BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 464, CONSTRUCTION AND GENERAL LABORER'S UNION affiliated with the LABORER'S INTERNATIONAL UNION	Case 14 No. 42977 A-4533
and	
J.P. CULLEN & SONS CONSTRUCTION CORPORATION	

Appearances:
Arnold and Kadjan, Attorneys at Law, by Mr. Donald D. Schwartz, appearing on behalf of the Union.
Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Mr. Joseph A. Melli and Douglas E. Witte, appearing on behalf of the Employer.

ARBITRATION AWARD

Local 464, Construction and General Laborer's Union affiliated with the Laborer's International Union, hereinafter referred to as the Union, and J. P. Cullen & Sons Construction Corporation, hereinafter referred to as the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, pursuant to the terms of the parties' agreement, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Madison, Wisconsin on December 12, 1989. The hearing was transcribed and the parties filed post-hearing briefs which were exchanged on January 30, 1990.

BACKGROUND

The instant matter essentially involves two disputes. The Employer is the general contractor on the Wisconsin Mutual Insurance Building in Old Sauk Trails Park in Madison, Wisconsin. In the first dispute, sometime prior to September 13, 1989, the Employer's job superintendent, Andy Blomstrom, made a request through the Union's hiring hall for a laborer qualified in pouring and placing concrete. The Union referred Dan Wilson to the Employer, although, according to Blomstrom, Wilson had not previously poured concrete in walls or in footings. On September 13, 1989, Blomstrom called Tom Fisher, the Union's field representative, and complained about Wilson's not being qualified to pour concrete. Blomstrom told Fisher that he would retain Wilson but in the future he wanted someone with the requested experience. On September 15, 1989, Blomstrom called Fisher and asked if he had any men on the bench to pour concrete. It is disputed whether Blomstrom merely asked whether any men were available or made an actual request for men to pour concrete. In any event, Fisher indicated that no men were available that day. Blomstrom then called Mark Cullen at the Employer's Janesville office and reported that Fisher had told him (Blomstrom) that no men were available. Cullen said he knew of a laborer in Janesville and would transfer him to pour concrete. On September 18, 1989, Cullen sent Mike McDaniels from Janesville to Madison to pour concrete. On September 18, 1989, Fisher and Robert Niebuhr, the Union's Business Manager, went to the job site after Blomstrom had called and told them McDaniels was working that day. Niebuhr talked with McDaniels and told him that the Union could not accept him on the job site because the Union had people on the layoff list and his working would violate the hiring hall procedures. Blomstrom was told that McDaniels could finish out the day but the Union objected to McDaniels' being on the job. Later that morning Niebuhr had a phone conversation with Mark Cullen concerning McDaniels. Cullen took the position that McDaniels was a key man, an exception from the hiring hall procedures, and Niebuhr took the position that laid off men of the Local took precedence over McDaniels. Cullen did not agree, so Niebuhr said he would look into it and call him later. Later that afternoon, Niebuhr called Cullen and reiterated his position. Cullen then acquiesced and McDaniels did no further work at the Madison job site after September 18, 1989.

The second dispute involves a mason tender position at the Wisconsin Mutual Insurance Building job site. Blomstrom had requested that the Union send him a qualified mason tender. Sometime in late September, either the 26th or 27th, the Union referred Cindy Pearson to Blomstrom. Sometime on October 4, 1989, an experienced mason tender, John Rupprecht, applied directly with Blomstrom for work. Blomstrom told him to report to work the next morning on October 5, 1989 and Blomstrom then laid off Pearson on the basis that she was not qualified for the job. Rupprecht stopped at the Union's office on October 4, 1989 and indicated that he had been hired by the Employer. When Niebuhr learned of this, he protested Rupprecht's hiring in a conversation with Blomstrom on October 4th or 5th on the grounds that Rupprecht had not been cleared through the Union. It rained on October 5, 1989 and Rupprecht

performed no work for the Employer. On October 5, 1989, Niebuhr told Blomstrom that Rupprecht was a member of the Waukesha Local and had not paid his October dues and that the Madison Local had a qualified mason tender on the Out of Work list and that even if Rupprecht was cleared, he still had to go on the bottom of the list. Niebuhr also called David Cullen, the Employer's vice-president, and told him that the Union had a qualified mason tender available, that Rupprecht was not from the area local, that he was not current in his dues, and therefore, Rupprecht had to transfer into the Union and get clearance on his dues before he could be referred. Cullen pointed out the problems with getting a qualified mason tender and sought a way to work out the hiring of Rupprecht. Ultimately Cullen agreed to take the mason tender Niebuhr said was next on the list and Cullen told Blomstrom that Rupprecht could not work on the project.

