BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AFL-CIO, LOCAL UNION NO. 565	
and	Case 9 No. 44049 A-4637
TRACHTE BUILDING SYSTEMS, INC.	

Appearances:
Mr. Mike Anderson, Business Representative, Sheet Metal Workers Local 565, 1602 South Park Street, Madison, Wisconsin 53715, appearing on behalf of Sheet Metal Workers International Association, AFL-CIO, Local Union No. 565.
Ms. Leslie F. Kramer, Tomlinson, Gillman, Travers & Gregg, S.C., Attorneys at Law, 315 Wisconsin Avenue, P.O. Box 2075, Madison, Wisconsin 53701-2075, appearing on behalf of Trachte Building Systems, Inc.

ARBITRATION AWARD

Sheet Metal Workers International Association, AFL-CIO, Local Union No. 565 (hereinafter Union) and Trachte Building Systems, Inc. (hereinafter Company) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of any dispute between the Company and the Union concerning the effect, interpretation, application, claim of breach or violation of the agreement by an impartial arbitrator appointed by the Wisconsin Employment Relations Commission (hereinafter Commission). On May 22, 1990, the Union filed a request to initiate grievance arbitration with the Commission. Said request was concurred in by the Company on June 8, 1990. On June 15, 1990, the Commission appointed James W. Engmann, a member of the Commission's staff, as the impartial arbitrator in this matter. A hearing was held on July 25, 1990, in Madison, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. No transcript was made of the hearing. The parties submitted briefs, the last of which was received on August 20, 1990, and the parties waived the submission of reply briefs. Full consideration has been given to the evidence and arguments of the parties in reaching this decision.

STATEMENT OF FACTS

Todd Keeley (hereinafter Grievant) was initially hired by the Company on August 18, 1986. On October 6, 1989, the Grievant went on medical disability leave for a non-work related injury. He began collecting disability payments at 66 per cent of his gross pay, pursuant to the collective bargaining agreement. At the Company holiday party on December 16, 1989, the Grievant told Gerald Thiltgen, the Company's Manufacturing Manager and the Grievant's supervisor (hereinafter Manager), that he was able to return to work with some weight restrictions. The Manager told the Grievant that if he returned to work at that point, he would be placed on lay-off status. The Manager told the Grievant that he would be better off remaining on disability leave. The Grievant again saw the Manager on March 3, 1990, at a wedding reception. The Grievant told the Manager that the Grievant's doctor told him he could go back to work when he felt able. Again, the Manager told the Grievant that he would be laid off if he returned to work at that time and that he should remain on disability leave.

In a letter to the Grievant from the Company dated March 29, 1990, the Company advised the Grievant that his disability pay would conclude on April 13, 1990, and that his health insurance premium would no longer be paid by the Company effective April 7, 1990. On April 9, 1990, the Grievant applied for unemployment compensation. On or before May 4, 1990 the Office of Unemployment Compensation advised the Manager that the Grievant had applied for unemployment compensation as of April 9, 1990. On or about May 4, 1990, the Manager called the Grievant's home. The Grievant was not home so the Manager talked to the Grievant's wife. He asked her if the Grievant had a doctor's release to return to work. She said that he did not but that he was going to the doctor on May 9, 1990. The Manager told her that the Grievant should get the release to the Company as soon as possible. The Grievant saw Dr. Javid on May 9, 1990, who completed a form stating that the Grievant "may return to work by April 9, 1990".

In a letter to the Grievant dated May 11, 1990, the Manager wrote:

> Trachte Building Systems, Inc. is terminating your employment effective April 9, 1990.

> You were considered to be on a "medical leave of absence" due to your disability and under the plant rules in the union contract you are required to provide us with a doctor's written release confirming your ability to come back to work. You applied for unemployment for week ending April 14, 1990 which in effect meant you were available for work. You therefore falsified information regarding your employment status, which is a violation of the Major Work Rules and subjects you to immediate dismissal.

The Union filed a grievance on May 14, 1990, stating that termination of the Grievant was without just cause in that the Grievant did not knowingly falsify any information to the Company. The Union requested reinstatement of the Grievant to his regular job and that the Grievant be made whole. In a reply to the Union dated May 17, 1990, the Manager wrote as follows:

> The major plant rules specifically state that anyone falsifying information is normally subject to discharge on the first offense. Todd falsified information by not informing us of his change from a medical leave of absence to being available for work. The general plant and safety rules state that he must provide the company with a doctor's written release confirming his ability to return to work and perform his job.
>
> Todd informed the unemployment compensation office that he had a doctor's release stating that he was able to work effective April 9, 1990. This was confirmed by the U.C. office and he was awarded benefits. We also received a doctor's written release confirming Todd's ability to return to work on April 9, 1990 which was dated May 9, 1990. This is the first notice that Trachte had in written or verbal form from Todd that he was available for work effective April 9, 1990.
>
> Trachte has and still is concerned about Todd's attitude and intentions relative to returning to work. At no time in the last approximate four months has Todd talked to anyone at Trachte regarding his desire to return to work, if there was anything he should do relative to work or whether we had openings or intentions of calling anyone back from lay-off, etc. One would think that Todd should have had some communication with Trachte relative to his possibilities of returning to work and when. Todd evidently did not take his responsibility of informing Trachte regarding his status very seriously. We still may not have known Todd's status if Trachte had not taken the initiative to find out.
>
> In further support of our decision to terminate Todd, I will note that Todd was absent from work for two consecutive days without giving notice, April 9 and April 10, 1990. Under the Union contract Article VI, Section 4, Letter E, this is reason for termination of employment.
>
> Based on the evidence provided above, Trachte has no recourse but to terminate Todd's employment with us.

The parties were unable to resolve the grievance. It proceeded through the grievance procedure and is properly before this Arbitrator.

PERTINENT CONTRACT LANGUAGE

Article III - Management Rights

> Section 1. It is agreed that the management of the Company and its business and the direction of its working forces is vested exclusively in the Company and that this includes, but is not limited to the following: To direct and supervise the work of its employees; to hire, promote, transfer or layoff employees or demote, suspend, discipline or discharge employees for just cause subject to Section 4A of this Article; to plan, direct and control operations; to determine the reasonable amount and quality of the work needed; by whom it shall be performed and the location where such work shall be performed; to introduce new or improved methods or facilities or to change existing service practices, methods and facilities, to schedule the hours of work and assignment of duties; and to make and enforce shop rules. Changes in existing plant rules and regulations, as well as new rules and regulations promulgated by the Company, shall not become effective

until five (5) regular working days after copies thereof have been furnished to the Union and posted on the bulletin board. If the Union considers a proposed Company rule or regulation to be inconsistent or in conflict with any provision of this Agreement, said change will be subject to the Grievance Procedure. Any plant rule so challenged will not become effective until the Grievance Procedure has been exhausted.

. . .

Section 4A. Disciplinary action for minor offenses will be handled as follows:

First Offense - Written Warning
Second Offense - One Day Off Without Pay
Third Offense - Three Days Off Without Pay
Fourth Offense - Termination of Employment

All disciplinary actions issued by the Company shall be done in the presence of a Shop Committeeman or Steward. Any employee who works for two and a half months consecutively without committing an offense shall drop back one discipline level and at seven and a half months consecutively without committing an offense shall have his offense record expunged.

Section 4B. Notwithstanding Section 4A, any employee act violating the major rules would normally be subject to discharge on the first offense.

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Article VI - Seniority

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Section 4. Seniority shall accrue from the most recent date of employment by the Company. Employees with the greatest amount of seniority shall have shift preference, if they possess the necessary skills and abilities. An employee's seniority shall be terminated for any of the following reasons:

(A) If the employee quits.
(B) If the employee is discharged for just cause.

. . .

(E) If the employee is absent from employment for two (2) consecutive working days without giving notice to the Employer.

. . .

Article XII - Leaves of Absence

Section 1. Leaves of Absence without pay shall be granted by the Company to any employee for reasonable cause without prejudice to the employee's seniority or other rights for a period of thirty (30) days. Application for leave of absence must be made in writing to the Company and be approved in writing by the Company and copy thereof given to the Union. Employees shall be granted medical leaves of absence to the extent of their illness or injury, for a period not to exceed eighteen (18) months. Seniority will accumulate during a medical leave of absence. Extensions may be granted upon approval of both parties.

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Article XV - Notification of Layoffs

Section 1. The Company shall notify affected employees at least three (3) working days in advance of any layoff, provided that this requirement shall not apply to layoffs of five (5) working days or less duration that are caused by a breakdown of machinery or other circumstances not under the control of the Company.

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Article XVII - Lost Time Medical

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Section 2. In the event the employee is absent due to illness or injury for more than one day in any thirty (30) day period, the Company shall have the right to require a medical release. This medical cost is to be paid by the Company. The employee will be compensated for the working hours lost while obtaining this release.

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APPENDIX

Except as referenced in Article III of the preceding Agreement, the following rules and regulations are not a part of the Collective Bargaining Agreement, but are reproduced here for employee's information and convenience.

TRACHTE BUILDING SYSTEMS, INC.
General Plant & Safety Rules

Effective April 22, 1985, the plant rules and discipline which follow will be strictly and impartially enforced. The company reserves the right to add to or amend these rules as may be necessary.

The purpose of these rules is to define and protect the rights of all employees and not to restrict the rights of any employee. It will help you to understand what is expected of you and also be the means of promoting goodwill and smoothness in the operation and the prevention of misunderstanding on the part of anyone affected. To the majority of you, these rules are familiar and common sense. They have worked out in the light of experience over many years and their observance is to the interest of everyone associated with Trachte Building Systems.

Violations of any of the rules shall be sufficient cause for disciplinary action ranging from a reprimand to immediate discharge. Disciplinary action will be handled as in Article III, Section 4A of the Union Contract.

1. Report to plant time office on or before the start of a shift any anticipated absence, the reason therefore and the expected duration.

No absence will be excused or time off granted except for: sickness employee, or employee's immediate family (wife, husband, children), dental or medical appointment for employee only, death in employee's family or emergency situations.

Permission for time off for other than the above situations must be secured in advance from your supervisor. To be absent two (2) consecutive days without calling in can result in termination per the contract. Excessive absence and tardiness can also result in disciplinary action.

No one is allowed to walk off the job or leave company premises during their scheduled work hours, without notifying his/her supervisor and without having a reasonable excuse to do so.

2. Provide the company with a doctors (sic) written release confirming the physical fitness to perform any reasonable and usual work which may be required when returning to work after a leave-of-absence granted for sickness, injury, operation, or the like; this release will be required before permission to resume work will be granted.

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Major Rules

Violation of major rules are normally subject to discharge on the first offense.

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2. Falsifying information on employment blanks, giving false information concerning any production records, time records, punching someone else's time card, or making false claims of injury is prohibited.

. . .

ISSUE

The parties were unable to stipulate to formulation of the issue.

The Union would frame the issue as follows:

Whether the discharge of the Grievant, Todd Keeley, for the alleged falsification of information regarding his employment status was proper and for just cause and, if not, what is the appropriate remedy?

The Company would frame the issue as follows:

Whether the Company had just cause under the terms of the collective bargaining agreement to terminate the Grievant? If not, what is the remedy?

The Arbitrator adopts the formulation as framed by the Company

POSITION OF THE PARTIES

A. Union

The Union argues that the Grievant had nothing to gain by falsifying information given to the Company; that at no time did the Company instruct the Grievant as to its procedure of layoff; that the Grievant had no access to the bulletin board where the Company posts layoffs; that the Grievant was under the impression that he was verbally told he was on layoff both at the holiday party and at the wedding reception; that while the Company contends that three other employes on medical leave during the same period all knew what was expected of them when released from their doctors' care, no evidence was presented as to what instruction they received from the Company; that it was the Grievant's understanding that when he told the Manager at the parties that he could return to work and the Manager said he would be laid off, that this constituted the verbal notification that customarily is used for layoff notification; and that he did not have access to the Company bulletin board to see if his name was there.

The Union also argues that the Company never said exactly what information the Grievant was supposed to have falsified; that if the Grievant intended to falsify records, then the Grievant would not tell the Manager on two different occasions that he could return to work; that not until the Grievant applied for unemployment benefits did the Company specifically request a release from the Grievant's doctor; that the Grievant did provide that release with the date that the Manager had told the Grievant's wife; that in the Company's answer dated May 17, 1990, the Company contends that the Grievant was absent for two consecutive days without giving notice; that this is really grabbing at straws; that it was established that when the Grievant twice talked to the Manager, the Manager told him he would be on layoff anyway; and that the Grievant did not call in because he thought he was automatically on layoff when his disability benefits ran out.

Finally, the Union argues that the Company has not met its burden of proving that the Grievant's discharge was for just cause or for knowingly falsifying information; that said discharge thereby violated the collective bargaining agreement; that the Arbitrator should so find; that the Grievant should be reinstated to his former job without loss of seniority; and that the Company should make the Grievant whole for all losses of pay and other benefits under the contract.

B. Company

The Company argues that the Grievant knowingly falsified information; that it is unrefuted that he failed to notify the Company of his availability to work as of April 9, 1990; that he never talked to any Company representative to tell them he no longer needed a medical leave of absence; that the Grievant applied for unemployment compensation benefits stating that he was available for work but he did not bother to inform the Company of that fact; that until the Company was contacted by the UC office, all the Company knew was that the Grievant continued to be on a medical disability leave; that the fact that his disability payments ended did not change his status; that without being informed to the contrary, the Company had no reason to believe he was not still injured; that the Company was not officially informed by the Grievant until May 14, 1990, when it received the medical release dated May 9, 1990, that his doctor considered him to be available for work as of April 9, 1990; that the

Grievant knowingly falsified his injury status by not informing the Company that he was available for work as of the date he now contends that he could return to work; that it is the employe's duty to provide the Company with a medical release when returning to work after a medical leave as the rules clearly provide; that violation of the rules is sufficient cause for immediate discharge, just as is falsifying information; that the Grievant clearly violated both these rules; and that having do so, the Company had the right to terminate his employment and it did so with just cause.

The Company also argues that the Grievant was not on lay-off status; that his contention that he thought he was on lay-off stats is without merit; that the Grievant just assumed he was on lay-off; that the Grievant testified that he was well-aware of the Company's lay-off and recall policies; that the Grievant admitted that he was never previously laid-off at a social event; that Company employes knew at the 1989 holiday party that lay-off notices would be posted in January 1990 and that some employes were still on lay-off status as of the March wedding reception is no reason for the Grievant to conclude that he too was officially on lay-off; that the Grievant's status never changed from that of being on a medical disability leave; that three other employes on medical leave notified the Manager when they were able to return to work and provided him with the required medical release; that each of them were then officially notified that they were laid-off; and that no credible evidence was adduced at hearing to support the Grievant's claim that he was laid-off, conveniently and effect as of the week of his disability payments ended.

Finally, the Company argues that the Grievant failed to notify the Company of his absence from work; that he was able to return to work as of April 9, 1990; that he did not inform the Company of that fact until at the earliest May 4, 1990; that the agreement clearly provides that an employe can be discharged for being absent for two consecutive days without giving notice to the Company; that the Grievant did not give notice of absence at any time in April 1990; that, accordingly, he violated the collective bargaining agreement and subjected himself to termination for just cause; that the Grievant acted with total disregard of his responsibilities under the parties' collective bargaining agreement and Company work rules; that his cavalier attitude toward his position of employment and his misrepresentations cannot now be condoned nor rewarded with employment reinstatement; and that the Grievant's termination was with just cause.

DISCUSSION

In its letter to the Grievant dated May 11, 1990, the Company stated that it was terminating the Grievant for two reasons: first, that he falsified information regarding his employment status in violation of Major Rule 2; and, second, that he did not provide a doctor's written release confirming his ability to work in violation of Plant Rule 2. In its second step answer to the grievance, the Company added a third reason: that the Grievant was absent from work for two consecutive days without giving notice in violation of Section VI of the collective bargaining agreement.

1. Major Rule 2

As to the falsification charge, the Company's Major Rules included in the collective bargaining agreement states that violation of major rules are normally subject to discharge on the first offense. Major Rule 2 states: "Falsifying information on employment blanks, giving false information concerning any production records, time records, punching someone else's time card, or making claims of injury is prohibited." While the Company did not specify which part of Major Rule 2 the Grievant is alleged to have violated, it is clear from the record that he did not give false information concerning any production or time records and he did not punch someone else's time card. The question is therefore whether he falsified information on employment blanks or made a false claim of injury.

