BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between GREATER WISCONSIN CARPENTERS BARGAINING UNIT, SOUTHWEST WISCONSIN DISTRICT COUNCIL OF CARPENTERS and HALLMARK DRYWALL, INC.	Case 2 No. 42768 A-4496

Appearances:

Mr. Robert C. Kelly, Kelly & Haus, Attorneys at Law, 121 East Wilson Street, Madison, Wisconsin, appearing on behalf of Greater Wisconsin Carpenters Bargaining Unit, Southwest Wisconsin District Council of Carpenters, hereinafter referred to as the Union.

Mr. Jeffrey W. Younger, Lee, Kilkelly, Paulson & Kabaker, Attorneys at Law, 1 West Main Street, Madison, Wisconsin, appearing on behalf of Hallmark Drywall, Inc., hereinafter referred to as the Employer or Hallmark.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union requested and the Employer agreed that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Scott E. Johnson, also hereinafter referred to as the Grievant or Johnson. The Commission appointed A. Henry Hempe, a member of the Commission, to serve as the Arbitrator. A two day hearing on the matter was held in Madison, Wisconsin, and was transcribed. Briefs were filed thereafter by both parties.

ISSUES

The parties stipulated the following issues for decision:

1. Did the employer discharge the individual grievant herein, Scott Johnson, and if so, did the employer violate

Section 11.7 of the Collective Bargaining Agreement by discharging the said Scott Johnson without cause?

2. Did the employer discharge the individual grievant herein, Scott Johnson, and if so, did the employer violate Section 6.2(h) of the Collective Bargaining Agreement by failing to give Scott Johnson, the individual grievant herein, a written notice giving date and reason for discharge at the time of his termination, and, if so, what is the remedy?

3. Did the employer violate Section 11.10 of the Collective Bargaining Agreement by failing to provide a locked tool shed or other adequate locked storage space for the storage of employees' tools at the job site, and, if so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

Section 11.7 DISCHARGE FOR CAUSE. The Contractor reserves the right to discharge an employee for cause, subject, however, to the right of arbitration as provided in Article IV. Grievances arising as a result of discharge must be delivered to the contractor in writing within ten (10) days of the date of discharge. Employees not complying with this requirement will forfeit their right to prosecute their grievance.

Section 6.2(h) NOTICE OF LAYOFF, DISCHARGE OR QUIT. When an employee is laid off or discharged, a written notice giving date and reason for discharge is required at time of termination and such employee shall be allowed fifteen (15) minutes prior to designated quitting time for pick-up of tools. An employee who quits shall also provide the employer with written notice giving date and reason for quitting.

Section 11.10(a) TOOL STORAGE: The contractor shall provide at each job site, a locked tool shed or other adequate storage space for the storage of employee's tools.

BACKGROUND

The grievant, Scott E. Johnson, a journeyman carpenter who resides in Loves Park, Illinois, was employed by the employer as a sheet rocker beginning March 16, 1989. As a sheet rocker, the grievant was required to install a 4' x 12' x 5/8" drywall panels on walls and ceilings of construction projects.

Johnson continued to be actively employed by the employer through May 22, 1989. On May 22, 1989, Johnson's assigned job site was at the Hazleton Laboratories in Madison. His normal hours of work were 7:00 a.m. to 3:30 p.m. According to the grievant's testimony, at or about 2:00 or 2:30 p.m. on his last day of active employment, while lifting a drywall panel over his head intending to install it, he felt a pull and burning sensation in his groin. After installing the sheet of drywall he was holding, he climbed down from the scaffolding on which he'd been working to pick up his tool bucket. He described again feeling a painful pull and burning sensation in his groin area. He concluded he had injured himself, and decided to leave the job site. The grievant reported that he placed his bucket of tools in the gang box and looked for a foreman. He was unable to find one, and believes both job foremen had been transferred to another job site. The grievant went home.

Johnson claimed he notified a Hallmark secretary of his injury and sought medical attention the following day; he was unable to get an appointment with his doctor until three days later. He was subsequently referred to a urologist whose diagnosis was that the grievant had suffered a varicoule from straining and recommended surgery. Surgery was performed successfully on June 6, 1989.

Johnson remained under his doctor's care until the afternoon of August 10, 1989, when his doctor cleared him to return to work. On the following day, the grievant called his employer for the purpose of communicating that he'd been released from his doctor's care. He was able to reach only a secretary who advised the grievant that he should call Rick Grosse, a person of some authority with the employer, the following day. Since the following day was a Saturday, the grievant waited until the next Monday to call Grosse. Grosse told the grievant that work was slow, that there was nothing available for the grievant to do, but to call back the morning following. On the following morning, Grosse again informed the grievant there was no work available for him.

During this conversation, the grievant inquired about his tools which he had left in the gang box on May 22. He was told they were at the office. When the grievant arrived at the office later that day, he was told the tools had been picked up and put in the shop. The grievant found some of his tools in the shop, but was unable to locate all of them. He left what he now claims was a partial list of missing tools in Grosse's office. He left an identical list of missing tools at the office of his union local. The union financial secretary promised to investigate.

Two days later Johnson phoned Hank Tonar, president of the employer, to inquire about the missing tools. During this conversation, Tonar made unflattering references about the grievant, was critical of his having involved the union on the question of the missing tools, and told the grievant to come to the office the following Monday to pick up any remaining tools.

