BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MODERN BUILDING MATERIALS, INC.

and

TEAMSTERS UNION LOCAL 43

Case 17
No. 44435
A-4677
(Strasser Discharge)

Appearances:

Mr. Charles Schwanke, President, Teamsters Union Local No. 43, 1624 Yout Street, Racine, WI 53404 appearing on behalf of the Union.

Mr. Mike O'Connor, President, Modern Building Materials, Inc., 8011 Green Bay Road, Kenosha, WI 53142 appearing on behalf of the Company.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Teamsters Union Local No. 43 (hereinafter referred to as the Union) and Modern Building Materials, Inc. (hereinafter referred to as the Company) requested that the Wisconsin Employment Relations Commission designate a member of its staff as arbitrator of a dispute over the discharge of Steven Strasser. A hearing was held on September 17, 1990 in Kenosha, Wisconsin at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. The parties submitted post-hearing briefs, the last of which was received by the undersigned on September 24, 1990, whereupon the record was closed.

ISSUE

The issue before the undersigned is whether Steven Strasser was discharged for just cause and, if not, what the appropriate remedy might be.

RELEVANT CONTRACT LANGUAGE

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ARTICLE 16. DESCIPLINE (sic) AND DISCHARGE

The right to discipline and discharge for just cause and to maintain order and efficiency is the sole responsibility of the Company, subject to the grievance procedure herein provided.

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EXHIBIT "B"

WORK RULES

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35. Absenteeism Control

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2. An occasion of absence is defined as a period of time consisting of one (1) or more hours in any work day during which an employee is absent from work. Absence from work on a day when an employee has been scheduled to work overtime shall be considered an occasion of absence.

3. When an employee incurs four (4) occasions of absence in any consecutive 6 month period, he shall receive 3 days off. When an employee incurs six (6) occasions in any consecutive 12 month period, he shall be terminated.

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5. The Company shall notify an employee and the Union after that employee has incurred two (2) occasions of absence within a consecutive twelve month period.

Time off must be given within a three week period from the offense.

An employee's record will be cleared of any offense when nine (9) months have elapsed since disciplinary action was taken in that case.

These rules are not intended to be a complete listing, but are merely examples of the common offenses; therefore, changes in these rules, as well as new rules, may be adopted by the Company from time to time. If the Union considers a new or changed rule to be inconsistent or in conflict with any provisions of this Agreement, it

may be challenged through the grievance procedure. The Company reserves the option of imposing a lesser or greater penalty than that indicated, based on the circumstances involved.

FACTUAL BACKGROUND

The Company manufactures precast concrete products in Kenosha, Wisconsin. The Union is the exclusive bargaining representative for the Company's non-probationary employees, excluding supervisors, guards and office clericals. The grievant was employed by the Company until the date of his discharge for excessive absenteeism on August 11, 1990.

The grievant's attendance record for the 12 months preceding the discharge included:

10/20/89	Absent - called in sick
11/16/89	1 hour and 39 minutes late
12/11/89	Absent - called in sick
1/12/90	1 hour and 44 minutes late
1/15/90	Absent - called in sick
2/09/90	5 minutes late
4/18/90	1 hour and 24 minutes late
6/15/90	Absent - called in sick
6/22/90	1 hour and 46 minutes late
6/27/90	Absent for one half day (unexcused)
	Absent for one half day (Court appearance - excused)

The absence on June 27th was occasioned by a court appearance. The grievant called in at 7:10 a.m., ten minutes after the start of the work day, and stated that he had to go to court. An employee warning notice was prepared by the dispatcher, noting the absence: "Called in 7:10 has to go to court" When the Company found that his court appearance was at 1:30 p.m., he was assessed a half day unexcused absence, and another warning notice was prepared: "Court appointment at 1:30. Didn't come in the whole day. 1/2 day unexcused absence."

The grievant had requested a day off on August 1st, explaining that he had a softball tournament the night before and intended to have a party afterwards. His request was denied, with his supervisor telling him he had to decide whether his job was important to him. He called in sick on the morning of August 1st, claiming to have injured his shoulder. The Company notified him on August 11th that he was terminated.

The instant grievance was thereafter filed. It was not resolved in the lower steps of the grievance procedure and was referred to arbitration.

THE POSITIONS OF THE PARTIES

The Position of the Company

The Company takes the position that the discharge was for just cause, as the grievant had incurred six occasions of absence in a twelve month period. The final absence was on a day for which he had previously asked to be excused because of a party the night before. Even though his request was denied, he still failed to report for work. The collective bargaining agreement specifically calls for discharge under such circumstances, and other employees have been discharged for exactly the same behavior in the past.

The Company stresses that the grievant has a very poor attendance record, and notes that his absence record would have been even worse if the Company had strictly enforced the one hour standard for tardiness. It is only because the Company has chosen to count an occasion of absence as happening after two hours that the grievant had six absences rather than ten. In this regard, the Company notes that the grievant has a pattern of tardiness that pushes the two hour limit, as opposed to being a few minutes late, reinforcing the Company's concerns about his attendance.

