and unfair labor practice cases (111.06), on the party who seeks to arouse the action of the Commission. Whether Briggs & Stratton, supra, and the aforementioned Supreme Court cases would apply to the situation where the parties have specifically set forth in their labor agreement, the placement of the burden of persuasion on the employer in discharge cases in terms as particular as the statute, may be an open question.

The Examiner, based on the Findings and Conclusion set forth, supra, and the discussion thereon, concludes that the Respondent-Employer had just cause, within the meaning of the collective bargaining agreement, to discharge Dickmann.

Dated at Madison, Wisconsin, this 23rd day of March, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner