BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SUB-ZERO FREEZER COMPANY, INC.	Case 58 No. 43641 A-4598
and	
SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO, LOCAL NO. 565	

Appearances:
Mr. Donald D. Emmerich, Personnel Director, on behalf of the Company.
Mr. Paul F. Lund, Business Manager, on behalf of the Union.

ARBITRATION AWARD

The above-entitled parties, herein the Company and Union, are privy to a collective bargaining agreement providing for final and binding arbitration before a Wisconsin Employment Relations Commission staff arbitrator. Pursuant thereto, I heard this matter on April 10, 1990, in Madison, Wisconsin. The hearing was not transcribed and both parties filed briefs which were received by May 7, 1990.

Based upon the entire record, I issue the following Award.

ISSUES

Since the parties were unable to frame the issues, I have done so as follows:

1. Did Grievant George Diaz serve his probationary period?

2. If so, did the Company have just cause to discharge him and, if not, what is the appropriate remedy?

DISCUSSION

Diaz was hired as a Utility Worker by the Company on November 20, 1989, for the second shift. He primarily filled in for various workers and he mainly performed material handling tasks, along with working on the main assembly production line. Except for this latter work, it is undisputed that Diaz performed all of his tasks in a capable manner during his sixty (60)-day probationary period.

Second Shift Supervisor Todd Collins testified that Diaz worked about ten (10) days on the assembly line where he always caused bottlenecks which held up production and that he sometimes did not do his job properly. He added that he tried to assign Diaz as many jobs as possible and that he even got some other employes to produce parts in order to help out Diaz when he worked on the line. He also acknowledged that he never wrote up Diaz over his faulty work, explaining that progressive discipline is not used for employes who are unqualified to perform their work and that they, instead, are put on floater status. He also added that if employes on probation must be warned about their job, they are simply let go.

Diaz admitted at the hearing that he had problems keeping up with the line; that he only got the incentive rate 2-3 times; that other employes sometimes told him he was too slow and that he should get out of the way because he was holding up the line; and that he did not believe that he would ever improve his skills enough to work on the main line. He went on to add that Collins at times had complimented him over his other work and that "he liked the way I put effort in my work."

On Friday, January 19, 1990, Collins told Diaz that he was being terminated by the Company, at which time Diaz agreed that he was too slow on the line but said, "That's rotten, I only had one day left on my probation." Collins stated that he waited until the very last possible moment to fire Diaz because he wanted to give him every opportunity to prove that he could do his job. Diaz thereafter filed the instant grievance on January 22, 1990, protesting that his termination was without just cause.

Lead Supervisor Scott Hamm on January 24, 1990, denied the grievance and stated, inter alia, "Although George is a nice person and is generally liked by his peers and supervisors alike, the fact is George was unable to perform his work duties, and it was necessary to terminate him -- a task his foreman labored about and found very difficult." Hamm also testified that "we knew the job was important to George and we wanted to help him."

Company and Union representatives subsequently met to discuss Diaz's grievance on January 31, 1990, at which time the Company offered to extend Diaz's probation for thirty (30) days to see if he could properly perform on the line for, as Collins put it, "a real close look." Although there is a question of whether the Union accepted that offer at that time, it is undisputed that Union representative Paul F. Lund by letter dated February 3, 1990, ultimately told the Company that its offer was unacceptable because Diaz had told him that he in all probability would flunk any extended probationary period. At the hearing, Diaz reconfirmed this sentiment, saying that "I figured they would let me work for 30 days and that they would let me go." As an alternative to the Company's extension of Diaz's probationary period, Lund on February 3, 1990, and with Diaz's agreement, proposed a "Memorandum of Grievance Resolution" which provided, inter alia, that Diaz's termination be converted to a lay-off and that Diaz be reinstated under the contractual lay-off provision for any job he was qualified to perform. The Company rejected said proposal.

In support of the grievance, the Union primarily asserts that "The grievant had satisfied the contractual probationary period prior to being terminated from employment" because Article III provides for a sixty (60)-day probationary period and because Diaz was fired sixty-one (61) calendar days after his initial November 20, 1989 hire date. The Union therefore argues that the Company was obligated to establish just cause for his termination -- something it did not do given the fact that but for the main line assembly work, Diaz did all of his other jobs very well and that, as a result, the Company easily could have put him on floater status where he could have worked on other jobs, just as it has done with other employes in the past.

The Company, on the other hand, asserts that Diaz did not complete his probationary period because he did not serve, i.e., actually work, sixty (60) days, given the fact that he did not work about ten (10) percent of those days and that "the Union erroneously included in its count six days that Diaz did not serve." The Company also notes that Supervisor Collins has always calculated the sixty (60) days the way he did here, i.e. to peg it two (2) months to the day from the time an employe has been hired. It also argues that Diaz in any event has admitted that he is unqualified to work on the line and that he thus "would be disciplined for the inability to perform" said job. The Company concedes, though, that Diaz "was a willing worker with a positive attitude" and that but for the assembly line work, he was 'acceptable'."

The first issue to be resolved here is whether Diaz finished his probationary period. On this score, Article III, entitled "Probationary Period," provides:

> "Section 1. New employees shall serve a Probationary Period of sixty (60) calendar days. During the Probationary Period, the Employer shall have the right to retain in employment or discharge from employment at the Employer's option.
>
> "If the employee is retained, after having served said Probationary Period, the employee's seniority shall

> start as of the first day of employment. The Union waives Grievance Procedure for probationary employees." 1/

The essence of the Company's argument here is that the word "served" in this language must be equated with the word "worked." But these two words, in fact, do not mean the same thing, as it is entirely possible for someone to "serve" with the Company without working all of the days of said service. In addition, by using the phrase "sixty (60) calendar days," rather than the phrase "sixty (60) work days," it is clear that an employe under this language does not have to work all of the sixty (60) days in issue.

Elsewhere in the contract, we see that Article VI, entitled "Holidays," provides that employes "who have served sixty (60) calendar days . . . should be paid" . . . certain holidays; that Article IX, entitled "Vacations," covers "Employees with sixty (60) days of service . . ."; and that Article XIV, entitled "Seniority," provides "Seniority is defined as length of service . . ." Article XIV, Section 2, is particularly instructive because it specifically lists those exceptions which constitute a break in "service," hence showing that the parties have crafted exceptions to continuous service in certain situations. Here, since there is no exception on the face of this language providing that one's probationary period is to be extended if an employe misses work for several days, there is no merit to the Company's assertion that Diaz's probationary period should be tolled because he did not work on three (3) holidays of two (2) days each.

1/ This language relieves the Company from issuing any formal warnings to probationary employes, as it has total, absolute discretion over whether or not to retain them without any regard to following progressive discipline.

As a result, the sixty (60)-day requirement must be given its plain meaning, i.e., that since Diaz was hired on November 20, 1989, his probationary period ended on January 18, 1990 -- sixty (60) days later. 2/ Since he was not terminated by that date, it must be concluded that he served his probationary period and that the Company thereafter could not fire him without just cause.

As to that, the record shows that while Diaz performed almost all of his material handling jobs in an acceptable manner and that while some of Diaz's supervisors praised said work, he nevertheless admittedly was unable to perform one of the key components of his job, i.e., to work on the main assembly line. Hence, even if Diaz were to be given additional training for that particular job as proposed by the Company, he in all probability will never be able to properly perform it.

This case therefore is highly unusual in that the Company had just cause to terminate Diaz over his continuing inability to work on the main assembly line, while at the same time it lacked just cause to fire him over the way he performed his other duties.

This unusual situation calls for an unusual remedy, one which recognizes on the one hand the Company's legitimate concern in having its workers properly perform all of their jobs, while on the other hand also recognizing Diaz's right to continued employment in jobs he is qualified to perform. Given the present posture of this case, that can be accomplished by the following:

1. Diaz's termination is hereby converted to a lay-off, effective January 22, 1990.

2/ The only possible basis for finding otherwise is Collins' statement that he has always computed one's probationary period the same way he did here for Diaz. His practice, however, was never communicated to the Union and it therefore cannot be binding on the Union, particularly since Article III is so clear and unambiguous in setting out the exact length of a probationary period.

2. Diaz is not required to serve any additional probationary period and his seniority date is November 20, 1989.

3. Diaz is entitled to be recalled under Article XIV, Section 1, of the contract to any job he is qualified to perform and for which he has the appropriate seniority, excluding any which involve the main assembly line and those jobs which require a degree of skill that Diaz does not have, i.e., Direct Incentive; the Maintenance Mechanic job; the Maintenance Assistance job; the Service Parts job; and the Janitor job.

4. The Company is to judge Diaz's qualifications for any other jobs to which he is recalled, with Diaz being given the right to grieve any adverse Company determinations. If there is a dispute regarding Diaz's qualifications, it shall be immediately submitted to arbitration, without any need for the Company to follow progressive discipline.

5. Diaz is entitled to the same contractual benefits that all laid-off employes are entitled to receive under the contract.

In light of the foregoing, it is my

AWARD

1. That Grievant George Diaz served his probationary period.

2. That since Grievant George Diaz is unable to properly perform his duties on the main assembly line, his termination is hereby converted to a lay-off and he should have the recall rights noted above.

Dated at Madison, Wisconsin this 24th day of May, 1990.

By _____
Amedeo Greco, Arbitrator