As suggested by Tonar, Johnson returned to Hallmark's office the following Monday

where he met with both Grosse and Tonar. He testified that he was given a utility belt and tool pouch, someone else's rusty utility knife, a razor knife, a C-vise clamp, his Craftsman tape measure, and a pair of broken tinsnips. Johnson stated he was advised that his hammer had been lent to another employee. Johnson inquired if the remaining missing tools would be replaced. He testified there was no response. Johnson next asked about his employment status, that is, whether he was laid off or fired; he further alleged that he was owed an additional week's pay. As to that, Grosse said he responded that the bookkeeper would check pay records when she came in at 9:00 or 9:30 that morning. Grosse further told Johnson that he'd had reports that the grievant had been waterskiing during the period of time he had supposedly been convalescing. Johnson renewed his complaints about his pay, his missing tools and work status. According to Tonar, he told Johnson to listen to Rick (Grosse), i.e., there was no work then available, that Johnson would have a job when work became available in Rockford. He ordered the grievant from the premises. Johnson, Grosse and Tonar all agree that at no time was Johnson told he was fired or laid off, but that there was no work then available for him. Each also agrees that Johnson was ordered from the Hallmark office premises.

In his testimony, Tonar acknowledged that he had lent out a tool pouch with belt, a pair of tinsnips, a hammer, and a tape measure. The grievant acknowledged having received these items back, subject to his contention that the tinsnips were broken as was the hammer handle. The grievant, however, said he was not seeking a replacement for the hammer.

The grievant claims that as Tonar ordered him from the premises, Tonar punched grievant's left bicep hard enough to leave a large bruise. Although the grievant reported the incident to the Madison Police Department and demonstrated a bruise on his bicep to a department officer later that day, following an investigation no criminal charges were ever formally filed against Tonar.

Tonar denies punching the grievant in the arm. He admits to touching grievant on the shoulder while advising the grievant in vivid, coarse, obscene terms as to the direction of the door, and that the grievant responded by saying, "Don't touch me." Tonar specifically denied touching the grievant anywhere near the area where the grievant developed a bruise. He did, however, further admit to threatening to wrap Johnson's sunglasses around his ears.

The grievant left the premises. He was never recalled to work by the employer. He did work briefly for two other employers for time periods totaling a little over a month. On January 15, 1990, the grievant became a full-time student and thus unavailable for employment.

Several other factual variances between the testimony of the grievant and that of other witnesses emerge. One such witness, Ron Kay, is a journeyman carpenter and foreman for the same employer. It was he who referred Johnson to the employer for employment. (Johnson is married to a cousin of Kay). Kay expressed disbelief that Johnson had owned three 75 foot extension cords (which Johnson had claimed were missing), although he acknowledged that the

grievant probably had owned one. He estimated the total value of Johnson's tools as being $150. Kay described a conversation he'd had with the grievant on the morning of May 22, 1989, in which Johnson had indicated an urgent need to take time off for the rest of the week, and if he'd couldn't be granted time off, he said he'd simply injure himself and take time off with pay. Kay said he advised Johnson not to take off any more time than he already had (6 days in 10 weeks of employment). Kay further stated that Johnson worked a full eight hours on May 22, leaving the job site at 3:30, not 2:30. He reported that he was unaware of any injury Johnson supposedly suffered on May 22, 1989, and that Johnson had actually requested an overtime opportunity for an extra hour of work that day. Kay stated that Johnson did not work on May 23. Kay acknowledged hearing a report from a neighbor of Johnson that Johnson and his wife had spent three or four days over the Memorial Day weekend of 1989 water skiing and swimming at a Madison lake. Kay stated he passed on that report to Hank Tonar.

Johnson denied any recollection of Kay's report of Johnson's desire to take time off. Johnson agreed that he had prepared a timecard showing he had worked eight hours on May 22, 1989, and seven hours on May 23, 1989; he explained that maybe he (grievant) had made an error. Johnson admitted that he and his wife had spent a few days at a Madison bed and breakfast over the 1989 Memorial Day holidays, but denied doing any water skiing. He further claimed he had asked Ronald Kay or his brother (also employed at Hallmark) to pick up his tools. The Kay brothers advised him that they were no longer working in Madison, but, according to the grievant would pick up the tools or make sure they were taken to the shop. The grievant stated that although he was not bedridden and could have driven an automobile, he had been told by his doctor not to lift his tools. Ultimately, it appears that when Hallmark's responsibilities ended at the Hazleton Lab project, Rick Grosse had taken grievant's five-gallon tool bucket to the Hallmark shop with whatever tools were then in it, where it was placed in an unlocked cubicle.

Rick Grosse, a foreman employed by Hallmark and Hank Tonar's son-in-law, also disputed some of the grievant's testimony. He verified that a vociferous conversation had taken place between himself and the grievant on the grievant's second visit to the Hallmark offices on August 21, 1989. Grosse said that the grievant kept going over the same ground, asking about his tools, his job status, and his back pay, even though Grosse claimed to have answered all of grievant's inquiries. Grosse finally ordered the grievant off the premises. It was about this time, according to Grosse, that Tonar got involved in the conversation. Grosse said he saw Tonar touch grievant on the shoulder with one finger as Tonar order the grievant to leave. An exhibit consisting of a Madison Police Department report on the incident, indicated that Grosse had told the investigating officer that Tonar had poked the grievant a couple of times on the shoulder, had not hit him, and had not poked him hard enough to produce a bruise. Grosse further stated that he'd no problem with Johnson's work habits, except that he'd taken a few days off, and no problem with the quality of Johnson's work.

Lori Julson, a Hallmark clerk, disputed grievant's contention that he had notified her by telephone of his injury on May 23. She was insistent that the first she had learned of grievant's

injury was on June 1, 1989. According to Julson, it is unlikely that any other clerical or secretarial employee of Hallmark would have received a phone call from grievant, because answering incoming phone calls is a responsibility primarily performed by Julson. The grievant had earlier testified that he had made his telephone notification on May 23, 1989, to a Laura or Laurie Tonar. Julson, however, is the only Hallmark clerk with first name similar to that described by the grievant. A daughter of Hank Tonar is employed by the company as a clerical, but her name is Karen. The grievant, however, did submit as an exhibit a copy of a report of his injury he had prepared at his Employer's request, bearing grievant's signature, and a date of June 1, 1989, in what appears to be his handwriting. The report form, grievant said, had been mailed to him by Hallmark. Julson, however, said she mailed the form to Johnson on June 1, 1989, when she first learned of Johnson's injury from him, and had received it back on June 7, 1989.

The parties also disagreed as to the value of the grievant's missing tools. The grievant introduced into evidence a "cash sales quotation" from A & E Equipment Company, Inc. which he claimed accurately reflected his actual expenses in replacing his missing tools. He subsequently acknowledged that he had purchased no replacement tools from A & E, but had, nonetheless, replaced all his missing tools by purchasing them from a different source, Gypsum Supply Company, some three days before he was laid off his last drywall employment in late 1989. In rebuttal, the employer introduced a list prepared by a Gypsum representative at Tonar's request of all the replacement tools the grievant had claimed to have purchased from Gypsum along with sales prices for those items which Gypsum stocked. The exhibit not only reflected prices which were less than all except one listed on the A & E quotation, it also represented that it did not stock some ten items which grievant had claimed to have purchased from it. In one instance, however, there appears to be a monumental price difference between Gypsum and A & E: what is described as a Valco #1 Screwdriver is priced by Gypsum at $115; A & E's price for what was described as "Vaco Screwdriver", but presumably the same tool, was $6.78. That difference was questioned by Hank Tonar, but not explained by either party. The A & E quote further priced three 100' electrical cords at $66.88 @ or a total of $200.64; the three cords Johnson claimed to be missing were 75' in length, not 100', but A & E reportedly didn't have any 75' cords it could price.

The grievant, however, stated he was not seeking reimbursement for a level, 25-foot Stanley tape, replacement blades, pencils, Aviator tin snips, and an insert bit listed on the A & E quotation. This served to reduce the monetary value of grievant's claim from $545.85 (Wisconsin sales tax included) to $384.75 (Wisconsin sales tax included). Johnson further conceded that a 75' electrical cord might cost $25 less than a 100' electrical cord. This would further reduce the monetary value of Johnson's claim by another $75, to a figure of $309.75. This contrasted with Gypsum Supply Company prices of $171.80 (Illinois tax <u>not</u> included) for those items the company stocked. The value of the items the grievant claimed to have also purchased at Gypsum Supply but Gypsum reported as not stocking is $287.60, according to the A & E quotation (Wisconsin sales tax <u>not</u> included).

When Johnson sought to be re-employed by Hallmark, employment opportunities there had changed. The Hazleton Lab project had been completed. Business had slowed. Thirteen Hallmark employees were on layoff status. There may have been some jobs in Green Bay and Milwaukee -- mostly wood jobs in the latter -- but Rick Grosse testified that he didn't know if Johnson could do the work. There was, however, a new project at the Hampton Inn in Rockford.

The parties disagreed over whether Johnson would have been permitted to work at the Hampton Inn project in Rockford. According to William Barreau, Business Representative for the Milwaukee Southeast District Council of Carpenters, any member of the Brotherhood of Carpenters can transfer his membership into any Local Union within the United States or Canada, and the Local to which transfer is sought cannot refuse the transfer. Thus, according to Barreau, had the grievant, as member in good standing of Local 314 of Madison, sought transfer to Local 792 of Rockford, there is no reason such transfer would not have been granted. Ron Kay, however, testified that the grievant would not have been permitted to work in the Rockford Local because of a physical altercation he'd had with the business agent's son-in-law. Tonar said that when he'd begun the Hampton Inn project he already had four men on his payroll who were members of the Rockford Local. The Local would permit him to bring in one lead man who apparently did not have to be a member of the Rockford Local. The names of any additional persons put on the Hampton Inn project were to be supplied by the Rockford Local. In response to questioning by counsel for the Union, Tonar said his company's contract with the Rockford Local had a hiring hall clause in it, and that he was required to give an employment opportunity to anyone referred to him by the Rockford Local for work in the Rockford jurisdiction. Scott Johnson, according to Tonar, was not a member of the Rockford Local, and his name was never given to Tonar as an employment referral by Rockford Local 792. Johnson acknowledged he was not a member of Local 792 because he had gone to work for a non-union job (apparently in Rockford); over a period of time Johnson said he had just stopped paying the dues and had informed the Union he was no longer a member.

The parties submitted two joint exhibits. The Union submitted fourteen additional exhibits, all of which were received into evidence; the Employer submitted eight additional exhibits, all of which were received into evidence. Further reference to these exhibits as well as additional facts will be developed as necessary.

POSITION OF THE UNION

I. The Union first argues that the employer terminated the grievant's employment without giving him, at the time of his termination, either a written notice giving him the date of his layoff or a written notice giving him the date and reason for his discharge, all in violation of Section 6.2(h) of the Collective Bargaining Agreement.

The Union asserts that the fact that grievant's employment with Hallmark was terminated is beyond dispute. The Union states the fact is that the grievant was absent from work from May 23,

1989 until August 10, 1989 due to a work related injury. A further fact, according to the Union, is that the grievant reported to Hallmark on August 11, 1989 that his doctor had released him the day before to return to work. The Union adds that an additional uncontroverted fact is that Hallmark did not put the grievant back to work.

This, the Union claims, demonstrates that the grievant was discharged.

Hallmark, says the Union, offers the excuse that the grievant was on layoff status as a result of there being no available work. Be that as it may, one thing is clear to the Union: the grievant's active employment was terminated.

Under these circumstances, postulates the Union, the Employer was required by the provisions of Section 6.2(h) of the collective Bargaining Agreement to provide a written notice of termination to the grievant, whether the termination was by means of layoff or discharge. In the event of termination by discharge, the written notice must additionally inform the employee of the reason for the discharge. The Union believes the language of Section 6.2(h) is clear and unambiguous, and concludes that the Employer's failure to provide the grievant with a written notice of layoff or discharge constitutes a violation of said section.

II. The Union next argues that Hallmark violated Section 11.7 of the Collective Bargaining Agreement by discharging the grievant without cause. Reasserting its earlier allegation that the grievant was, in fact, discharged, the Union claims the discharge took place, if not before August 21, 1989, on August 21, 1989. The Union again attributes to the Employer the justification that the grievant was laid off due to lack of work, which, the Union avers, "flies…in the face of the evidence in this case…", relying particularly on the testimony of Hallmark foreman, Rick Grosse.

The Union begins with the assertion that counsel for the Employer errs in saying there was no work available for the grievant, and insists that there was work for the grievant.

The Union acknowledges that most of Hallmark's jobs in mid-August, 1989, were outside the Madison area. This, to the Union, is irrelevant, because whether a member of one Local can work in another Local's jurisdiction is determined by the Local Union involved, not by the employer. Moreover, claims the Union, any member of the Brotherhood of Carpenters can transfer his membership to any Local Union within the United States and Canada at any time, and the Local Union to which transfer is sought cannot refuse the requested transfer.

Pointing out that in late August, and in September and October, Hallmark had jobs as far away as Green Bay, Wisconsin, as well as in the Milwaukee area, the Union claims that Hallmark didn't concern itself with whether the grievant could have worked those jobs. The reason, according to the Union, is that the Employer had determined it was not going to make that work, or any work, available to him.

The Union notes the Employer submitted a list naming 13 former Hallmark employees whom the Employer claimed were on layoff status when Johnson wanted to be reinstated. The Union further notes Rick Grosse's testimony that he would not have hired the grievant ahead of any of the 13. The Union finds Grosse's explanation that in his opinion all 13 were better workers than the grievant to be unconvincing in view of Grosse' earlier testimony that he had no criticism of Johnson's work habits other than that he missed a few days, and, specifically, that he (Grosse) had no problem with the quality of grievant's work. The fact is, says the Union, that the employer would have employed anyone, whether or not he was better than Johnson, before it would have re-employed Johnson.

In support of this view, the Union points to another Hallmark project, this one at the Hampton Inn in the Rockford area. The Union alleges that once this project started, Hallmark hired new employees who had not been previously employed by Hallmark. Although the grievant resides in Loves Park, Illinois, he was not offered employment on the Hampton In project.

The Union acknowledges Rick Grosse's explanation that the grievant wasn't hired at the Hampton Inn project because Grosse didn't know the grievant was looking for work at that time, and, ultimately, that the Rockford local wouldn't have let the grievant work in its jurisdiction. The Union finds these explanations unpersuasive, and suggests that the latter explanation was not discovered until March, 1990. Even if Grosse, or Tonar had heard in August or September of 1989 that the Rockford Local wouldn't let the grievant work in its jurisdiction, the Union believes that either Grosse or Tonar should have checked with the Rockford Local to ascertain the truth of this report.

The Union cites several reasons for what it perceives to be Hallmark's negative employment attitude towards Johnson: 1) Ron Kay's report to Hallmark President Tonar as to Kay's conversation with the grievant on May 22, 1989, regarding grievant's desire for time off; Kay's telling Tonar that the grievant didn't leave the job site on May 22, 1989 until 3:30 p.m.; Kay's relaying to Tonar the report of Johnson's neighbor that Johnson and his wife had been water skiing and swimming in the Madison are over the 1989 Memorial Day weekend.

Other factors the Union cites as also causal in creating Hallmark employment hostility towards the grievant include the missing tools problem, grievant's seeking help with this problem from his Union, and, finally, the confrontation between grievant and Grosse and Tonar on August 21, 1989, when according to the Union, the grievant was punched on the left bicep and ordered off the premises in vulgar terms.

This, says the Union, was not a layoff. "Scott was canned -- fired -- discharged…his employment with Hallmark was severed…"

This was without cause, the Union next asserts. Again noting that Hallmark had no

significant criticism of the grievant's work habits or his quality of work up to the time he left his employment on May 22, 1989, the Union contends that nothing occurred between May 22, 1989 and August 21, 1989, which gave Hallmark cause to discharge the grievant, specifically listing the grievant's Workers' Compensation action (even if resisted), and grievant's attempts to track down his missing tools with the assistance of his Union as both being statutorily protected activities. Nor does the Union perceive any impropriety in grievant's actions on August 21, 1989, which the Union characterizes as seeking to clarify his employment status, his pay status, and to locate his missing tools. The union describes the grievant as threatened, assaulted and battered by Hallmark President Tonar on August 21, 1989 -- actions, it says, for which the grievant did not retaliate.

In summary, the Union believes the record is clear the grievant was discharged by Hallmark, and Hallmark had no cause to do so.

As for remedy, the Union argues that the grievant is entitled to be paid, by way of a make-whole remedy, the wages he lost as a result of his being improperly discharged on August 21, 1989. The Union calculates these net wages to be $8,266.83, which includes a credit for some 233 hours grievant was able to work for two other employers between August 21, 1989 and January 15, 1990. The Union developed this figure by first determining that 21 work week exist between August 21, 1989 and January 15, 1989. It further finds grievant's previous workweeks with Hallmark to have averaged 36 hours. 21 (work weeks) x 36 (hours) = 756 (hours) - 233 (hours worked for other employers) = 533 (net hours); 533 (net hours) x $15.51 (minimum hourly rate payable to journeymen carpenters under Collective Bargaining Agreement then in effect) = $8,266.83.

III. The Union also believes that Hallmark violated Section 11.10 of the Collective Bargaining Agreement by failing to provide a locked tool shed or other adequate locked storage space for the storage of employee's tools at the job site.

The Union argues that the grievant notified Hallmark of his injury on May 26. It acknowledges that the grievant's tools had already been placed in the gang box by him when he left on May 22, 1989. But, the Union cites the testimony of an experienced carpenter union representative to the effect that usually when someone is injured on the job, the foreman will take the responsibility of securing that man's tools. . .normally they don't put them in a gang box, but in a more secure position like a job shed. This, according to the testimony of union representative James R. Weiss, is the common practice in the carpenter's trade.

The Union notes that this did not happen here. The grievant asked Ron Kay to pick up his tools for him, and Kay agreed to do so. The grievant renewed his request a few days later and again Kay agreed to do so. The Union points out that Kay never did. The grievant's tools remained in the gang box where grievant had placed them until the gang box was moved to another job site. Ultimately, Rick Grosse took grievant's bucket of tools and placed them in a 5' x 8' caged-in storage area with no door, back at the Hallmark shop. This area, argues the Union,

was not the "adequate locked storage space" required by the Collective Bargaining Agreement.

The Union further argues that President Tonar's lending some of grievant's tools to other employees was atypical in the trade, and compounded the problem.

The remedy urged by the Union for this conduct is payment to the grievant of the additional sum of $474.15. This sum represents all of the items listed on the A & E cash sales quotation and their respective prices, except for a level ($63.26), pencils ($1.72), and insert bits ($3.30). This sum urged as restitution -- $474.15 -- will make the grievant whole for the amount he was required to spend for his lost and missing tools, the Union contends.

POSITION OF THE EMPLOYER

With respect to the issue involving the grievant's tools, the Employer argues that Sec. 11.10(a) of the Collective Bargaining Agreement deals only with the storage of tools on a job site. The Employer finds no language dealing wit the storage or handling of tools away from the job site. Thus, according to the Employer, any issue regarding the handling and storage of tools off the job site cannot be addressed in a grievance forum.

The Employer contends that it had provided a gang box at the job site to which the grievant had been assigned. The gang box was locked at night and open during the day. The Employer believes this complies with the requirements of the contract and cited testimony from the grievant and two union representatives in support thereof. In fact, the Employer notes, there is no apparent allegation by the grievant of a violation of the contract relating to the handling of tools at the job site.

The Employer points out that the grievant stopped working on or about May 22, 1989, because of a claimed injury suffered on the job. The Employer notes that if the grievant was able to carry his tools to the gang box, he would have probably been able to carry them to his car. Since the Employer had complied with its contractual responsibilities as to providing secure tool storage, according to the Employer the grievant bears primary responsibility for recovery of his tools. Yet, the Employer asserts, the grievant took no reasonable steps to recover them.

The Employer alleges that it is undisputed that an employee is primarily responsible for the tools of the trade which he owns, but that the grievant did not reasonably protect his tools. He didn't ask any Union representative to recover or care for his tools. The Employer acknowledges the grievant's claim that he asked Mr. Kay to pick up his tools, but notes Kay's response was that he was no longer working in Madison where the tools were located. According to the Employer, Kay's response constituted a denial of grievant's request to him, yet the grievant took no follow-up action.

The Employer contends that it did everything which could be reasonably expected in

regard to grievant's tools. When the gang box was to be removed from the Hazleton Lab job site, Rick Grosse discovered the excess tools in the gang box, inquired as to their ownership, and took them back to the shop for storage.

During the two to three month period the tools were left in the gang box, the Employer suggests that some of them could have been stolen by persons unknown, since the tools would have been accessible to a wide variety of people during the day.

Once the tools were stored at the shop, the Employer does not believe the labor agreement addresses them. The Employer concedes that some of the tools were lent by Hank Tonar to an employee, but asserts that the evidence is undisputed that all of the tools lent out were eventually returned to the shop and the grievant. The Employer does not believe there is any evidence that any of the tools placed in the shop by Rick Grosse were taken by any person. According to the Employer, even if some tools were missing (which it does not concede) it is most likely they were taken from the job site by persons unknown.

The Employer believes that the credibility of the various witnesses, including the grievant, has a significant bearing on the issue of the value of the missing tools. The Employer points out the grievant has provided multiple variations of the tools he claimed were missing. First, he provided a handwritten inventory of missing tools; then he provided a differing list of missing tools in the grievance itself; finally, he produced a quote for replacement of the missing tools which differed from the other two lists.

The Employer contends that the grievant has routinely overstated and exaggerated the value of any missing tools. One such exaggeration involved his claim that he had owned three 75' power cords which, based on an identical value of a 100' cord, he claimed were worth $66.88 apiece. Yet, Ron Kay testified that he believed the grievant owned only one power cord, and that the custom in the industry is to buy $10 to $12 cords because they are subject to frequent damage. Moreover, the Employer adds, Kay estimated the total value of grievant's tools was approximately $150.

The Employer further attacks the grievant's credibility on the basis of the evidence the grievant presented. The Employer specifically notes the quote from A & E grievant submitted into evidence. But, says the Employer, the grievant concedes he didn't buy any replacement tools at A & E, and alleges that he purchased them from Gypsum Supply in Rockford. The Employer attacks this contention by the grievant on the basis that a quote from Gypsum submitted into evidence by the Employer indicates that Gypsum doesn't stock certain of the items the grievant claimed to have purchased there. Moreover, according to the Employer, it is incredible that the grievant would produce a quote from A & E as evidence of his replacement expense instead of the actual receipt from Gypsum, particularly when such receipts are necessary to prove such purchase for tax deduction purposes.

In summary, the Employer's position is that it did not violate the Collective Bargaining Agreement with respect to tool storage because the contract provision relates only to tool storage on the job site. Even to the extent that the grievant has a claim for handling of the tools, the reasonable value of the tools is less than $100.

The Employer next refers to grievant's initial contention that he was owed a weeks's wages, a claim the grievant subsequently dropped the first day of hearing. although it is not in issue now, Employer cites it because Employer believes it has continued bearing on credibility determinations.

The Employer denies that Johnson was either discharged or laid off. The Employer agrees that under the circumstances of this case, there is no material distinction between discharge and layoff.

The Employer states that Johnson worked from March 18, 1989 until May 22, 1989. He was off work due to his claimed injury beginning May 23, 1989. He advised the Employer of his availability to return to work first on August 11, 1989, when he spoke to a clerk, Lori Julson, and again on August 14, 1989, when he spoke to Rick Grosse. He was told by Grosse that business was slow, but to call back the next day. When Johnson called the next day, Grosse indicated a possibility of work in the Rockford area. Johnson went to the Hallmark shop to pick up his tools. He picked up what tools he could find, and left a list of those missing. He returned on August 21, 1989, when the confrontation with Grosse and Tonar took place.

The Employer characterizes Johnson as repeatedly asking the same questions. He was chastised for not taking care of his own tools during his three month absence; he was told some had been lent out; he was told he would get those back and, according to the Employer, he received them. As a result of Johnson continuing to ask the same questions, the discussion became argumentative. However, the Employer insists that Tonar did not strike Johnson, but merely touched (poked) him on the shoulder.

The Employer concedes that Johnson was not given a formal written notice of layoff or discharge. However, the Employer emphasizes that when Johnson left the job site on May 22, 1989 and did not return, his departure was not as a result of layoff or termination, but because of an injury he claimed he had suffered. He wa subsequently off work for three months due to his doctor's orders. When he notified the Employer he wa able to return to work, there was no work available for him, and he was so advised orally. On this basis, the Employer describes as incredible the grievant's argument that there was a violation of the notice provisions in section 6.2(h) of the labor contract.

The Employer denies there was any work available for Johnson when he became medically available for work. The Employer notes there are no seniority provisions in the labor agreement, and that such provisions are uncommon in the construction industry.

Since, in Employer's view, there is no issue as to Johnson being removed from a job on which he was working and which was completed during his convalescence, the Employer believes the principal issue is whether the labor contract requires the Employer to re-employ Johnson on another job site after August 11, 1989 at the expense of another employee who is already working there.

The Employer points out that it had many employees on layoff at the time Johnson became available to work in August, 1989. The Employer believes that a significant number of them would have been entitled to be brought back before Johnson. The Employer argues that this situation continued through January 15, 1990.

The Employer contends that the Union doesn't dispute this, except for questioning the status of two specific employees, a Mr. Carty and Mr. Rask. Both, however, say the Employer, indisputably were hired well before Johnson was again available for work in August, 1989; Carty was hired on November 14, 1988; Rask was hired on May 15, 1989; both were continuously employed at least through January, 1990.

The Employer further argues that had it laid off another employee to accommodate Johnson's desire to become re-employed, it would risk being subjected to a grievance claim by the employee being laid off.

The Employer reasserts that Johnson was not fired. Pointing out that no one ever told Johnson he was fired, the Employer believes this is moot in that there was no work available. In fact, the Employer, adds, Johnson was told that work might develop.

With respect to the Rockford Local, the Employer notes the undisputed testimony that Hallmark was allowed to bring only a limited number of employees into the area, pursuant to agreement with the Rockford Local. The employees Hallmark brought to Rockford had been working continuously for Hallmark, were members of the Rockford Local, and were experienced. Any other employees required were furnished by the Rockford Local, of which Johnson was not a member. But, even if Johnson had been a member of the Rockford Local, there still would have been no work available for him unless Local 792 referred him to Halmark's Hampton Inn project for employment.

The Employer is critical of Johnson's credibility. The Employer believes that Johnson testified according to his best interests in an effort to win his case. Specific credibility failures are asserted by the Employer with respect to Johnson's testimony as to:

1) Identity of his missing tools. Johnson made three lists of missing tools, each different from the other. Ronald Kay said all three were wrong.

2) The valuation of the tools was changed whenever possible.

3) Johnson claimed to have bought tools at Gypsum Supply which are not available there.

4) Johnson engaged in manipulation and exaggeration with respect to his claim of being hit by Tonar. The police investigated and dropped the matter.

5) Johnson's report of when he reported his injury to Hallmark conflicted with that of Lori Julson, a Hallmark clerk.

6) Johnson's version of his trouble with the Rockford Local appears incredible.

Based on the aforesaid, the Employer urges that the grievance be denied in its entirety.

EMPLOYER'S REPLY

In a reply to the brief filed by the Union, the Employer sought to emphasize that the unequivocal and undisputed testimony demonstrated that Hank Tonar was responsible for hiring at the Hampton Inn project, and that Tonar had reached a specific agreement with the Rockford Local. Under the agreement, the Rockford Local designated whom Hallmark should hire from the Rockford hiring hall, and that the Employer did not have the ability to designate any employees for hiring from the Rockford area. The Employer reasserts that the crew Hallmark brought to Rockford were experienced, regular crew members, and that there were, at the time, a substantial number of Hallmark employees on layoff who had more experience and longevity than Johnson.

The Employer reiterated its belief that there is no basis for the Union's assertion that there was work available for Johnson.

UNION'S REPLY

In response to the Employer's Reply Brief, the Union notes that its arguments are based on a transcribed record, duly cited in its brief, and refers the Arbitrator's attention to same.

DISCUSSION

The parties have stipulated to three issues for the arbitrator to determine. The first inquires whether Scott Johnson was discharged by his employer without just cause, contrary to sec. 11.7 of the Collective Bargaining agreement, the second inquires whether the employer discharged Scott Johnson, and, if so, if the employer failed to provide Johnson with a written notice giving date and reason for discharge at the time of termination, contrary to sec. 6.2(h) of the Collective Bargaining Agreement. The third inquires whether the employer failed to provide a locked tool shed or other

adequate locked storage space for the storage of employee's tools at the job site, contrary to the provisions of sec. 11.10(a) of the Collective Bargaining Agreement. Should the arbitrator provide an affirmative answer to any of the three questions, an appropriate remedy or remedies must then be fashioned.

Both the "just cause" issue and the "written notice" issue contain the threshold question of whether or not Scott Johnson was discharged. If he was not, both "just cause" and "written notice" become irrelevant, for it is only under discharge circumstances that either term becomes contractually operative, given the wording of the first two stipulated issues.

The Union argues that Hallmark's failure to put Johnson back to work after Hallmark learned he had recovered from his injury is sufficient to demonstrate the fact that Johnson was discharged.

I do not agree.

Notwithstanding the fact that the time card Johnson filled out for himself reflected 7 hours of employment on May 23, it seems reasonably clear that that was an error and Johnson's absence from work began sometime on May 22, 1989. It was due to neither layoff nor discharge. It resulted, instead, from Johnson's leaving his work site because of a work related injury. Under this circumstance, he had not been fired; he was not on "layoff" status -- for both discharge and layoff are employer initiated actions. This one was initiated by the grievant. Johnson had been injured, required surgery, and needed time to recover. But, by the time Johnson's doctor pronounced Johnson physically fit to resume his employment, business circumstances with Hallmark had changed significantly. The project at Hazleton to which Johnson had been assigned had been completed; thirteen Hallmark employees -- all of whom had greater experience than Johnson -- were on layoff status. None of the Hallmark employees still working for Hallmark had been hired by Hallmark after Johnson's alleged date of firing, August 21, 1989, with the possible exception of some journeymen carpenters on the Hampton Inn project in Rockford.

As to them, I am satisfied that the Employer had no hiring control, pursuant to a "hiring hall" agreement he had with Local 792 of Rockford. Under the terms of the agreement, Hallmark was permitted to bring in a lead worker, plus four additional employees who were already members of the Rockford Local. Any other carpenters needed on that project had to be supplied by Local 792. By his own acknowledgment, Johnson was no longer a member of the Rockford Local. Whether that Local would have been required to accept Johnson as a transfer seems to have been rendered moot by Johnson's apparent failure to seek a transfer from his Madison Local to the Rockford unit. Absent a successful transfer effort by Johnson, however, coupled with his being referred by the Rockford Local to the Employer and turned down, it is difficult to credit the Union's contention that Johnson was discharged.

This is because the Collective Bargaining Agreement contains no provision which requires

the Employer to lay off an active employee so that a previously injured employee can be reinstated. Despite a valiant effort, the Union was unable to demonstrate that the employer had selected any new employees for hire after Johnson had been medically released to resume work. Indeed, the Employer was able to establish the converse. I am satisfied that Hallmark hired no new employees after Johnson had been medically released to resume work except, of course, for those provided from the hiring hall of Rockford Local 792 pursuant to that Local's agreement with Hallmark.

Certainly, there was work available. There was, however, none available to which Johnson had a contractual right.

This appears as true for the Green Bay and Milwaukee projects as it is for the Rockford Hampton Inn project. There is no evidence to suggest that the Employer had any greater responsibilities in placing Johnson in those areas than it had in placing Johnson in Rockford.

Under these circumstances, a flawed and ultimately acrimonious relationship between Johnson and the Hallmark principals seems immaterial. That, by itself, cannot create for Johnson any greater employment opportunity to which he was contractually entitled than would otherwise exist. This appears to be the case even if Johnson endured an assault and battery at the hands of Hank Tonar, as Johnson alleges. Those allegations may well constitute a cause of action against Tonar in some other forum; absent a showing of available work work to which Johnson had some contractual claim, however, they cannot constitute a basis to support a discharge, even a constructive one. The simple fact is that Johnson was never reinstated to employment with Hallmark after he left the Hazleton job site on May 22, 1989 due to injury -- not for a day, not for an hour. Since he was never reinstated, and has failed to demonstrate any contractual right to any remaining work at the expense of remaining employees, he was incapable of being discharged.

This is not changed by Grosse and Tonar ordering Johnson off the Hallmark premises on August 21, 1989. All three, Grosse, Tonar, and Johnson, agree that no one ever told Johnson he was fired or laid off. Notwithstanding Union anticipation to the contrary, the Employer has never characterized its failure to rehire Johnson as a lay off. Johnson was told to leave the premises because both Grosse and Tonar had become irritated with him. Their irritation resulted from a confrontation in which accusations and counter-accusations had been made. Clearly, all parties present at that confrontation could have demonstrated greater interpersonal skills. But since Johnson had not yet been reinstated to an employment status, his being ordered from the premises cannot be fairly regarded as a discharge from employment; since no work became available to which Johnson was contractually entitled after the confrontation, neither can the order to leave the premises constitute a basis to find a "constructive" discharge.

Accordingly, I conclude that the Employer did not discharge the grievant, Scott Johnson.

Since there was no discharge, it is unnecessary to determine the existence of "just cause".

Similarly, in the absence of a discharge of the grievant, it is also unnecessary to determine whether he was entitled to a written notice advising him of same and the reason therefore.1/

One issue remains. The parties inquire whether the Employer violated the Collective Bargaining Agreement by failing to provide a locked tool shed or other adequate storage space for the storage of employee's tools at the job site.

I find no violation.

In the instant case, the Employer provided a "gang box" at the Hazleton Lab job site where Grievant Johnson was assigned. Johnson was familiar with this facility. When he concluded he had suffered an injury on May 22, 1989, his testimony was that he laced his bucket of tools in the gang box and left the job site. It was the common practice to leave the gang box unlocked during the day, but to lock it at night. When the job at the Hazleton Laboratory was completed, the gang box was moved to another site. Johnson's tools were noticed, identified, and taken to the Hallmark shop where they were kept in a storage cubicle which had no door.

Based on the testimony, it appears the gang box provided by the Employer generally complied with Section 11.10(a) of the Collective Bargaining Agreement. James Weiss expressed no misgivings about it, and he was familiar with the Hazleton job site. William Barreau made no objection to the arrangements for tool storage at Hazleton but he was not personally familiar with the site.

The Employer maintained the gang box at Hazleton until the job was completed. That was all it was contractually obligated to do. The language of the Collective Bargaining Agreement is clear and unambiguous. Nowhere does the Agreement impose any obligation on the Employer with respect to tool storage <u>off</u> the job site. Under this circumstance, there is nothing to interpret.

I do not doubt that the experience of Union representative James Weiss has led him to conclude that normal custom in the trade is for a foreman to take care of an injured man's tools. Nor do I doubt the counter-point that it is customary for employees to make reasonable provision

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1/ However, even if a layoff would be deemed to have occurred at the point Johnson was orally advised there was no work available for him (from which a finding of a 6.2(h) contract violation -- failure to provide a written notice -- necessarily follows), it does not follow that the grievant is entitled to the remedy he demands or, for that matter, any remedy at all. This is because the remedy is supposed to make the grievant whole, i.e., put him in the same place he would have been had the contract violation not taken place. In the instant case, all a written notice would have done is to advise the grievant of what he'd already been told orally -- that there was no work for him -- and would have achieved no more for the grievant than had already been accomplished.

for the care of their own personal tools. But absent ambiguity in contract language, "custom" cannot be properly considered, nor competing customs weighed against each other. While "custom" can be an interpretative aid for ambiguous language, it does not rise to the level of a contractual provision.

Thus, it is unnecessary to analyze or attempt to apportion negligence for the missing tools between Johnson and the Employer or Employer's agents in this proceeding. Whether a gratuitous bailment was created when Rick Grosse took charge of Johnson's tools, the duty of care owed by the bailee if a bailment was established, whether Hank Tonar's loaning out some of Johnson's tools is consistent with whatever, if any, duty of care the Employer owed, whether the Kay brothers bear any liability, and whether Johnson was guilty of some contributory negligence may all be relevant matters should Johnson seek recovery of monetary damages for his missing tools in some other forum. Not here, however. The sole question to be decided here is whether the Employer violated the obligation placed on it by the the provisions of Section 11.10(a) of the Collective Bargaining Agreement.

The answer to that seems pellucid: under the factual circumstances of this case, the Employer complied with its tool storage responsibilities arising under Section 11.10(a) of the Collective Bargaining Agreement, and hence did not violate same.

In view of this conclusion, it is unnecessary to determine the monetary value of grievant's claim for damages he alleges resulted when he replaced his missing tools. It is clear that resolution of that question would require an assessment of witness credibility; it is equally clear that there is no reason to do so in this proceeding.

AWARD

Based on the foregoing discussion and the entire record, the aforesaid grievance filed on behalf of Scott E. Johnson is dismissed in its entirety.

Dated this 11th day of February, 1991.

By A. Henry Hempe /s/
A. Henry Hempe, Arbitrator