According to the termination letter, the Grievant violated this rule by applying for unemployment compensation benefits, that by doing so, he was stating he was available for work, that he had not advised the Company he was available for work, and that, therefore, he falsified information regarding his employment status. In the grievance response, the Company specifies that the Grievant falsified information by not informing the Company of his change from a medical leave of absence to being available for work. Yet on two occasions the Grievant did inform the Company that he was available for work: at the holiday party and at the wedding. While he did not advise the Company in the manner in which it expected, he certainly was not falsifying information on employment blanks nor was he making a false claim of injury. The Company errs when it asserts that the Grievant did not inform the Company he was available to work because he did so inform the Company twice.

The punishment of termination of employment is severe and language which normally subjects one to discharge on the first offense will be looked at narrowly. Here the Grievant did not falsify information on employment blanks, or at least none were presented as evidence in this case. The Grievant did not give false information concerning any production or time records, nor did he punch anyone else's time card. Finally, he did not make a false claim of

injury. He advised the Company through the Manager that he was available for work with weight restrictions in December. He advised the Company through the Manager that he was available for work in March. While he did not advise the Company immediately prior to applying for unemployment compensation that he was available for work, I do not find this to be a violation of Major Rule 2.

2. Plant Rule 2

As to not providing a doctor's written release, Plant Rule 2 makes it a requirement for an employe to provide "the company with a doctors (sic) written release confirming the physical fitness to perform any reasonable and usual work which may be required when returning to work after a leave-of-absence granted for sickness, injury, operation, or the like." According to Plant Rule 2, "this release will be required before permission to resume work will be granted." The agreement requires that disciplinary action for a violation of plant rules be handled as progressive discipline from a written warning for the first offense to termination for the fourth offense.

The Grievant did provide a doctor's release. He did so on or after May 9, 1990. Previously, he had told the Manager in March that the doctor said he was able to go back to work when he felt ready. It was the Manager who told him to stay on disability. The Grievant did not provide a doctor's release in April. The record suggests he did not do so because he thought he was not returning to work. Indeed, the release is required "before permission to resume work will be granted." However, there was no work for him to do. If he had presented such a release in April, he would not have gone back to work; he would have been laid off. Again, although the Grievant did not provide the Company with the release in the time and manner it wanted, he did provide a medical release; thus he did not violate Plant Rule 2. Even if he had violated Plant Rule 2, absent evidence to the contrary, this would have been his first offense which would have called for a letter of reprimand, not termination.

3. Article VI

As to being absent from work for two days, Article VI (4) (E) states that an employe's seniority shall be terminated if the employe is absent from employment for two days without notice to the Company. Again, the Company was on notice that the Grievant was able to work. Regardless of whether he was on disability leave or lay off, he would not have been working. He was not absent from work. In essence, the Company is saying that because he did not advise them for two days that he was available for work, he either quit or was discharged for cause by said action. He did not quit. He had advised the Company of his interest in returning to work. Nor was he discharged for cause.

4. Conclusion

The two key facts in this case are as follows: the Grievant told the Manager on two occasions he was able to work; and the Grievant did not get anything he would not have gotten under the Company's scenario. The Company through the Manager knew that the Grievant was available for work in March. The Grievant did not try to hide this fact. True, he told the Manager at a wedding, but he did tell the Manager. The Company knew not only that he was available for work in May, the time at which it acts so surprised to find out that the Grievant applied for UC benefits, but it knew so in April and even in March. No secrets here. In addition, what happened here is exactly what would have happened if the Grievant had formally told the Company in April that he was available for work: he was on unemployment compensation. The record is clear that if he had presented the doctor's release on April 9 he would not have been reemployed by the Company but he would have been laid off. He would have then have applied for and received unemployment compensation benefits. No undeserved gain here.

Thus, this case would have turned out differently if, one, the Grievant had hidden his availability to return to work, or two, if the Grievant had received something he would not have otherwise been entitled to. Neither of these situations apply here. For these reasons, the Arbitrator issues the following

AWARD

1. The Company did not have just cause under the terms of the collective bargaining agreement to terminate the Grievant.

2. That the Grievant be reinstated to his position and be made whole for all losses he received as a result of the Company's action in this matter.

Dated at Madison, Wisconsin this 17th day of September, 1990.

By _____
James W. Engmann, Arbitrator