BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
UNITED STEEL WORKERS OF AMERICA, LOCAL 2138, AFL-CIO-CLC	
and	Case 8 No. 42943 A-4525
PHOENIX STEEL, INC.	

Appearances:

Mr. Donald Schmidt, Staff Representative, United Steelworkers of America, District 32, 901 Marshall Street, Manitowoc, Wisconsin, appearing on behalf of the Union.

Krukowski & Costello, S.C., by Mr. Timothy G. Costello, 7111 West Edgerton Avenue, Milwaukee, Wisconsin 53220, appearing on behalf of the Company.

ARBITRATION AWARD

United Steel Workers of America, Local 2138, AFL-CIO-CLC, hereinafter referred to as the Union, Phoenix Steel, Inc., hereinafter referred to as the Company, are parties to a collective bargaining agreement, effective October 1, 1987 through September 30, 1990, which provides for final and binding arbitration of grievance. Pursuant to a request for arbitration the undersigned was appointed by the Wisconsin Employment Relations Commission to arbitrate a dispute over the employment status of an employe. Hearing on the matter was held in Eau Claire, Wisconsin on December 20, 1989. A stenographic transcript of the proceedings was prepared and received by the undersigned on January 12, 1990. The Company submitted post-hearing arguments by February 16, 1990. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUES:

During the course of the hearing the parties agreed upon the following issues:

1. Is the grievance properly before the arbitrator under the terms of the collective bargaining agreement?

If yes,

2. Did the grievant quit his employment with the Company?

If not, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE X
SENIORITY

> Seniority shall be defined as the length of continuous service with the Company based on the employee's last date of hire.
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> . . .
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> New employees shall be regarded as probationary employees for the first seventy-five (75) days worked and during this period, the employee shall have no recourse to the grievance procedure. However, after thirty (30) calendar days of employment, the employee shall become a member of the Union. If he is continued in service after the first seventy-five (75) days worked, he shall receive a full continuous service credit from the last day of hiring. Employees who are called back or rehired after a break in service, after expiration of Article X - Loss of Seniority, subparagraph 3, will not be required to serve a probationary period and will retain the seniority they left with at the time of layoff.
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> Loss of Seniority. Seniority and the employment relationship shall be broken and terminated if an employee:

1. Voluntarily quits or retires,

2.Is discharged for just cause,

3.If an employee who is hired before October 1, 1983 performs no work for the Company for two (2) years. In the case of an employee who was hired after October 1, 1983, seniority shall be broken if the employee performs no work for the company for one (1) year. Upon completion of eight (8) years of seniority, the seniority of those employees hired after October 1, 1983 shall be broken if the employee performs no work for the Company for two (2) years.

4.Fails to report to work from leave of absence within three (3) working days.

5.Is absent from work for three (3) consecutive scheduled working days without notification to the Company.

6.Fails to report back to work within three (3) working days after receiving notification in writing directed to his last known address to return to work following layoff, unless otherwise mutually extended by the Union and Company. The employee is solely responsible for having his correct address and telephone number at the Company.

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ARTICLE XI
GRIEVANCES

Differences of opinion or disputes concerning the interpretation of or adherence to the terms and provisions of this Agreement shall be handled in the following manner:

The employee originating the grievance shall immediately discuss the matter with the foreman in charge as to his grievance. If the grievance is not immediately resolved the employee shall then initiate Step One of the grievance procedure under Article XI of the labor contract. All grievance claims shall be presented within five (5) working days, except in wage claims, when the employee has been absent from work, he shall have five (5) days after returning to work to present his claim. (Emphasis added)

FIRST STEP -- The employee or employees having the grievance shall notify their steward and/or one committeeman, and the matter shall then be taken up by the employee and/or steward or committeeman on behalf of the employee with the immediate supervisor or foreman.

SECOND STEP -- if the grievance is not settled within twenty-four (24) hours after being presented to the plant immediate supervisor (or foreman) it shall be reduced in writing by the grieving party and/or steward or committeeman on grievance blanks furnished by the Union, and filed with the plant superintendent. All three (3) copies of the grievance form to the Management for response and the Management puts the answer on the back of the grievance form. The Management retains the pink copy and returns the yellow and white copies to the local. Arrangements shall then be made for a meeting of two (2) committeeman and the grieving party or parties with the shop superintendent. If possible, such meeting shall be scheduled within twenty-four (24) hours of the filing of the grievance. In the event the Management elects to include in this meeting more than two people, the Union likewise shall have an equivalent number of committeemen. The Company shall give its answer in writing to the Union within five (5) working days.

THIRD STEP -- If the grievance has not been settled at the Second Step, the Union shall have ten (10) work days from the receipt of the Second Step answer to move the grievance to Step 3. The representative of the National Organization of the Union along with the local

grievance committee and the Company representative(s), which will be any of the following: General Manager, Production Manager, Plant Superintendent, Supervisor, shall meet to settle the grievance. The Company shall give its answer in writing to the representative of the National Organization through the local committee within ten (10) work days.
FOURTH STEP -- If the matter cannot be settled by agreement, it shall be referred to arbitration within twenty (20) days after Management answers the Third Step for final decision as follows:

If the parties cannot agree within five (5) days of such reference as to the arbitrator, they shall call in the Wisconsin Employment Relations Commission who shall according to its rules, appoint the arbitrator. The cost of the services of this arbitrator shall be borne equally by the Company and the Union. The decision of the arbitrator shall be final and binding upon both parties.

If any of the proceeding time limits are not met, the party not in compliance shall be deemed to "have Lost the Grievance. Time limits may be extended by mutual agreement. The arbitrator shall have no right to amend, modify, nullify, ignore or add to or subtract from the provisions of this Agreement or extend its duration, and any grievance not involving a provision of this Agreement or its interpretation shall be denied. He shall consider and decide only the particular issue(s) presented to him in writing by the Employer and the Union, and his decision and award shall be based solely upon its interpretation of the meaning or application of the terms of this Agreement to the facts of the grievance presented. (Emphasis added)

If the Company initiates the discussion of a grievance or requests a meeting during normal working hours with a union official this individual will not lose pay for said meeting.
The Company and the Union agree to meet once each month at a time and date agreeable to each party.

In the event a grievance shall arise which cannot be reasonably delayed, either party may call a special meeting of the Management and grievance committee to settle the dispute, at which time the National Representative of the Union may be present.

ARTICLE XII
DISCHARGE

Nothing in this Agreement shall prevent the Company's right to discharge it's employees for cause. If any employee is discharged or given a lay-off as a matter of discipline, such employee shall be given the reason in writing within three (3) working days of such action, but if an employee governed by this Agreement believes that he has been discharged for Union activity or that he has been dealt with unjustly as a result thereof, he shall have full right of grievance under Article XI hereof, if so requested by written letter or grievance to the Union and Company within three (3) working days after Union and Company within (3) working days after receiving such notice. If the action was without just cause, the Company shall reinstate the employee with or without backpay.

Prior to such action becoming effective, a meeting between the Company representatives, the Local Union Grievance Committee and the employee involved shall be held to review the intended discipline in an attempt to determine if the disciplinary action is for just cause. However, the Company has the right to make the final decision with regards to the disciplinary action to be taken.

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BACKGROUND:

Jack Bergeman, hereinafter referred to as the grievant, has been employed by the Company for approximately fourteen (14) years. On August 15, 1985 the

grievant was involved in a traffic accident while driving the Company's straight bed truck. He received immediate medical attention whereby he was examined and later released. On August 19, 1985 he was examined by a Dr. Kark, who released the grievant to return to light-duty on August 26, 1985. The grievant returned to work of August 26, 1985, but did not complete the entire work day. The grievant sought further medical attention from a chiropractor, Dr. Stockman. Based upon the chiropractor's recommendations the grievant did not return to work until September 21, 1985. Thereafter the grievant performed light duty work until November 18, 1985.

On October 14, 1985 the grievant saw Dr. Ihle who referred the grievant to Dr. Narotzky, Dr. Narotzky recommended that the grievant return to normal activity. On October 15, and November 18, 1985, Dr. Ihle recommended continued light duty with a lifting restriction of twenty (20) pounds. On November 18, 1985 the grievant left work claiming his welding helmet was causing him problems. The Company was unable to provide work which met the limitations set by Dr. Ihle.

On December 6, 1985, Dr. Stockman recommended continued light work for six (6) weeks. On January 20, 1986 Stockman ordered the grievant off work until February 17, 1986. During January, 1986 the grievant began working in his brother's plumbing business. On February 26, 1986 the grievant was sent to Minneapolis to be examined by a Dr. Stern. Stern released the grievant to return to work with no limitations. Dr. Ihle, on March 10, 1986, recommended that the grievant visit the Mayo Clinic. On June 13, 1986 the grievant visited the Mayo Clinic which released him to perform light duty and suggested a physical therapy program. On August 2, 1986, Dr. Ihle recommended light duty for six (6) week trial period and on September 15, 1986 set restrictions on the grievant's return to work.

On December 16, 1986 the grievant contacted the Company being concerned about his records placing him on AWOL status. On January 13, 1987 the grievant, his attorney, met with the Company's Corporate Risk Manager, Tim Galarnyk, Galarnyk's assistant, Mark Minor, and General Manager Bill Kline. The Company expressed concerns that several physicians had released the grievant to return to work. The grievant was informed that prior to returning to work it would be necessary for him to have a Functional Capabilities Evaluation (FCE). Due to the differing physician opinions the Company suggested an independent medical examination. The Union had been informed at the January 3, 1987 labor management meeting that the grievant was AWOL.

On February 3, 1987, Minor called Bergeman concerning an independent medical examination. The grievant informed Minor he had to discuss the matter with his attorney. On February 4, 1987 Galarnyk contacted the grievant's attorney. The attorney said no to the independent exam and stated there was no progress in getting a FCE for the grievant. On February 26, 1987 the Company requested the FCE again and the grievant said he would look into it. On March 3, 1987, Minor wrote to the grievant confirming the Company's requests for an FCE.

On November 5, 1987 a COBRA letter and form was sent to the grievant based upon the Company's belief the grievant no longer desired to work for the Company. On December 17, 1987 the grievant telephoned Garlarnyk. At the hearing, Garlarnyk testified that the grievant threatened to sue the Company if he was not rehired and stated he would contact the Union on this issue. At the hearing, the grievant did not dispute Garlarnyk's testimony concerning the December 17, 1987 telephone conversation.

On September 20, 1988 and on February 14, 1989 the issue of the grievant's employment status was raised at labor/management meetings. The Union was informed both times that the Company no longer considered the grievant to be an employe. On March 20, 1989 a meeting was held between the Company and the Union at which the Union was again told the grievant was not considered to be an employe. On March 22, 1989 the instant grievance was filed and thereafter processed to arbitration in accordance with the parties' grievance procedure.

COMPANY'S POSITION:

The Company argues that the grievant's failure to perfect his claim over a three (3) year period of time renders his grievance untimely. The Company points out that Article XI requires that a grievance be presented and determined in a timely manner. Thus, the grievant and/or the Union must have presented the grievance within five (5) working days from the time when either attained or could reasonably have attained knowledge of the event on which the grievance was based. The Company asserts the grievance was not filed within this limitation.

The Company points out the grievant was aware of his AWOL status as of December 16, 1986. The matter was discussed on January 13, 1987. The grievant was informed of the discontinuation of his health insurance via a letter dated November 5, 1987. The grievant was also informed of his employment status via a telephone conversation with Galarnyk on December 17, 1987. The Union was informed of the grievant's status at labor/management meetings on September 20, 1988 and on February 14, 1989. The Company points out the Union's own notes of

these meetings demonstrate that each time the Company was asked to clarify the grievant's status the Union was informed the Company no longer considered the grievant to be an employe. The Company concludes the grievance is not timely and therefore the undersigned lacks authority to issue a decision on the merits of the grievance.

The Company, turning to the merits, argues the grievant's actions constitute a quit. The Company points out that as of February 25, 1986 the grievant had a valid release to return to work. The Company argues that the grievant forfeited his claim to reinstatement when he failed to submit a complete clearance from a physician and failed to make himself available for work after recovery from his injury.

The Company would have the undersigned deny the grievance.

UNION'S POSITION:

The Union claims the grievant was never notified by the Company that it considered his employment to be terminated. The Union argues that the grievant was informed by the Union on March 20, 1989 that the Company considered him to be a terminated employe and on March 22, 1989 the grievant filed the instant matter. The Union also argues that the issue of timeliness was not raised until just prior to the arbitration hearing in a letter to the undersigned. The Union submits that therefore the timeliness issue should be rejected by the undersigned.

DISCUSSION:

The record demonstrates that on November 5, 1987 the grievant was sent a letter informing him the Company would cease payments for his health insurance coverage. The record also demonstrates that Garlarnyk on December 17, 1987 refused to reemploy the grievant, that the Grievant threatened to sue the Company if he was not employed, and that the grievant informed Galarnyk he would take the matter up with the Union. The undersigned finds there is nothing in the record to dispute a conclusion that the grievant was aware as of December 17, 1987 that he was no longer considered an employe of the Company. The record also demonstrates the Union raised the issue of the grievant's employment status on September 20, 1988, whereat the Union was informed the Company did not consider the grievant to be an employe. Further, and contrary to the Union's claim, the record demonstrates the Company asked why there was a time delay in filing the grievance during the Step 3 meeting of grievance on May 9, 1989.

Article XI of the parties' collective bargaining agreement specifically states that if time limits are not met, " . . . the party not in compliance shall be deemed to "have lost the Grievance." Given the above facts and the clear and unambiguous language of Article XI the undersigned finds that the grievant was required by Article XI to grieve this matter within five (5) working days of the grievant's December 17, 1987 telephone conversation with Galarnyk. At that time the grievant was clearly aware that the Company no longer considered him to be an employe.

The record is silent concerning when the grievant first brought this matter to the Union's attention. The record does demonstrate that the Union first raised the matter with the Company on September 20, 1988. Absent an agreement between the parties to extend the time limitations of Article XI, the grievant was required by Article XI to raise the matter within five (5) working days. The grievant did testify at the hearing that he was unsure as to who to present his grievance to. However, the ten (10) month delay between the grievant's telephone conversation with Galarnyk and when the Union first raised this issue with the Company clearly renders the instant matter untimely.

Based upon the above and foregoing, and the arguments, testimony and evidence presented by the parties, the undersigned concludes the grievance is not properly before the arbitrator as the grievance does not comply with the time requirements of Article XI. Having so found the undersigned has not reviewed the merits of the grievance. The grievance is denied.

AWARD

Under the terms of the collective bargaining agreement the grievance is not properly before the Arbitrator. The grievance is therefore denied.

Dated at Madison, Wisconsin this 10th day of May, 1990.

By _____
Edmond J. Bielarczyk, Jr., Arbitrator