BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SUB-ZERO FREEZER COMPANY, INC.

and

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION 565, AFL-CIO

Case 54
No. 42214
A-4442

Appearances:
Paul Lund, Business Manager and Financial Secretary/Treasurer, for the Union.
Donald D. Emerich, Personnel Director, for the Company.

ARBITRATION AWARD

Sheet Metal Workers' International Association, Local Union 565, AFL-CIO, herein the Union, and Sub-Zero Freezer Company, Inc., herein the Company, requested that the Wisconsin Employment Relations Commission designate Douglas V. Knudson as an arbitrator to hear and resolve a dispute. The undersigned was so designated. Hearing was held in Madison, Wisconsin on September 27, 1989. No transcript of the hearing was taken. The parties filed post-hearing briefs, the last of which was received on October 25, 1989.

ISSUE:

The parties stipulated to the following issue:

> "Did the Company violate the contract when it gave Rick Grueneberg a Step II written warning on March 31, 1989 for insufficient quantity of work, and if so, what is the appropriate remedy?"

BACKGROUND:

The grievant in this case, Rick Grueneberg, has been employed by the Company as a factory production worker for approximately 12 years. During about 11 of those years, Grueneberg was welding the sheet metal outer cabinets for freezers and refrigerators. Welding is paid on an incentive wage system. The welding performed by Grueneberg involved considerable lifting and physical effort on a regular basis.

In late spring 1988, Grueneberg decided to bid out of welding due to shoulder pains. He bid for and was awarded a Test Room Operator job. Grueneberg trained as a Test Room

Operator for about 1 1/2 weeks in late June, 1988. Subsequent to being awarded the Test Room job, but before training on said job, on June 2, 1988, Grueneberg strained his right forearm at work. On June 13, 1988 he was examined by his physician, who referred him to an orthopedist. After an examination on June 14, 1988, the orthopedist wrote: "He will be allowed to return to work on a sedentary duty basis with minimal lifting of the right arm which nothing greater than five pounds can be attempted." The Company claims it did not receive reports of the June 13 and 14 doctor visits, while Grueneberg said he did give the Company a copy of the June 14 report.

Following the Company's annual two-week shutdown, Grueneberg began working in the Test Room on July 11, 1988. On July 14, 1988, the orthopedist examined Grueneberg and instructed him not to lift over ten pounds and to minimize overhead work. After about two weeks in the Test Room, due to his physical problems, Grueneberg was moved to a float status, which is the normal procedure at the Company when an employe is unable to qualify on a new job assignment received through the job posting procedure. A floater can be given various assignments, in either incentive or non-incentive jobs, until the employe successfully bids on another posted position. Grueneberg was assigned primarily to the sub-assembly department to perform assembly of controls and other small units for installation in the refrigerator and freezer units by the main assembly line.

Grueneberg was seen by the orthopedist on August 1 and September 12, 1988. On each visit, Grueneberg was told to continue working at his present (then in effect) restricted level.

On October 11, 1988, Grueneberg received a Step One verbal disciplinary warning for an insufficient quantity of work. Grueneberg did not grieve that warning.

When examined on November 11, 1988, Grueneberg was told by the orthopedist to follow the previously written work restrictions of no lifting greater than 10 pounds, no overhead work and minimal repetitive work with the right arm. On November 17, 1988 the orthopedist told Grueneberg to continue working at his present restricted level.

Grueneberg again saw the orthopedist on February 17, 1989, 1/ at which time the orthopedist stated: "This patient will be allowed to return to work 2/20 as this patient's restrictions will be altered such that there will be no repetitive lifting greater than 30 lbs. above shoulder height." The Company received a copy of the restrictions of February 17.

On March 31, Grueneberg received a Step II written warning based on his quantity of work. The warning read: "Rick has had ample time to improve his work effort. There has been a rate change in Rick's favor and yet his production is unsatisfactory. "Grueneberg grieved the warning on April 4.

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE XII

SHOP RULES & BULLETIN BOARDS
WASH-UP TIME

Section 4.

. . .

(c) Accidents and Injuries: All accidents and injuries, however minor, must be reported within a 24 hour period of occurrence.

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ARTICLE XV

DISCIPLINE AND DISCHARGE

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Section 2.

. . .

Any employee who works for six (6) months without committing another offense of that same nature shall have all references to disciplinary action expunged from the employee's personal record and thereafter return to Step I of the reprimand procedure as to the offenses of that nature.

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ARTICLE XVI

MANAGEMENT

Section 1. The operation of the plant and the direction of the work force, including the right to hire, promote, transfer or to demote, suspend or discharge for just cause, the right to relieve employees from duty because of lack of work or for other legitimate reasons are vested exclusively in the Company, provided, that the sole limitation upon the prerogatives of management in these respects

shall be, that it will not conflict with

the terms and conditions of this contract nor shall it be used for purposes of discrimination against any employee.

ARTICLE XVII

ADJUSTMENT OF GRIEVANCE

. . .

Section 2.

Step 4. . . .The arbitrator shall not have jurisdictional authority to modify, alter, or amend in any way the provisions of the Agreement and his or her decision must be in accordance with the terms of this Agreement. The arbitrator's decision shall be binding on the parties.

. . .

Section 4. . . .Arbitration shall be limited to determination of whether the Company or the Union have violated the terms of this Agreement. The Arbitrators shall not have authority to decide any dispute other than whether the Agreement has been violated, and he shall not add to, detract from or modify in any way the terms of this Agreement.

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SUB ZERO INCENTIVE PLAN

A. TIME STUDY AND WAGE INCENTIVE PROCEDURE

Section 1. It is agreed that efficient production is the goal of both the Company and the Union and to this end, it is agreed that an employee who produces below normal (adjusted 100%) on an approved and accepted standard, may be subject to disciplinary action up to and including discharge. . .

. . .

POSITION OF THE UNION:

When assigned to sub-assembly, Grueneberg advised the supervisor that he was not good

at putting together small parts because he lacked the necessary fine manual dexterity. Based on his relatively high incentive production in welding, the Company apparently made the erroneous assumption that Grueneberg would be at least as productive in sub-assembly and, when he was not, the Company concluded he was not really trying.

Scott Hamm, assistant general foreman, testified he knew nothing about Grueneberg's more restrictive work limitations prior to February 20. Such testimony is not credible in light of both the reference in the February 17 physician's report to less restrictive limitations, and the supervisor's response to the grievance. Therefore, the only basis for the warning on March 31 should be the time period of February 13 through March 17. Grueneberg's productivity average for that period is 102.4%. Since he was over 100%, he should not be disciplined. Other employes were not disciplined for lower production levels.

The Company's exhibit of employes producing over 100% in sub-assembly contained employes who are regulars in sub-assembly, have worked there longer than Grueneberg, and receive more of the jobs with the greatest incentive bonus potential.

After the October 11, 1988 discipline, Grueneberg improved his average from 67% to over 95% of standard. During 1989 Grueneberg averaged over 100% through March 31. An employe's overall average performance over a reasonable period of time should be the appropriate measure of whether or not discipline is warranted. In this case, the Company did not have just cause to discipline Grueneberg.

POSITION OF THE COMPANY:

The Union attempted to show that the rates for the sub-assembly area were too tight, but did not have employes other than Grueneberg testify. If the rates were objectionable, the rates would have been arbitrated long before the instant case. It is clear that other employes were making a very good incentive effort in sub-assembly. This argument by the Union is simply a smoke screen.

The medical excuse of February 17 set medical restrictions which were well within the parameters of the sub-assembly job. If the excuse did not contain all of the physician's instructions, it was up to Grueneberg to provide the proper documentation. The Company could only proceed in accord with the written limitations it received from the physician.

The Company did not rely on the first sentence of Section 1 of the incentive plan in disciplining Grueneberg. That language does not contain the proper basis for disciplinary action against an incentive worker. Grueneberg was disciplined for failing to make a good effort. His incentive rates were far below those of any other employes doing the same job and below 100% on numerous occasions. The Company has disciplined other employes for poor effort and production without addressing the question of overall production below normal.

DISCUSSION:

The physician's statement of February 17 revised the medical limitations on Grueneberg's work activities by increasing the lifting limit from 10 pounds to 30 pounds effective February 20. During the four-week period of February 20 to March 18, Grueneberg averaged just over 100%, i.e., 100.37%, while on incentive. On 6 of the 16 days when he was on incentive duty during those four weeks, his daily average was below 100%. If the week ending on February 18 is added to the four-week period, then his overall average increases to 102.4%, while his daily averages were below 100% on 8 of 21 days.

The evidence does not show that the Company failed to comply with those medical limitations placed on Grueneberg's work activities by his physician and which were made known to the Company. Thus, those limitations do not explain why Grueneberg's daily averages frequently fell below 100%.

During the same five-week period, three employes assigned to sub-assembly (Blankenheim, Ott and Thony) had weekly incentive averages ranging from 140.1% to 203.13%.

The Union notes that Duane Leighton averaged only 92.5% during the period of March 12 through May 21, 1988 without being disciplined. However, Leighton worked on sub-assembly on only one or two times during said time period.

Weekly averages were introduced also for several other employes who worked as floaters during the time Grueneberg was in sub-assembly. However, the record is not clear as to how much time those employes worked in sub-assembly or in other assignments. It does appear, based on Grueneberg's testimony, that one of those employes, Dean Collins, worked fairly regularly in sub-assembly from October, 1988 to April, 1989. During that time period, Collins had several weekly averages below 100%, although information on his daily averages was not presented.

With the exception of Collins, the data does not lend any support to the Union's assertion that the Company has failed to apply discipline for insufficient production in a uniform manner. The example of Collins is troublesome, since his average of 100.31% for the time period of February 20 to March 18 is similar to Grueneberg's average of 100.37% during said time period. Other than Grueneberg's testimony that Collins had worked in sub-assembly fairly regularly, there was almost no additional information concerning Collins' status. While the Company's failure, either to also discipline Collins on or before March 31, or to explain why Collins was not disciplined, raises some doubt about the Company's consistency in disciplining employes for a lack of effort and/or insufficient production, that is an inadequate basis to nullify the discipline of Grueneberg.

Certainly an employe can be disciplined for not making a reasonable effort to produce at a normal level. Such a lack of effort can be established by comparing the employe's incentive production averages with the averages of other employes doing the same work. Thus, even if the employe maintains a normal (adjusted 100%) production average over a reasonable period of time, the employe still may be subject to discipline if a lack of a reasonable effort creates an

unreasonable disparity between the employe's averages and the averages of other employes performing the same work. Also, the employe's daily averages can be reviewed for consistency over a reasonable period of time. An unreasonable disparity in daily averages might be a basis for discipline. Similarly, if the employe has frequent daily averages below normal (adjusted 100%), then the employe may be subject to discipline, even though the employe's overall production average for a reasonable period of time is at or above normal (adjusted 100%) production level. The language of Section A(1) of the Incentive Plan does not prohibit discipline of an employe when the Company can show, by one or more of the above described methods, that an employe has failed to make a good and reasonable effort to produce a normal or sufficient quantity of work. However, each of those methods of evaluating an employe's level of effort contains subjective judgements which must meet the just cause standard if discipline is applied.

In the instant matter, it is concluded that the Company did have just cause to discipline Grueneberg on March 31, because of the frequency of his daily averages, which were below 100% during the period of February 13 to March 18, even though he averaged over 100% during said time period.

Based on the foregoing, the undersigned enters the following

AWARD

That the Company did not violate the contract when it gave Rick Grueneberg a Step II written warning on March 31, 1989 for insufficient quantity of work; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin this 5th day of December, 1989.

By Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator

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