On October 6, 1989, the mason tender referred by the Union did not show up for work because his former employer had called him that morning and asked him to return to work which he did. Blomstrom called Fisher and reported that the mason tender that had been requested failed to show up. Niebuhr, after finding out why the mason tender did not show up, called Mark Cullen and explained what had occurred. Cullen asked if the Employer could now employ Rupprecht and Niebuhr reluctantly agreed, whereupon Rupprecht was referred by the Union and was hired.

Niebuhr testified that on October 12, 1989, he visited the Madison job site and met with Blomstrom about the hiring hall problems and the two specific gentlemen that it had problems with. Niebuhr further testified that he told Blomstrom the reason that he was there was to attempt to work out a solution on the job site pursuant to the grievance procedure to which Blomstrom had responded that he did not have the authority at that time to reach a direct settlement.

Blomstrom, on the other hand, testified that he could recall no conversation with Niebuhr on October 12, 1989. Thereafter, a request to initiate grievance arbitration was filed by the Union with the Commission. At the hearing, the Employer raised procedural issues of arbitrability of the grievance. The hearing was bifurcated and the hearing in this matter was limited to the procedural issues of arbitrability.

ISSUE

The parties were unable to agree on a statement of the issues.

The Union stated the issues as follows:

1. Did the company waive the right to raise procedural objections to arbitrability by failing to raise the issues before the hearing?

2. Did the Union follow the grievance procedural (sic) in processing the grievance?

3. Are there any issues ripe for arbitration?

The Employer stated the issue as follows:

> Is the grievance properly before the arbitrator or arbitrable?

The undersigned adopts the issues as stated by the Union.

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE III - GRIEVANCE PROCEDURE

Section 1. The settlement of contractual disputes and grievances for the duration of this Agreement between the parties of this Agreement shall be settled as follows:

a. The parties of this Agreement shall attempt to settle the matter between themselves immediately on the job site by the Business Manager and/or Field Representative of the Union and a representative of the Employer.

b. If, after twenty-four (24) hours from the time of the incident or discovery of the incident a settle-ment is not reached, the matter will be referred to the W.E.R.C., whose decision will be final and binding.

c. It is expressly understood and agreed that disputes involving work jurisdiction (Jurisdictional disputes) shall not be resolved under this Article.

UNION'S POSITION

The Union contends that the Employer has waived its right to raise procedural defenses at the arbitration hearing by its failure to raise them prior to said hearing. It submits that the Employer had at least thirty days

to inform the Union of its intended procedural defenses and its failure to do so improperly prejudices the Union's ability to prepare for the defense and imposes increased costs on the Union.

The Union denies that there are any procedural defenses as it has met the requirements of Article III. It notes that Niebuhr immediately questioned the hiring of McDaniels and Rupprecht and had a meeting with Blomstrom on October 12, 1989, but when no remedy was obtained, Niebuhr timely filed an appeal to arbitration. It insists that Niebuhr didn't immediately file the request for arbitration without a job site effort to resolve the issue. According to the Union, the argument that there was no meeting on October 12, 1989 cannot be credited. Thus, it claims that Niebuhr did all that Article III requires before demanding arbitration.

The Union maintains that there is a viable dispute for the arbitrator to decide. It argues that the hiring of McDaniels and Rupprecht was in violation of the contractual hiring hall procedures. It points out that the hiring of Mike Scholl also violated this provision and these repeated and blatant violations clearly establish an issue ripe for arbitration. The Union admits that the remedy it is seeking is limited to a declaration that the Employer violated the hiring hall provision of the parties' agreement but the Union insists this does not mean that the Union does not have a legitimate right to seek through arbitration an order that the Employer cannot hire whomever they want in violation of the contract. It argues that steps taken after a wrong is committed do not transform the wrongdoing into a non-event and contends that a finding in favor of the Employer will encourage the Employer to continue such wrongdoing. It asserts that the Union must be able to present the case on the merits and seek an order requiring the Employer to adhere to the contract. The Union asks that the procedural arguments of the Employer be denied and a hearing on the merits be set.

Employer's Position

The Employer contends that it is widely accepted that the right to contest arbitrability before the Arbitrator is not waived merely by failing to raise the issue before the arbitration hearing. It submits that those cases finding a waiver usually involve a multi-step grievance procedure, whereas here, Article III provides for a one-step procedure, so the first opportunity to raise the issue is at the arbitration stage. It claims that the Employer didn't discuss the matter with the Union as there was no meeting between the parties and it didn't know the specifics of the grievance until the day of the hearing. It also asserts that the Union could have asked for more time to prepare to refute the arbitrability issue but it didn't, so there is no basis for the Union to complain about the question being raised for the first time at the arbitration hearing.

The Employer insists that there was no discussion of the grievance prior to filing for arbitration. It contends that failure to follow the procedural requirements of the grievance procedure bars arbitration of the grievance. It claims that no notification was given to the Employer about the nature of any grievances prior to the demand for arbitration. It maintains that the Union did not seek to resolve any grievances because there was no dispute to resolve. It submits that Niebuhr's claim that he went to the job site on October 12, 1989 is not credible because if such a conversation had taken place, it would have been documented by Blomstrom and either David or Mark Cullen would have been advised of it by Blomstrom. It also points out that when the problems arose with McDaniels and Rupprecht, Niebuhr had called either David or Mark Cullen. It takes the position that Niebuhr's claim that he tried to resolve the matter on October 12, 1989 with Blomstrom is just not believable because Niebuhr never called either David or Mark Cullen after Blomstrom allegedly had told Niebuhr he had no authority to resolve the matter. It insists that there was no discussion of the grievance at all on October 12, 1989, thus the Union violated Article III and the grievance is not arbitrable.

The Employer also submits that there was no discussion because both the disputes involving McDaniels and Rupprecht were resolved. It claims that the remedy requested by the Union amounts to an admission that there is no dispute. It asserts that Mark Cullen acquiesced to Niebuhr's demand that McDaniels not work and David Cullen acquiesced to Niebuhr's demand that Rupprecht not work. Thus, the Employer maintains, there is no dispute and it is improper for the Arbitrator to take jurisdiction in the absence of a bona fide dispute. The Employer asks that the grievance be dismissed as it is not arbitrable.

DISCUSSION

The first issue to be determined is whether the Employer waived its right to raise the arbitrability issue at the arbitration hearing on the basis that it didn't raise it earlier. It is generally accepted that the right to contest arbitrability is not waived by failing to raise the issue before the arbitration hearing. 1/ The cases cited by the Union do not support a contrary

1/ Elkouri & Elkouri, How Arbitration Works (4th Ed, 1985) at 220.

result. In Sterling Engineered Products, 93 LA 340 (Kaufman, 1989), the union appealed a grievance to arbitration beyond the 3-day time limit. The arbitrator found that the employer had waived any objections to the timeliness of the appeal based on the employer's conduct. There, the union, when it submitted the grievance, asked the employer to set a date to meet after the grievance was answered. The employer's answer advised the union that it would consider arbitration, whereupon the union's attorney wrote the employer to select an arbitrator. The arbitrator was jointly selected, and a hearing date set. The issue of time-liness was first raised at the hearing. The arbitrator analogized the case to one where the parties agreed to submit a specific dispute to the arbitrator which did not include any issue of timeliness and thus found a waiver of the timeliness issue. In Consolidated Coal Co., 91 LA 1011 (Stoltenberg, 1988), the parties' agreement mandated that the parties disclose all facts which would be relied upon during the hearing. The employer's failure to serve notice that it would assert a procedural defense during the processing of the grievance was determined to be a waiver of the right to assert the facts relied on at the hearing to oppose the grievance on procedural grounds.

These cases are inapplicable to the present case because the contractual grievance procedure here simply consists of an oral step followed by referral to the Wisconsin Employment Relations Commission. There is no evidence of conduct on the part of this Employer that demonstrates that it waived any arbitrability defenses. The Employer never suggested arbitration nor jointly selected an arbitrator as in Sterling, supra. The parties' grievance procedure simply states that if a settlement is not reached, the grievance will be referred to the W.E.R.C. There is nothing in the procedure which gives either party a choice in the selection of the arbitrator, a time limit to raise procedural issues or any right to refuse to proceed to arbitration. Arbitrators generally rule on procedural issues, thus this language may be construed to mean that the only time and place arbitrability may properly be raised is before the arbitrator at the hearing. This conclusion is bolstered by the fact that there are no prior steps at which arbitrability can be raised. Additionally, there is no requirement for a written grievance so the Employer may not know the exact nature of the claim asserted by the Union until the arbitration hearing. It follows that the Employer could raise the issue of arbitrability when it learns of it at the arbitration stage. It is also noted that Article III does not mandate any disclosure of facts to the other party. Thus, it is concluded that neither of the cases cited above require a departure from the general rule that arbitrability may be first raised at the arbitration hearing. Also, the undersigned does not find any improper tactics on the part of the Employer which would prevent it from raising the procedural issues at the arbitration hearing. Both parties have agreed to Article III. If the parties intended a more comprehensive procedure so that all issues and defenses had to be raised prior to the hearing or be waived, they could have easily so provided. As the language provides for a single step followed by arbitration, it must be concluded that the parties recognized the procedural issues would be raised for the first time at the arbitration hearing. The advantages of a simplified and prompt procedure for grievance handling apparently outweighed the disadvantages associated with the raising of procedural defenses for the first time at the arbitration hearing. The undersigned finds that the Employer did not waive its right to raise the arbitrability issue at the arbitration hearing.

