BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 464	
and	Case 13 No. 42976 A-4532
J P CULLEN & SON CONSTRUCTION CORPORATION	

Appearances:
Arnold and Kadjan, 19 West Jackson Boulevard, Chicago, Illinois, 60604-3958, for the Union.
Brennan, Steil, Basting and MacDougall, S.C., 119 Martin Luther King Jr. Boulevard, Madison, Wisconsin, 53703-3358, for the Employer.

ARBITRATION AWARD

Laborers International Union of North America, Local 464, hereinafter referred to as the Union, and J. P. Cullen & Son Construction Corporation, hereinafter referred to as the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to appoint an arbitrator to hear and decide the instant dispute. The Commission appointed Coleen A. Burns, a member of its staff, as Arbitrator. Hearing in the matter was held on December 27, 1989, in Madison, Wisconsin. The record was closed on March 30, 1990, upon receipt of post-hearing briefs.

ISSUE:

The parties stipulated to the following statement of the issue:

Did the Employer violate the sex discrimination provision of the contract in the termination of Cindy Pearson?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE V - HIRING HALL SYSTEM

Section 1. In the interest of maintaining an efficient and effective system of production within the Construction industry on a non-discriminatory basis, to provide an orderly procedure in referral of applicants for employment, to eliminate the evils of casual employment and to secure a fair distribution of work with a living wage for those workers who must gain their livelihood from an industry to which they contribute their labor, there is hereby established this plan of referral between the Madison Employers Council, Inc., building and construction Contractors, herewith referred to as the "Employer" and the Construction and General Laborers' Union, Local No. 464, Madison, Wisconsin, hereinafter referred to as the "Union".

a. Registration, selection and referral of applicants for employment shall be on a non-discriminatory basis and in no way affected by Union membership, rules, regulations, bylaws, constitutional provisions or any other aspect or obligation of Union membership policies or requirements. There shall be no discrimination against race, color, creed, sex or physical handicap.

b. The Employer shall notify the Union of the need for workers and shall not recruit applicants or hire persons who have not been referred by the Union except under conditions stated herein.

An employer reserved the right to:
(1) Employ directly employees hired by him during the previous season.
(2) Appoint a labor foreman of his choice.
(3) Employ a minimum number of key laborers.

The Union Office shall be notified weekly of all men/women so hired, listing the names of

employees and the date of hiring.

c. In requesting referrals, the Employer shall specify:
(1) Number of employees required. The Union agrees that when the Employer is required to comply with any governmentally imposed affirmative action requirements and if the Union, pursuant to the provisions of this Article, is unable to supply applicants as required by the Employer for compliance, the Employer may recruit and employ applicants directly without regard to the requirements of this Article.
(2) Nature and type of construction work.

(3) Location of the project.
(4) Information deemed important to enable the Union to make proper referral of applicants.
d. The Employer reserves the right to accept or reject an applicant referred by the Union or to discharge for just cause an employee who has been accepted, but proves unsatisfactory, subject to the Appellate Procedure contained herein.
e. The Union shall maintain a register of applicants available for employment established on the basis of the groups listed below. Each applicant shall be registered in the highest priority Group for which such applicant qualifies. Registration and referral of all applicants shall be in accordance with the following plan:

. . .

BACKGROUND:

Cindy Pearson, hereinafter the Grievant, is a member of Laborers International Union of North America, Local 464. The Union and the Employer are parties to a collective bargaining agreement, which agreement applied to the Employer's job site at the Wisconsin Mutual Insurance Building in Madison, which job began on or about September 1, 1989. On September 26, 1989, Andy Blomstrom, the Employer's Job Superintendent at the Wisconsin Mutual Insurance work site, contacted a Union Representative to request an experienced mason tender. At that time, Blomstrom was told that the Union had two laborers who were available for work, one of whom was the Grievant. The Union Representative indicated that the other laborer was more experienced than the Grievant, but would have to be transported to the work site because he did not have a driver's license. During this conversation, the Union Representative mentioned that the Grievant was a power lifter and Blomstrom recalled that he had met the Grievant earlier in September, when the Grievant visited the work site. Blomstrom then asked the Union Representative to refer the Grievant to the work site.

On September 26, 1989, the Grievant was contacted by the Union and referred to the Employer's Wisconsin Mutual Insurance project. The Grievant reported for work on September 27, 1989 and was assigned to work on the carpenters' crew. On October 2, 1989, after several days of working with the carpenters' crew, the Grievant was assigned to work with the mason crew. The Grievant worked with the mason crew until the close of the work day on October 4, 1989, when Blomstrom informed the Grievant that she was being terminated for lack of work.

POSITION OF THE PARTIES:

Union:

The Employer bears the burden of establishing just cause for the discharge. The Employer has failed to meet its burden of proof.

The events leading to the Grievant's discharge were detailed in Blomstrom's testimony. This testimony reveals little, if any, legitimate criticism of the Grievant's performance as a mason tender. Rather, the overwhelming majority of Blomstrom's testimony deals with Grievant's conduct as a carpenter's assistant. As the Grievant's testimony demonstrates, she was not hired to perform work as a carpenter's assistant, and she had advised Blomstrom that she lacked experience in this field. Accordingly, criticism of the Grievant's work as a carpenter's assistant are not relevant to a determination concerning her mason tending duties.

Blomstrom's criticism of the Grievant's mason tending work are unsupported. Blomstrom alleges that the Grievant could not set up the morgan scaffolding. However, other witnesses' testimony demonstrate that this is not work which is generally required of mason tenders. The only other criticism of the Grievant's mason tending was that the Grievant talked while on the job. As the Grievant testified, this conversation occurred while she was on the scaffold performing her normal work duties and she did not discontinue these

duties to engage in a conversation. Clearly, the Grievant's conversation with the electrician does not constitute a valid basis for discharge.

In support of its decision to discharge the Grievant, the Employer argues that the Grievant's lack of ability and training was evidenced by the fact that she did not bring any work tools to the job site. However, all credible witnesses stated that the Grievant did bring a hammer to the job site. With respect to the tape measure, the record demonstrates that the tape measure is not a required tool for a mason tender and that it is common for mason tenders to borrow a tape measure as needed.

This case is similar to the recent federal court decision in Jones vs. Jones Brothers Construction Company, 50 Fep. 1539 (N.D. Illinois 1989) wherein the Court found the Employer's criticisms of the female employe were "exaggerated". The Employer has placed undue weight on unsupported criticism of excessive talking and failing to have proper tools on the job site. The Employer failed to produce any bricklayers to testify that the Grievant was not adequately attending to their needs.

As in the Jones' situation, it is significant that the Grievant was the only woman on the job. Discriminatory intent may be inferred from the fact that the Grievant was misassigned duties, that she was the only woman on the job, that she was fired, that she was replaced by a man and that since her firing, the Employer has not utilized any female employes at the job site.

It is evident that the Employer was looking for a way to terminate the Grievant and did so as soon as a male friend of the labor foreman was available to perform the Grievant's work. This use of "old boys" network to deprive women of rightful jobs must be condemned.

As demonstrated by her prior work experience, the Grievant was a qualified mason tender. The Company has acted in bad faith in determining that the Grievant could not perform the duties required of a mason tender. The Employer's stated reasons for discharge are contrived and not supported by any credible evidence. Discharge is particularly inappropriate because the Grievant was never warned of her alleged faults. Rather, the Company's supervisors conspired to conceal the alleged shortcomings and resorted to discharge as soon as a male replacement was found.

Assuming arguendo, that the Arbitrator determines that the Union bears the burden of proof, the discharge must still be overturned. The Union has made a prima facie case of discrimination by showing (1) that the Grievant is a member of a protected class, (2) that the Grievant was meeting the legitimate expectations of her job, (3) she was fired, and (4) she was replaced by a male employe. The Company's profess defense, lack of performance, has been demonstrated to be nothing more than a pretext for unlawful sex discrimination.

The work project, by all testimony, has been on going since October 4, 1989. The Grievant is entitled to backpay for all weeks from October 4, 1989 to the date of this decision. The Company is entitled to credit for interim earnings and unemployment benefits received, if any. The grievance must be sustained.

Employer

At hearing, the parties stipulated to a statement of the issue which presented the question of whether the Employer violated the sex discrimination provision of the collective bargaining agreement by terminating the Grievant. Thus, it was with some surprise that the Employer read the Union's brief and found the Union had completely rephrased the issue to be whether the Employer had just cause to discharge the Grievant. The two issues are not the same. It is entirely inappropriate for the Union to try to change the formulation of the issue in its post-hearing brief. The Employer's hearing strategy was affected by the formulation of the stipulated issue. As a general rule, arbitrators strictly limit themselves to answering the question presented at hearing, and do not have the jurisdiction over other questions. This rule should be applied herein.

The provision of the agreement which expressly contains a prohibition against sex discrimination pertains to the conduct of the Union in making referrals from the hiring hall, which provisions are found in Article V, Section 1 (a). The language of this provision clearly provides that the prohibition against discrimination applies only to registration, selection, and referral of applicants. The nondiscrimination provisions do not express an intent to extend the prohibition on discrimination to discharges by the Employer, nor is such an intent reflected in the language of Article V, Section 1(d).

There has been a split of opinion among arbitrators over the issue of whether the concept of "just cause" implicitly incorporates the nondiscrimination provisions of state or federal employment laws. Numerous arbitrators have held that their task is to interpret the contract language and not to incorporate, by implication, Title VII of the Civil Rights Act of 1964 or other similar laws into the collective bargaining agreement. This approach

is sound and does not sanctify acts of discrimination. Rather, it recognizes the existence of other forums and the expertise that other tribunals have developed in determining whether discrimination occurred. It also recognizes the unique limitations that the parties may have placed upon themselves in negotiating their contracts. It is evident from the provisions of the collective bargaining agreement that the parties did not intend for the just cause article to incorporate the prohibitions against sex discrimination. Had the parties intended such a result one would see a provision in the contract to the effect that the Employer will not discriminate on the basis of sex, race, creed, color, age, religion or handicap.

Given that the nondiscrimination clause is limited to the Union's negotiation, selection and referral of applicants, the grievance should be dismissed on the basis that the nondiscrimination clause does not apply to discharge. Such a conclusion will work no hardship upon the Grievant since, as was presented by the Union at the hearing, the Grievant has already filed a sex discrimination charge against the Employer with the DILHR.

In the alternative, the Employer argues that the discharge was not due to sex discrimination. In the normal sex discrimination case, an employe presents a prima facie case by showing that she was a female, that she was qualified to do the work, that she was discharged, and that she was replaced by a male. The Employer must then articulate legitimate, nondiscriminatory reasons for the conduct. The employe then has the opportunity to show that the reason given is pretextual. The focus of proof of pretext is upon disparate treatment.

In the present case, there is a legitimate question of whether the Grievant was a qualified, skilled mason tender. The Union has presented no convincing rebuttal evidence to the Employer's claim that the Grievant was not performing her work in a satisfactory manner. The Grievant's own testimony supports the evidence that she was wholly unsatisfactory while working on the carpenter crew. Further, the Grievant's admissions concerning her inexperience on the morgan scaffolding, her lack of familiarity with the electrical equipment, and her conversation with the electrician also bolster the evidence that she did not perform well on the mason crew.

The testimony of Mike Scholl fails to rebut the Employer's evidence that the Grievant did not perform well as a mason tender. Scholl's observation of the Grievant's work performance was very limited and, further, on cross examination, Scholl acknowledged that the Grievant had problems with the scaffold and he also observed that her foreman, Gene Haegele, was disgusted with her work performance.

As the record demonstrates, the Employer has consistently discharged unsatisfactory male employes with the explanation that it was a layoff. This fact rebuts the Union's assertions that the Employer's explanation of a discharge is pretextual.

The Union's claim that the Grievant should never have been assigned to the carpenter crew and, therefore, was somehow judged unfairly, is nonsensical. Other laborers, including her replacement, as admitted by Scholl, were switched around from mason tending to carpenter's assistant, as the need arose. Moreover, the record demonstrates that the Grievant would have been promptly assigned to the mason crew if she had the ability to mix mortar or erect scaffolds. Blomstrom's testimony that, on her first day of work he had asked the Grievant if she could mix mortar or erect scaffolds is supported by the fact that Dan Wilson was switched from the carpenters' crew to the mason crew. There would have been no need to switch Wilson had the Grievant been able to mix mortar and erect scaffold.

The Union misunderstands why the evidence pertaining to her performance on the carpenter crew was presented. In Jones vs. Jones Construction Co., 882 F.2d 125 (7th Cir. 1989) the court held that a company had to explain why it did not transfer a female into an opening for another type of laborer's job on a construction site even though there was good reason to lay her off a different subsection category of a labor job. In the present case, there was work for both carpenter assistants and mason tenders. Thus, when Blomstrom decided that the Grievant was not working out on the mason tending crew, there was still a need to inquire whether she should be transferred back to the carpenter crew. Blomstrom did this and the Carpenter foreman responded that he did not want the Grievant because she was not productive.

The Union's claim that the Grievant was discharged so that she could be replaced by a male laborer who was a part of the "old boys network" flies in the face of common sense. The Employer was looking for good mason tenders and hired several more after Rupprecht was hired. There was plenty of room on the job site for both the Grievant and Rupprecht if the Grievant had been any good. In addition, if the Employer had been trying to replace the Grievant with the first male it could find, it could have done that when it hired Scholl, who was hired two days before Rupprecht applied. The Union's suggestion that the Employer was looking for an excuse to get rid of a female is without foundation. The Employer willingly hired the Grievant, was initially patient with her and shifted her from the carpentry to masonry crew. There were no sexually derogatory comments made to or about the Grievant by her supervisors

and the Grievant was not given less desirable work. Indeed, the evidence demonstrates that the Grievant was treated like any male employe. The Grievant was discharged solely on the basis of her inability to perform her assigned work duties.

Given the short, seasonal nature of construction work, a system of progressive discipline has no relevance. Indeed Union Representative Niebuhr's admission on cross-examination that firms like Monona Masonry weed out unsatisfactory performance within several days is a testament to the fact that progressive discipline is not the norm on construction jobs. Accordingly, the Union's claim that the Grievant should have been given more warnings about her unsatisfactory work before she was terminated is without foundation.

Contrary to the argument of the Union, it was not necessary for the Employer to bring in masons to testify about the Grievant's work performance. If the Union wishes to make the argument that Schultz' testimony was fallacious, it was the Union's burden, not the Employer's, to do so with masons or other observers.

A grievant in a construction industry case is only entitled to damages until the end of the project, if it precedes the date of decision. Similarly, a grievant is not entitled to full damages when he or she switches careers and takes himself or herself out the construction market. The grievance must be denied.

DISCUSSION:

As the Employer argues, the arbitrator's jurisdiction in this matter is limited to the issue which was stipulated to by the parties at hearing, i.e.:

> Did the Employer violate the sex discrimination provision of the contract in the termination of Cindy Pearson? If so, what is the appropriate remedy?

As the Employer further argues, the "just cause" provision is not the same provision as the "sex discrimination" provision. While it may be reasonable to imply that a "just cause" for discharge provision incorporates a prohibition against discriminatory conduct based upon the sex of an employe, it is not reasonable to imply that a "nondiscrimination" provision incorporates a "just cause" standard. Contrary to the argument of the Union, the arbitrator does not have jurisdiction to determine the issue of whether or not the Employer had "just cause" to discharge the Grievant.

Andy Blomstrom is the Employer's job Superintendent on the Wisconsin Mutual Insurance project. Blomstrom's duties involve work coordination, quality control, hiring and discharge of employes, and recordkeeping. Blomstrom recalls that on September 27, 1989 the Grievant reported for work, at which time Blomstrom asked the Grievant a series of questions to determine her work experience. Blomstrom recalls that he asked the Grievant if she had put together a Morgan's scaffold, to which the Grievant replied that she had not. Blomstrom also recalls that the Grievant indicated that she had not mixed mortar. According to Blomstrom, the Grievant's remarks lead him to conclude that the Grievant had limited experience and was not qualified to perform the mason tending work which was available at that time, i.e., mixing mortar and erecting the morgan scaffold. Blomstrom then assigned the Grievant to work as a carpenter's assistant and reassigned Don Wilson, a carpenter's assistant, to mason tending duties to assist in the erection of the Morgan scaffold.

According to the Grievant, she was not questioned about mixing mortar or erecting a Morgan scaffold on September 27, 1989, but rather, was immediately assigned to work with the carpenters. The Grievant recalls that on Monday, October 2, 1989, she had a conversation with Blomstrom in which Blomstrom did ask if she could mix mortar and that she had replied "yes". The Grievant also stated that she did indicate that she didn't have a lot of experience erecting a Morgan scaffold.

As the testimony of each witness demonstrates, there was a conversation between the Grievant and Blomstrom in which the two discussed the Grievant's experience with mixing mortar and erecting a Morgan scaffold. There is a disagreement as to the timing and the content of the conversation. While the Union argues that Blomstrom's account of the September 27, 1989 conversation must be rejected on the basis that the proffered rationale for the Grievant's carpentry assignment is pretextual, designed to disguise the fact that the decision to assign the Grievant to the carpentry crew was motivated by an intent to discriminate against the Grievant on the basis of her sex by "misassigning" her duties, the Union's argument is not supported by the record.

The Grievant does not claim and the record does not indicate that Blomstrom made any remarks to the Grievant, or to any other individual, which evidenced a sexual bias. Rather, the record indicates that Blomstrom treated the Grievant in the same manner as any other laborer. For example, the record demonstrates that, in mid-September, when the Grievant met with Blomstrom to discuss the availability of work, Blomstrom did not seek to dissuade the

Grievant, but rather, responded to the Grievant by questioning the Grievant about her ability to perform the work available at that time, i.e., pouring concrete. 1/ Moreover, as the Employer argues, had Blomstrom not wanted a female laborer, he need not have accepted her referral, but rather, could have accepted the referral of another laborer, who was male. The Union's argument that Blomstrom terminated the Grievant as soon as a male mason tender became available, i.e., John Rupprecht, is rebutted by the fact that, at the time of the Grievant's referral, Blomstrom had the option of selecting a male laborer and by the fact that Mike Scholl, a male mason tender, was hired on October 2, 1989, a few days before the Grievant's discharge.

As the Grievant acknowledges, and the record demonstrates, she did not have experience in performing the carpentry work which she was assigned. However, contrary to the argument of the Union, the record does not demonstrate that Blomstrom was aware of this fact at the time that he assigned the Grievant to the carpenter crew. Blomstrom's assertion that he did not know that the Grievant couldn't perform the carpenter's assistant duties is supported by the Grievant's testimony that, while she was surprised to be assigned to the carpentry crew, she did not protest the assignment. According to the Grievant, she could see that they were still pouring foundation and were not laying much brick. The Grievant recalls that she decided to do the best that she could and hoped to be switched to mason tending when the brick laying started.

The record demonstrates that the carpenter assistant duties assigned to the Grievant are duties of the Grievant's laborer classification. While it may be common for a laborer to do only carpenter assistant duties or mason tending duties, the Employer has the right to assign either type of duties to a laborer such as the Grievant. Indeed at the time that the Grievant began her employment, the two male laborers, Steve Lawry and Dan Wilson, had been moving back and forth between the carpenter crew and mason crew, as the work dictated. Moreover, as the testimony of Union witness Scholl demonstrates, the Grievant's replacement, John Rupprecht, was also switched between carpenter and mason crews.

Upon consideration of the demeanor of the witnesses at hearing, as well as the record as a whole, the undersigned credits Blomstrom's testimony that on September 27, 1989, he questioned the Grievant concerning her prior work experience and concluded that the Grievant did not have the ability to perform the mason tending work available at that time, i.e., mixing mortar and erecting the Morgan scaffold. 2/ While it may be that Blomstrom's conclusion concerning the Grievant's ability to mix mortar was erroneous, the undersigned is persuaded that it was, nonetheless, bona fide. 3/

In summary, as the Union argues, the Grievant was referred as a mason tender, not a carpenter's assistant. However, contrary to the argument of the Union, the record fails to demonstrate that the Grievant's assignment to the carpentry crew was discriminatory on the basis of sex or made in bad faith. Rather, the record supports the conclusion that Blomstrom's decision to place the Grievant on the carpenter crew, rather than on the masonry crew, was due to Blomstrom's bona fide belief that the Grievant could not mix mortar and was not experienced in erecting the Morgan scaffold and, thus, could not perform the mason tending duties available at that time. 4/

1/ The Grievant agrees that this conversation took place and that she told Blomstrom that she could not pour walls, but had experience with flat work and mason tending. According to the Grievant, a mason tender is one who supplies blocks and mud to masons so that they can erect walls.

2/ Despite the Union's assertion to the contrary, an experienced mason tender, such as requested by the Employer, would be expected to assist in the erection of a Morgan scaffold.

3/ Inasmuch as the Grievant had prior experience mixing mortar and all witnesses agree that one can learn to mix mortar in less than one day's time, it is likely that the Grievant did not tell Blomstrom that she could not mix mortar. However, Blomstrom's confusion concerning the Grievant's experience with mixing mortar is understandable given the record evidence that, on September 27, 1989, Blomstrom's primary concern with respect to the mason crew was to erect the Morgan scaffold so that it would be available when the masons began the walls. The Grievant acknowledges that she told Blomstrom that she was not experienced in erecting a Morgan scaffold.

4/ It is true that after the Grievant had been assigned to the mason crew on Monday, October 2, 1989, she assisted the mason foreman in erecting the Morgan scaffold. It appears, however, that this assignment was made by the mason foreman, rather than by Blomstrom. It is not evident that the mason foreman had any discussions with the Grievant concerning her prior experience with the Morgan scaffolding. As Scholl stated at hearing, the Grievant did not know how to erect the Morgan scaffold.

At hearing, Blomstrom indicated that his decision to terminate the Grievant was based upon his own observations of the Grievant's work performance, as well as complaints that he had received from other supervisors concerning the Grievant's work performance.

According to Blomstrom, on the Grievant's first day on the job, he observed that the Grievant had difficulty removing pins from the forms. Blomstrom recalls that he showed her how to take the pins out and put them in the pail. Blomstrom recalls that when he returned, about fifteen minutes later, the Grievant was still having difficulty removing the pins. Blomstrom also recalls that rather than taking four or five pins out at a time and placing them in the pail, the Grievant removed the pins one at a time, walking back and forth to the pail each time. Blomstrom recalls that on the second day, he asked the Grievant to hold a door frame while Blomstrom drove a stake. According to Blomstrom, the Grievant let the door frame fall and the door frame hit another employe as it fell. According to Blomstrom, he then held the frame, told the Grievant to drive the stake, and that the Grievant had to be shown how to use the sledge hammer to drive the stake. Blomstrom recalls that the Grievant did a lot of standing around and striking up conversations with other employes.

The Grievant, who acknowledges that she did not have any prior experience as a carpenter's assistant, did not contradict Blomstrom's testimony concerning her work with the pins and agreed that, as she was holding the door frame, that it fell on another employe. While the Grievant does not believe that she had a problem driving the staking, she recalled that as she was driving the stake, Blomstrom said "This is how you do it" and, drove the stake in himself. As the Employer argues, the Grievant's testimony supports Blomstrom's testimony concerning his personal observations of the Grievant's work performance.

According to Blomstrom, he received criticism of the Grievant's work performance from three other supervisory employes, i.e., Vern Witek, Dale Schultz, and Gene Haegele. According to Blomstrom, Witek, the foreman of the carpenter crew, complained on each day that the Grievant was on his crew that the Grievant was not productive and did not follow simple orders. The specific criticisms recalled by Blomstrom were that Witek complained that the Grievant brought him a barn broom when he asked for a house broom and that the Grievant repeatedly brought the wrong size forms, causing Witek to retrieve the forms himself.

At hearing, Witek agreed that, prior to the Grievant's discharge, he had told Blomstrom that he was dissatisfied with the Grievant's work performance. When asked to describe the reasons for this dissatisfaction, Witek indicated that the Grievant took too long to strip forms; that the Grievant was not able to find the forms and panels that he requested, requiring Witek to leave his work to find the right materials; and that the Grievant choked the hammer when she pounded stakes. Witek also recalls that when he asked the Grievant to get a house broom from the trailer, the Grievant returned saying she could not find the broom, that the Grievant twice returned with the wrong broom, and that eventually Witek had to go to the trailer to find the broom. Witek, like Blomstrom, recalls that the Grievant carried one stake in each hand. According to Witek, a laborer normally carried at least five or six stakes in each hand. According to Witek, he often told the Grievant to hurry up but that it didn't seem to make her move any faster; that at one point he observed that the Grievant was leaning on a wall; that Witek told the Grievant not to lean on the wall, that the Grievant responded she was waiting for a form and that Witek told the Grievant to look busy because management was in the trailer. Witek stated that, while the Grievant was on his crew, he told Blomstrom that he was not comfortable with the Grievant and that he wanted one of the other laborers back. Witek further stated that, after the Grievant had been transferred to the masonry crew, 5/ he advised Blomstrom that he would not take the Grievant back on his crew because he was displeased with her work.

At hearing, the Grievant did not recall leaning against a wall, but did recall that as she was waiting for Witek, Witek made a comment that she should not stand around and that she should pretend to work because there were "big whigs" in the trailer. The Grievant also recalled that she was not able to find the broom and that she had difficulty stripping forms because she had not performed that type of work before. According to the Grievant, however, once she was shown the procedure, she worked steadily. The Grievant did not comment upon the other aspects of Witek's testimony.

As the Employer argues and the record demonstrates, the carpenter assistant work assigned to the Grievant was work of the laborers classification. Upon consideration of Witek's demeanor at hearing, as well as the generally corroborative testimony of both Blomstrom and the Grievant, the undersigned credits Witek's testimony that, while under his direction, the Grievant did not perform her laborer duties in a satisfactory manner and that

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5/ It is not clear whether the transfer to the masonry crew was due to Witek's dissatisfaction with the Grievant's work or the availability of mason tending duties on the scaffold.

he advised Blomstrom of his dissatisfaction with the Grievant prior to Blomstrom's decision to terminate the Grievant.

According to Blomstrom, the mason foreman complained that the Grievant was not there when she was needed, that she let the masons run out of mortar and that she was not setting up ahead. Gene Haegele, the mason foreman, has retired and did not testify at hearing. However, Blomstrom's testimony that the mason foreman was unhappy with the Grievant's work performance was corroborated by Union Witness Mike Scholl, who stated that he had heard the mason foreman complaining to himself about the Grievant's work performance.

