BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration of a Dispute Between | |
| CONSTRUCTION AND GENERAL LABORERS' UNION, LOCAL 464 | Case 15 No. 43028 A-4537 |
| and | |
| J.P. CULLEN & SONS, INC. | |

Appearances:

Mr. Donald D. Schwartz, Arnold & Kadjan, Attorneys at Law, 19 West Jackson Boulevard, Chicago, Illinois 60604-3958, appearing on behalf of Construction and General Laborers' Union, Local 464, referred to below as the Union.

Mr. Joseph A. Melli, with Mr. Douglas E. Witte, Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, 119 Martin Luther King Jr. Boulevard, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of J.P. Cullen & Sons, Inc., referred to below as the Company, or as the Employer.

## ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union requested, and the Employer agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed with the Commission by Robert C. Niebuhr. The Commission appointed Richard B. McLaughlin, a member of its staff, to serve as the Arbitrator. Hearing on the matter was held in Madison, Wisconsin, on January 11, 1990. The hearing was transcribed, and the parties filed briefs by April 4, 1990. On April 26, 1990, the Employer submitted an decision issued by Arbitrator Crowley on another grievance between the parties. The Union objected to this submission in a letter filed with the Commission on May 1, 1990. I returned the Employer's submission in a letter to the parties dated May 3, 1990.

## ISSUES

The parties stipulated the following issues for decision:

> Is the grievance properly before the Arbitrator?
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> Did the Company violate Article VIII, Section 1, d, of the contract by failing to provide termination slips to the Union?

## RELEVANT CONTRACT PROVISIONS

> **ARTICLE III - GRIEVANCE PROCEDURE**
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> **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:
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> 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.
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> b. If, after twenty-four hours from the time of the incident or discovery of the incident a settlement is not reached, the matter will be referred to the W.E.R.C., whose decision will be final and binding.
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> . . .
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> **ARTICLE VIII - GENERAL RULES AND UNDERSTANDING**
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> **Section 1.** The Parties Agree to Faithfully Comply With the Following Rules:
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> . . .
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> d. TERMINATION SLIP - The Union and the Employee must receive a termination slip (Form UC-15) with the

employee's final check clearly stating the reason for layoff.

. . .

BACKGROUND

The Union represents laborers in part or all of the following Wisconsin counties: Dane; Columbia; Walworth; Sauk; Iowa and Jefferson. Robert Niebuhr serves as the Union's Business Manager.

The Employer is a construction business, active since 1979, and owned by Mark Cullen (referred to below as Cullen) and his two brothers. The Employer is a signatory employer to the collective bargaining agreement between Madison Employers Council, Inc., and the Union, relevant parts of which are set forth above.

On September 1, 1989, the Employer started work on a project, located in Dane County, for the Wisconsin Mutual Insurance Company. On September 11, 1989, the Employer started its first concrete pour on the project. At that time, the concrete supplier, Lycon, Inc., was in the midst of a labor dispute with Teamsters Local 695. Pickets from the Teamsters followed the Lycon trucks, and certain Laborers refused to handle the concrete. A second pour was attempted on September 12, 1989, with the same result. Ultimately, a dual gate system was established so that Laborers would not have to cross Teamster picket lines to reach the work site.

Marc Wareham is a member of the Union, and was referred to the Wisconsin Mutual site by Steve Young, the Job Superintendent of a Van Hise School project performed by the Employer for the Madison School District. On September 18, 1989, Wareham reported to Andy Blomstrom, the Employer's Field Superintendent, at the Wisconsin Mutual site. Wareham had learned of the Lycon dispute from other workers, and asked Blomstrom if he would be assigned to a pour involving Lycon employes. Blomstrom told him he would be so assigned, and Wareham informed Blomstrom he did not wish to perform that work. Blomstrom then informed Wareham that there was no other work available, and Wareham left the site. That afternoon, however, he was informed that the Employer had work for him at the Van Hise site. He reported there in the morning of September 19, 1989, and worked there until September 26, 1989.

The Company issued a termination slip to Wareham for the Wisconsin Mutual project. That slip contained check marks next to form entries to document the basis of the termination. One of the form entries was "Lack of work in your classification" and the other, listed under the heading "**For cause as follows:**", was "Other (specify)". Next to this entry was the handwritten notation: "Voluntary Quit Work was available". Attached to the termination slip was a cover letter to Wareham from Cullen, dated September 19, 1989, which states:

> J.P. Cullen & Sons, Inc. has no dispute with the Madison Teamsters Local. You have every legal right to work on this project. Work was available and you were ordered to continue working. When you walked off this job you adopted the Teamsters strike as your own and the Company will replace you.

After receiving this letter, Wareham called Niebuhr to determine what impact it might have on his eligibility for unemployment compensation.

Work at the Wisconsin Mutual site prompted a disagreement between the Union and the Employer, best summarized in correspondence between them. In a letter to Niebuhr dated September 25, 1989, Cullen stated the following:

> I am writing to you to discuss the problems we have experienced with you and the laborers on the (Wisconsin Mutual Insurance) job. Your statements to your laborers and me, to the effect that the workers did not have to handle Lycon's concrete and that we should not terminate them for refusing to handle Lycon's material violate our collective bargaining agreement and may be in violation of law.
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> Section 9 of the contract provides that "It shall not be a violation of this Agreement nor cause for discharge if any employee in the course of his/her employment refused to cross a picket line established by the Building Trades Craft unions of the AFL-CIO." The picket line at the Wisconsin Mutual Insurance job site is established by Teamsters Local 695, not a Building Trades Craft Union. Moreover our employees use a neutral gate and do not cross a picket line on their job. By instructing your laborers that they do not have to handle Lycon's concrete, you are not only

> violating the contract, but you are instructing them to violate the contract. I insist that you rescind your statement to the laborers and inform them of their contractual obligation to work. We intend to hold you liable for any damages which result from the laborers refusing to handle Lycon concrete.
>
> We are also concerned about the way we have been treated regarding the referral of men from the hiring hall. Specifically, on September 14, 1989, our foreman, Andy Blomstrom, called and spoke to Tom Fisher to tell him we would need one more laborer on September 15th. Fisher stated there were 15 men on the bench on the 14th, but when the 15th came we were told that all the men had been placed so nobody was provided to us. We are concerned that the sudden lack of men on the bench is related to our use of Lycon, Inc. or our redi-mix supplier. Under the circumstances, we feel we deserve an explanation.
>
> According to the contract requirements, if you are not willing to refer employees -- that is employees willing to work -- we will have to get our employees elsewhere. We have a job to do and would appreciate your cooperation.

John J. Toomey, an attorney from Arnold and Kadjan Law Offices, responded to Cullen in a letter dated September 26, 1989, which states:

> Robert Niebuhr of Laborers Local No. 464 has requested me to respond to your September 25, 1989 letter.
>
> Mr. Niebuhr has never in his capacity as a business agent directed or instructed members of Local 464 not to handle a product. That is a matter of individual choice.
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> In Madison, Wisconsin, the Teamsters Local 695 is a member of the Madison Building Trades. Regarding statements dealing with termination, the law is clear that an employer's termination of an employee who acts in sympathy of another trade's dispute is unlawful. See Newberry Energy Corp., 227 NLRB No. 58, 94 LRRM 1307 (1976).
>
> Regarding referrals, Local 464 stands ready to furnish you with the additional laborer you seek.
>
> On September 15, 1989, the Union had no men available. On September 16, 1989 men were available and you were so advised. On September 26, 1989 the Union filled your request for a skilled mason tender and is sending C. Pearson to you tomorrow.
>
> Thus, all the statements and conclusions in your September 25, 1989 letter are substantially incorrect on each and every item. Further, as you hint at future litigation in your letter, I ask that you direct all future correspondence to me rather than my client.

Lycon filed a charge against the Union with the National Labor Relations Board on October 2, 1989.

The background sketched to this point, although posing points in dispute, has not posed disputed facts. It is undisputed that Niebuhr and Cullen talked on October 6, 1989. The substance of their conversation is, however, disputed, as is a conversation Niebuhr had with Blomstrom on October 12, 1989. These points are more fully addressed below.

In a letter to the Commission dated October 13, 1989, Niebuhr stated:

> We are requesting the employment of an arbitrator to settle a contractual grievance between J.P. Cullen & Son Construction Corporation and Construction and General Laborers' Union, Local No. 464, considering the following violations of our Collective Bargaining Agreement:
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> **ARTICLE II - Section 9...PICKET LINE**
> **ARTICLE V - Section 1(a)...SEX DISCRIMINATION**
> **ARTICLE V - Section 1(b)...HIRING OF PERSONS**
> **ARTICLE VIII - Section 1(d)...TERMINATION SLIP**
>
> . . .

In a letter dated January 5, 1990, the Union's Counsel informed the Employer's Counsel that:

> . . . the termination slips for the following persons are in issue at the January 11th arbitration:
>
> 1. Todd Blystone
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> 2. Tim Adler
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> 3. Steve Lawry
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> 4. Tony Reisem
>
> 5. Mark Warham

The reference to Blystone is to Todd Blomstrom, Andy Blomstrom's son, who worked for the Employer on the Wisconsin Mutual site for a few days in mid-September before quitting to return to school. Blomstrom also worked for the Employer for a short time in December, 1989, before again quitting to return to school. Adler worked for the Employer at the Wisconsin Mutual site from November 8 until December 8, 1989. Lawry was transferred between the Van Hise and Wisconsin Mutual sites from September 9 through sometime around October 29, 1989. Reisem started work at the Wisconsin Mutual site on November 1, 1989, and received a termination notice on November 29, 1989. The reference to "Warham" is to Marc Wareham, whose employment history is touched upon above.

The balance of the factual background is best detailed by an overview of the testimony of individual witnesses.

Robert Niebuhr

Niebuhr testified that he values a good working relationship with the contractors who use the Laborers he represents, and that he files grievances only when absolutely necessary. Prior to the grievances which include that at issue here, he had not filed any grievances against the Employer. Niebuhr stated that Wareham called the Union Hall on September 18, 1989, regarding his termination from the Wisconsin Mutual site. Niebuhr asked Wareham to forward a copy of any termination slip he received to the Union. Wareham forwarded the termination slip noted above to Niebuhr, who decided to contact Cullen to discuss his concern that characterizing the termination as a voluntary quit might affect Wareham's eligibility for unemployment compensation.

Niebuhr called Cullen on October 6, 1989, and asked Cullen about Wareham's situation, and specifically about whether the Employer would contest Wareham's eligibility to receive Unemployment Compensation. According to Niebuhr, Cullen stated that due to the circumstances of Wareham's termination from the Wisconsin Mutual site and rehire to the Van Hise site, he would "have to accept the fact that (Wareham) is a standard layoff." 1/ Niebuhr stated he asked Cullen for a termination slip to confirm this, but Cullen did not respond. Niebuhr stated he hoped the issue had been resolved at this point, but the Employer never did supply him with a termination notice. Niebuhr did not discuss with Cullen the issuance of a termination notice for Wareham after their October 6, 1989, conversation. He denied that the Union failed to refer competent laborers to the Employer, and further denied that he ever advised any Laborer to refuse to handle concrete supplied by Lycon.

Niebuhr stated that he never specifically requested a grievance meeting regarding the Employer's failure to supply termination notices to the Union. He testified that, on October 12, 1989, he went to the Wisconsin Mutual job site and informed Blomstrom that he wished to discuss the four outstanding grievances. Niebuhr summarized the resulting conversation thus:

> I discussed -- there were three other issues in addition to this specific issue. As a matter of formality, I discussed all four issues. Not discussed, asked if there was a way that we could settle these issues prior to initiating an arbitration . . . 2/ I mentioned the four problems that we had under the contract and was informed that the authority was not there to settle it on the job site. So therefore, I felt there was no reason to go into great detail . . . 3/

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1/ Transcript (Tr.) at 93.

2/ Tr. at 112.

3/ Tr. at 113-114.

Mark Cullen

Cullen acknowledged that Niebuhr called him on October 6, 1989, but denied that Niebuhr questioned him about Wareham or about termination notices. Cullen testified that the conversation on that date concerned Blomstrom's hiring of a Laborer/Mason Tender who had reported directly to the job site, and Lycon's filing of a charge with the NLRB. Cullen summarized the latter aspect of the conversation thus:

> (I)t was discussed that Bob had received the Unfair Labor Practices complaint from Lycon, and indicated that we were in collusion with Lycon. And that two could play at that type of game, and that he would be filing grievances. And I again asked what it was about, and he would not advise me what they were about. 4/

Cullen acknowledged that the Employer has never supplied the Union with termination notices and denied that Niebuhr ever specifically requested one for Wareham or any other employe.

The Remaining Witnesses

It is not necessary to complete this overview of the record to recount the testimony of the remaining witnesses in detail. Blomstrom testified that he could not recall having any discussion with Niebuhr on October 12, 1989. Wareham and Adler testified that they reached their own conclusions on whether or not to handle Lycon concrete, and did so without any advice from the Union.

Further facts will be set forth in the Discussion section below.

The Union's Position

After a review of the record, the Union asserts that the Employer "(w)aived the right to raise the procedural defect defense", since "(d)espite all of the advance notice and opportunity to raise the procedural defenses, (the defense) was not raised until trial". Arbitral authority, according to the Union, establishes that allowing an employer "to spring the issue at hearing" serves to "improperly prejudice the Union's ability to prepare for the defense and impose on the Union the costs of preparation for the substantive issue which is not even presented at hearing." Even if it is concluded that the procedural issue is properly presented for determination, the Union argues that "Article III of the contract has been met by the Union", since Niebuhr held a meeting with the job superintendent on October 12, 1989, before filing the request for grievance arbitration. According to the Union, relevant testimony establishes that:

> There is no reason to conclude that (Niebuhr) bypassed the clearly established grievance procedure, which only requires one meeting before a demand for arbitration is proper. Niebuhr's testimony concerning the job site meeting is the only testimony worthy of belief.

From this, the Union contends that "(a) viable issue exists which is ripe for arbitration", whether or not any employe suffered "any actual injury". Beyond this, the Union asserts that it has not waived the grievance "because it has not brought prior grievances concerning the termination slip provision of the contract." Accepting the Employer's contention on this point would, according to the Union, "effectively read the termination slip provision out of the contract", and would violate arbitral authority. Beyond this, the Union argues that "the arbitrator lacks authority to consider the reason behind the filing of the grievance." Relevant judicial and arbitral authority establish, according to the Union, that the "question of violation of the National Labor Relations Act is not arbitrable" since it does not fall within the "four corners of the contract." Because the contract unambiguously requires the issuance of a termination slip, and because "(i)t is uncontroverted that the Employer never presented termination slips to the Union", it follows, the Union argues, that "the contract has been violated." As the remedy appropriate to this violation, the Union requests that "the grievance . . . be sustained . . . (and) (t)he Employer must be ordered to abide by the contractual termination slip provision in all cases."

The Employer's Position

After a review of the record, the Employer argues that "(i)t is proper to raise the issue of arbitrability for the first time at the arbitration hearing." Although noting that a prior grievance put the Union on notice of the pending arbitrability dispute, the Employer contends that arbitral authority establishes that it is proper to raise such claims at the arbitration hearing. Cases to the contrary, the Employer contends, are inapposite, since

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4/ Tr. at 16-17.

those cases are based on employer waivers, and involve multi-step grievance procedures unlike that stated in Article III. Beyond this, the Employer argues that the Union failed to present the grievance at the job site, and thus forced the Employer to wait for the arbitration hearing before asserting the procedural defense. Beyond this, the Company argues that any Union concerns regarding surprise could have been addressed by a request for a continuance, and the Company concludes that "(t)here is no basis for the Union to complain about the question of arbitrability being raised for the first time at the hearing." Relevant arbitral precedent establishes, according to the Employer, that parties must make bona fide efforts to settle grievances before arbitrators will take jurisdiction. From this, the Employer concludes the grievance is not arbitrable because "nobody from Cullen was notified about the nature of any grievances prior to the demands for arbitration being filed." A review of the record establishes, according to the Employer, that Niebuhr's claim to the contrary is not credible, and masks the Union's true motive for filing the grievance, which the Employer states thus:

> Niebuhr filed the request for arbitration in retaliation for Cullen's cooperation with Lycon in filing unfair labor practice charges.

The record also establishes, according to the Employer, that the Union has failed to enforce Article VIII, Section (1)(d). This failure, under relevant arbitral authority establishes, the Employer argues, a waiver in this case. Beyond this, the Employer asserts that the Union has been unable to demonstrate a bona fide reason for requesting the UC-15 form. The Employer's final major line of argument is that "Article VIII, Section (1)(d) only requires notice when the employee is laid off" and is, thus, irrelevant to the facts posed here. The Employer concludes that the grievance must be dismissed.

DISCUSSION

The first stipulated issue is broadly stated, and subsumes a number of procedural objections. Threshold among these is the Union's contention that the Employer forfeited any objections by not raising them before hearing.

Article III governs this point, but does not directly address the Union's contention. The most persuasive basis to clarify the contract's silence would be the parties' past practice, but there is no established practice here.

The Union's argument draws on considerations ultimately rooted in arbitral precedent. None of those considerations are, however, persuasive here. Waiver is a legal doctrine which has been applied by arbitrators in the interpretation of labor agreements, and which is defined as "(t)he intentional or voluntary relinquishment of a known right." 5/ The record does not establish that the Employer has intentionally or voluntarily relinquished the right to challenge the Union's compliance with Article III.

The Union's argument does not, however, rely on the Employer's intentional relinquishment of the right. Rather, the Union asserts that the Employer should be precluded from advancing those objections because it did not raise them before hearing. This argument poses another legal doctrine adopted by arbitrators -- equitable estoppel. Broadly speaking, this doctrine requires (1) action or nonaction which induces (2) reliance by another (3) to their detriment. 6/ Even assuming the Employer's failure to raise the objections prior to hearing induced the Union to rely on the absence of such objections, the record does not establish any detriment to the Union not bargained for in Article III. If the asserted detriment was surprise at hearing, that problem could have been addressed by granting a continuance. No such request was made. Nor can it be persuasively asserted that the detriment was a forfeiture of a hearing on the substantive issue. In this case, as is often done in arbitration, an evidentiary record was made on the procedural and substantive issues. 7/ If the asserted detriment is the potential forfeiture of a remedy if a procedural objection is sustained, that detriment was bargained for, and only serves to preface the dispute here, which is to determine if the procedures of Article III have been complied with. There is, then, no persuasive basis for estopping the Employer from asserting the procedural objections.

Each party cites arbitral precedent to independently establish that the

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5/ Black's Law Dictionary, Revised Fourth Edition, (West, 1968).

6/ See Pennsylvania Dept. of Corrections, 86 LA 978, 982 (Kreitler, 1986); and, for a legal definition, State v. City of Green Bay, 96 Wis.2d 195, 202-203, 291 N.W.2d 508, 512, 1980.

7/ Cf. Labor Agreement in Negotiation and Arbitration, Zach & Bloch (BNA, 1985) at 100: "Often management will raise a challenge to arbitrability as a preliminary matter. In most cases, the parties will proceed to argue the arbitrability aspect of the dispute, then proceed to hear the merits."

Employer, by not raising the procedural objections until the hearing, either did or did not forfeit them. That authority establishes that if the issue posed can be considered a matter of procedural arbitrability, then arbitrators may find a waiver of the objections, but that if the issue posed can be considered a matter of substantive arbitrability, arbitrators typically will not find such a waiver. The authority is of limited assistance here, however the objections are characterized. More significant than such general considerations is that Article III states only one step preceding arbitration, and some of the objections concern compliance with that step. Against this background, it is difficult to conclude that the Employer must raise the procedural issues prior to hearing. Beyond this, the record will not support a conclusion that the Union fully detailed the scope of the grievance prior to the arbitration hearing. This will be dealt with in greater detail below, but it can be noted here that the January 5, 1990, letter reflects that the grievance remained ill-defined prior to the Employer's request for greater detail, and, eventually, the hearing. Against this background, it is impossible to conclude that the Employer's failure to raise the procedural objections prior to hearing bars consideration of those objections.

It is now necessary to address the Employer's procedural objections. The Employer has contended that the grievance was filed "in retaliation for (the Employer's) cooperation with Lycon in filing unfair labor practice charges", thus constituting "unlawful secondary boycott activity." The relationship of external law, in this case the National Labor Relations Act, to contract interpretation has, over time, posed a disputed point among arbitrators. 8/ The Union contends that Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593, 46 LRRM 2423 (1960) must be read to preclude any consideration of external law. The Court implied in that case, however, that an arbitrator may permissibly look to "'the law' for help in determining the sense of the agreement." 9/ Because the applicability of external law to contract interpretation is disputed, the Employer was permitted to make an evidentiary record on this point.

That an evidentiary record has been made on this point does not, however, establish that external law is a persuasive means to resolve the procedural issues posed here. After a review of the parties' arguments, I am convinced that applying the Act to the grievance is not appropriate. The agreement does not incorporate the Act, and the parties have not mutually sought my opinion on the point. Without this grant of authority, my opinion would be less likely to resolve issues than to raise them. An arbitrator's opinion can not bind an administrative agency or a court. Bargaining parties may, however, by contract or by stipulation choose to seek such an opinion for whatever it may be worth to them. In the absence of such a mutual request, there is no clear authority for the opinion, and significant reason to believe an arbitral foray into external law would serve only to exacerbate an existing area of dispute. Thus, no attempt will be made here to determine if the Union's conduct in filing the grievance violated the Act.

The Employer has asserted that the history of the Union's non-enforcement of Article VIII, Section 1, d, establishes a waiver that provision. The record does not establish that this non-enforcement constitutes an intentional relinquishment by the Union of any right to receive a termination slip. Niebuhr testified that the form of the termination slip was not a significant concern, and that he would not request one without a significant reason to. He stated that Wareham's concern with his rights to unemployment compensation constituted such a significant reason. Both Cullen and Blomstrom testified they were unaware of the requirements of Article VIII, Section 1, d, until the processing of this grievance. None of this testimony can be considered extraordinary, given the context of the present dispute. A construction project is subject to time constraints imposed by the underlying construction agreement and by the nature of the materials used. Work is performed by employes offered, and relieved from, work on a job by job basis. It is not surprising that the niceties of Article VIII, Section 1, d, have been honored, when honored, with less than strict precision. It does not follow from this, however, that those niceties have been rendered meaningless. The principle of acquiescence asserted by the Employer would have greater persuasive force applied to a bargaining relationship in which the workforce was sufficiently stable over time that a termination was the exception, not the rule. That parties to a bargaining relationship in the construction industry would pay less than scrupulous attention to a paperwork requirement can not, standing alone, be persuasively made into a waiver.

The Union's non-enforcement of the requirements of Article VIII, Section 1, d, does, however, serve to preface the final, and dispositive, objection raised by the Employer. That objection concerns the relationship of

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8/ See, generally, Elkouri & Elkouri, How Arbitration Works, (BNA, 1985) at Chapter 10; Fairweather, Practice and Procedure in Labor Arbitration, (BNA, 1983) at Chapter XVI; and Zach & Bloch, Labor Agreement in Negotiation and Arbitration, (BNA, 1985) at Chapter 3.

9/ 46 LRRM at 2425; see also Zach & Bloch (footnote 8/) at 28-30.

Article VIII, Section 1, d, to the requirements of Article III.

Article III, Section 1, a, states that the parties "shall attempt to settle the matter between themselves immediately on the job site . . . " Subsection 1, b, underscores this requirement by stating what happens if "a settlement is not reached." In this case, no attempt to settle the matter consistent with the requirements of Article III occurred. This precludes, on the present record, the relief the Union seeks under Article VIII.

Examination of this point turns on the meeting of October 12, 1989, because Niebuhr's desire for a termination slip was triggered by Cullen's failure to issue a termination slip after the October 6, 1989, conversation. Niebuhr hoped his concerns on Wareham's termination had been resolved in that conversation, and hoped a termination slip would be issued to verify this. Thus, his concern over the Company's failure to issue a new termination slip could not be "settled" until after the October 6, 1989, conversation.

The parties have argued that the October 12, 1989, meeting poses a credibility dispute, but resolution of that dispute is not necessary to determine the issues posed here. If Blomstrom's and Cullen's testimony is credited, no settlement discussions occurred. If Niebuhr's testimony is credited, no settlement discussions sufficient to meet the requirements of Article III occurred.

Niebuhr's testimony establishes only a perfunctory mention of the four grievances as a group. He testified that he discussed the grievances with Blomstrom on October 12, 1989, "as a matter of formality" 10/ and could not recall "whether I mentioned termination notice . . ." 11/ Nor could he recall asking Blomstrom to seek authority to resolve the grievances: "For me to ask that, I am just complying with my contract, so I did not feel I would have authority to tell them to ask anything." 12/ The contrast with Niebuhr's presentation of a termination slip grievance three years ago is stark:

> I contacted the company, Timme Construction, informed them that I had a member that was in their employ that was in our opinion in a stage of limbo. We did not know what his classification was, informed them that under the contract they were required to present the member and the Union with a UC-15 form. They had not complied, and if this situation for the individual's case were not taken care of, charges would be filed. 13/

More telling is the nature of the violation Niebuhr presented to Blomstrom. Niebuhr was asserting a contractual provision which had never been asserted by the Union against the Employer. Beyond this, at the time of the meeting, Niebuhr hoped the nature of Wareham's termination had been resolved and required only a termination slip as confirmation. There is no apparent reason why this dispute could not have been more meaningfully discussed. Given the Union's non-enforcement of Article VIII, Section 1, d, some discussion was necessary to identify the nature of the notice desired and the reason for it. Given the provisions of Article III, something more than a perfunctory mention of four grievances was necessary to "attempt to settle the matter . . . "

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10/ Tr. at 112.

11/ Tr. at 113.

12/ Tr. at 114.

13/ Tr. at 85.

In sum, crediting Niebuhr's testimony will not establish that the Union complied with the requirement of Article III, Section 1, a, that the "parties . . . shall attempt to settle the matter . . . on the job site . . ." Nor should the significance of this requirement be minimized, as Elkouri and Elkouri have noted: "A limitation by arbitrators of their jurisdiction to cases which the parties have made bona fide efforts to settle can be expected to result in improved handling of grievances at the lower levels." 14/

The Union seeks an order that the Employer "abide by the contractual termination slip provision in all cases." Given the Union's non-compliance with the requirements of Article III, Section 1, a, this request can not be granted.

AWARD

The grievance is not properly before the Arbitrator.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 14th day of May, 1990.

By_____
Richard B. McLaughlin, Arbitrator

14/ How Arbitration Works, at 204.