The Union contends that it has complied with the provisions of Article III in that on October 12, 1989, Niebuhr met with Blomstrom at the job site and could not resolve the dispute, so it was appealed to arbitration the next day. The Employer disputes whether such a meeting was ever held. The undersigned finds that it is unnecessary to decide the credibility issue because, even if such a meeting was held, there was no longer any dispute because each controversy had been resolved and was moot. At most, Niebuhr was attempting to resurrect past grievances so as to obtain an arbitration to settle a hypothetical or abstract question.

Although the Union asserts that a viable dispute exists, the undersigned finds that the disputes had been previously resolved by the parties and that any remaining questions were moot. In its brief the Union candidly admits that the primary remedy sought is a declaration that the Employer violated the hiring hall provision of the contract. While this alone would not be sufficient to find that the case is moot, when coupled with the actions taken on the McDaniels and Rupprecht disputes, it leads to the inescapable conclusion that the issue is moot. The Union protested the transfer of McDaniels from Janesville to the job site in Madison. Although the Employer asserted that he was a key man, the Union insisted that McDaniels not continue to work at the job site in Madison. The Employer acquiesced to the Union's demand and complied with what the Union had requested. There was no appeal of that case after the Employer did what the Union asked. Thus, the case was settled and the undersigned is precluded from deciding the merits of that case.

With respect to Rupprecht, the Union insisted that he not be put to work but rather another mason tender be utilized. The Employer again did what the Union asked and that case was also resolved and the undersigned will not reconsider it.

The cases cited by the Union do not apply to the above two cases. In Buckeye Steel Casting Co., 92 LA 630 (Fullmer, 1989), a discharge was reduced to a suspension but the Union refused to sign a settlement which it asserted did not embody the settlement terms. The Union was found not to have agreed to the suspension. In other words, there was no settlement of the grievance, so it, of course, was not moot. Unlike that case, there was a settlement here. It should be noted that the arbitrator in Buckeye, supra, stated in dicta that no settlement with the Union would be required where the Company rescinded the discharge and paid full back pay to the returned employe. In such case, the continuation of a grievance would be a waste of time and money.

In County of Santa Clara, 88 LA 489 (Koven, 1986) and P.N. Hirsch & Co., 60 LA 1335 (Bothwell, 1973), the remedy sought in each case had not been granted, so each case was held not to be moot. Here, the remedy sought had been granted. The Employer did not bring McDaniels back to the job site and it agreed to the mason tender sent by the Union instead of Rupprecht. Thus, the remedy sought was granted in each case. The cases were settled and the issue raised by Niebuhr on October 12, 1989, assuming that a meeting occurred, was moot. Arbitrator Turkus in Jacob A. Bretan and Drug and Hospital Employees Union, Local 1199, 64-3 ARB para. 9161 (1964), succinctly stated the rule with respect to moot disputes as follows:

> "Where as here, the existing controversy has come to an end, the matter becomes moot and must be treated accordingly. However convenient it might be to have decided the dispute, it is neither the function nor authority of the arbitrator to decide moot controversies or abstract propositions, or to declare, for the government of future disputes, principles or criteria which cannot affect the result or decision as to the issues before him.
>
> When a dispute or controversy becomes moot during an arbitration, there is no longer any actual complaint, dispute, grievance or controversy within the scope of which any final or binding decision may issue in the arbitration."

This rule is applicable to the instant case and the undersigned finds that the grievance is moot and thus is not arbitrable.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The grievance is denied.

Dated at Honolulu, Hawaii this 2nd day of April, 1990.

By _____
Lionel L. Crowley, Arbitrator