Dale Schultz, who has been a job superintendent with the Employer for approximately 12 years, was assigned to work at the Wisconsin Mutual Insurance job site for a few days until he received another assignment. Schultz, who was not one of the Grievant's supervisors, stated that he did observe the Grievant working for three of the four days that he was at the job site and that at the time of these observations, the Grievant was working with the mason crew. Schultz recalls that he saw the Grievant standing around talking to trades people, that when he observed the Grievant she was not working as fast as a laborer normally works, and that the Grievant had difficulty assisting a mason to hook-up a mason saw. Schultz stated that he had talked to Blomstrom several times about the Grievant's poor work performance and that he told Blomstrom that given what Schultz had seen, the Company would be better off getting someone who could perform the work more quickly and more satisfactorily.

At hearing, the Grievant acknowledged that she did have difficulties in assisting a mason in hooking up a saw, i.e., she had brought the wrong electrical cord. The Grievant, however, believes that she was performing her mason tending duties in a satisfactory manner because she did not receive any complaints from the mason foreman.

According to Blomstrom, the straw that broke the camels back occurred on October 4, 1989, when Schultz complained that the Grievant was talking to an electrician, rather than tending to her duties. Blomstrom recalls that he observed the Grievant talking to the electrician for at least ten minutes, that the Grievant was not tending to her duties during this time, and that during the conversation one mason called for mortar. Schultz confirmed that a mason called for mortar while the Grievant was talking to the electrician.

The Grievant recalls talking to the electrician for a few minutes on October 4, 1989, but denies that the conversation interfered with her duties. The Grievant does not believe that a mason yelled for mortar while the Grievant was talking to the electrician.

At hearing, Union witness Mike Scholl, who began work as a mason tender on October 2, 1989, stated that when he observed the Grievant she was working in a competent manner and that he had not heard any mason yell to her that they needed any material. However, as Scholl also stated at hearing, during the time he worked with the Grievant, he was busy mixing mortar at a site approximately fifty to seventy-five yards away from the wall on which the masons were working. Since Scholl was busy performing his own job duties, at a work site some distance from that of the Grievant, the undersigned is not persuaded that Scholl was in a position to monitor the Grievant's work performance. Accordingly, the fact that Scholl did not observe the Grievant to be performing her work in an unsatisfactory manner does not serve to rebut the supervisors' testimony that the Grievant was not performing her mason tending duties in a satisfactory manner.

Upon consideration of the demeanor of the witnesses, as well as the record as a whole, the undersigned credits Schultz' and Blomstrom's testimony concerning their observations of the Grievant's work conduct while performing her mason tending duties.

As the Grievant and Scholl stated at hearing, it may not be uncommon for a mason to call for mortar. However, where, as here, the mason runs out of mortar during a time when the mason tender is engaging in a non-work related conversation with an electrician, the Employer may reasonably conclude that the mason tender is not performing his/her assigned work in a satisfactory manner.

In summary, the undersigned is persuaded that the Grievant was terminated because of unsatisfactory work performance. While it is true that the Grievant was advised that her termination was due to lack of work, the undersigned credits Blomstrom's testimony that, unless an employe was discharged for drinking on the job, he always gave the reason for discharge as lack of work because he didn't want to get involved in a dispute over unemployment compensation. 6/

Assuming arguendo, that the sex discrimination provision contained in Article V, Section 1(a) is applicable to Employer conduct in discharging an employe, the record fails to demonstrate that the Grievant's discharge involved sex discrimination.

6/ Blomstrom has now changed this practice.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The Employer did not violate the sex discrimination provision of the contract in the termination of Cindy Pearson.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 26th day of June, 1990.

By _____
Coleen A. Burns, Arbitrator