While the grievant claims that he believed his absence on June 27th was only a half day absence because he was excused for the afternoon court appearance, the Company points to the fact that anything in excess of two hours is an occasion of absence under the contract, and that the grievant did not grieve the employee warning notice he received for that absence. Thus he may not question it in this proceeding.

For all of the foregoing reasons, the Company asks that the discharge be upheld.

The Position of the Union

At the hearing, the grievant argued that the June 27th half-day unexcused absence left him with four and one half days of absence at that point, and that the August 1st absence brought him to five and one-half days, a half day short of the six days in twelve months necessary for a discharge. In its brief, the Union takes the slightly different position that the discharge of the grievant was premature, given that the contract allows discharge for six absences in twelve months, while the grievant had knowledge of only five absences. The absence on June 27th was believed by the grievant to have been excused, since the notice he received did not refer to it as an unexcused absence. As the grievant had no notice of the Company's view that this was an unexcused absence, it cannot be held against him for disciplinary purposes. He believed his absence on August 1st to be his fifth, rather than his sixth. The Company, having failed to adequately warn the grievant on June 27th of the possible consequences of another absence, should not be allowed to discharge him. The grievant should be reinstated with full seniority and some compensation.

DISCUSSION

There is no dispute over whether the Company might legitimately discharge the grievant if the absence on August 1st constitutes his sixth unexcused absence in twelve months. No allegations of lax enforcement, disparate treatment, failure to follow progressive discipline or similar defects in the disciplinary process have been made. The sole issues in dispute are whether the half day absence on June 27th was an "occasion of absence" within the meaning of Exhibit "B" of the contract and, if so, whether the grievant had adequate notice of that fact.

Exhibit "B" of the contract defines an "occasion of absence":

> "2. An occasion of absence is defined as a period of time consisting of one (1) or more hours in any work day during which an employee is absent from work..."

The Company has interpreted this section more leniently, allowing up to 2 hours of absence before counting it against the employee. Even applying this more lenient standard, the half day unexcused absence assessed against the grievant for June 27th plainly meets the definition of an "occasion" set forth in the work rules. The grievant's argument at the hearing, that he had only five and one-half days of absence, misreads the threshold for discharge set in the work rules. Discharge is triggered by six "occasions" of absence, not six days of absence. Thus it is irrelevant that the afternoon's absence was excused on the 27th. If the grievant had notice that the 27th was being treated as an occasion of absence, his subsequent absence on August 1st constitutes the sixth occasion needed to support his discharge. 1/

The Union asserts that he did not understand it to have been unexcused. If this is true, then the corrective purpose of discipline is not served by sustaining the discharge. On the basis of the record evidence, I conclude that the grievant could not reasonably have been ignorant of the Company's decision that the absence on the 27th was an "occasion of absence."

The Union's contention that the grievant did not understand the Company's position regarding the June 27th absence is apparently based upon the existence of two notes in the file.

1/ Although the grievant offered an explanation at the arbitration hearing of why he might have needed the entire day off for a 1:30 court appearance, the explanation at the hearing in September cannot mitigate the discipline imposed in June. Assuming that the grievant was aware of the warning notice designating the morning of the 27th as an unexcused absence, he had the obligation to challenge it promptly through the grievance procedure. As no grievance was filed, it must be assumed that he accepted the warning notice as presented.

The first, taken by the dispatcher when the grievant first called in, notes the absence, the time of the call and the reason given. The second, prepared after the grievant had given his reasons for the absence and a copy of the court summons, notes:

> "Court appointment at 1:30. Didn't come in the whole day. 1/2 day unexcused absence."

In order for the Union's argument that there was confusion between the two notices to have any validity, the grievant must have been ignorant of the second warning notice, notwithstanding the Company's claim to have made him aware of it. However, the grievant must have been aware of the review the Company gave the first notice, since he was required to present his summons the next day to justify the absence. More importantly, at the hearing the grievant himself presented the second notice as part of his argument that he only had five and one-half, rather than six, occasions of absence. This is completely inconsistent with his claim to have been unaware of the notice. While the Union's argument is ingenious, and points up flaws in the Company's system of using the same form to record initial calls from absent employees and the later disposition of the absence, the grievant's own arguments at the hearing undercut the factual basis of the argument -- that he was unaware of the second notice and thus had no opportunity to challenge it or to subsequently modify his behavior based upon the knowledge that he was close to discharge. Instead the evidence suggests that the grievant was well aware of the June 27th disposition, but believed that an "occasion of absence" was the same as a "day of absence", thus leaving him just short of the threshold. As discussed above, this belief was incorrect and therefore the absence on August 1st justifies the discharge.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

Steven Strasser was discharged for just cause. The grievance is denied.

Signed this 25th day of October, 1990 at Racine, Wisconsin:

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator