BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MIDWESTERN INDUSTRIAL COUNCIL, U.B.C., AFL-CIO	
and	Case 4 No. 47942
BADGER FIXTURES, INC.	A-4969

Appearances:
Mr. Lowell Schultz, Representative, Midwestern Industrial Council, U.B.C., AFL-CIO, on behalf of the Union.
Mr. Michael Miller, Vice President, Badger Fixtures, Inc., on behalf of the Em

ARBITRATION AWARD

According to the terms of the 1991-94 collective bargaining agreement between Badger Fixtures, Inc. (hereafter Company) and Midwestern Industrial Council, U.B.C., AFL-CIO (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them involving the Company's treatment of Milan (Mike) Karl, Jerry Beil and Larry Bowe after they had been on layoff status. The parties stipulated that the undersigned would act as sole arbitrator of this case, specifically waiving the Arbitration Board procedure contained in Article XIX. The Commission appointed Sharon A. Gallagher as impartial arbitrator. Hearing was held at Marshfield, Wisconsin on October 13, 1992. No stenographic transcript of the proceedings was made. The parties filed their post-hearing briefs by October 28, 1992 and they were thereafter exchanged by the undersigned.

Issues:

The parties were unable to stipulate to the issues to be determined in this case but they agreed to grant the undersigned the authority to frame the issues. The Union suggested the following issues as their preferred issues:

1) Were Karl, Beil and Bowe discharged for just cause under the collective bargaining agreement?

2) If so, what is the appropriate remedy?

The Company could not stipulate to the above issues but it did not suggest any alternative issues. Rather, the Company stated that it had not violated the contract in any way.

Based upon the relevant evidence and argument herein, I find that the issues herein, are appropriately framed for determination as follows:

3) Did the Company violate Article XVI - Status of Employees, when it extinguished grievants Karl, Beil and Bowe's recall rights by letter dated May 6, 1992.

4) If so, what is the appropriate remedy?

Relevant Contract Provisions:

ARTICLE XVI - STATUS OF EMPLOYEES

The party of the First Part recognizes 4 or more departments within Badger Fixtures as listed:

Woodwork department Finishing department
Stainless steel department Delivery and installation

The generally accepted standards of seniority shall at all times apply, as to rehiring and discharging. In filling vacancies or making promotions, employees with the longest service shall prevail; provided however, that ability and skill are reasonably equal. At no time shall the seniority list be by-passed in favor of employees or employee with lowest seniority. Employees required by the Party of the Second Part to perform duties requiring absences from their duty, shall be granted by the Employer the necessary time required. Employees entering the service of the U.S.A., shall retain their job and seniority status provided they report for work within ninety days after their honorable discharge or release from such service. In the event of a plant lay-off, requests by employees for lay-off will be accepted by seniority with the exception of those directly involved in the installation or fabrication of any job currently in production. The lay-off period length shall be determined by the Party of the First Part and subject to change. Recall from layoff shall be performed on a seniority basis.

An employee shall lose seniority rights if:

1. The employee voluntarily quits or retires.
2. The employee is discharged for just cause.

Background:

The Union and Company have had a collective bargaining relationship for the past thirty years with successive labor agreements covering this period of time. In March of 1984, the Company was purchased by its present owners. At that time a labor agreement was in effect between the prior owners and the Union. The present owners agreed to abide by all of the terms and conditions of the unexpired labor agreement, to retain all bargaining unit workers employed by the Company prior to the sale and to seek to negotiate a new agreement with the Union for 1985-87.

The layoff procedures at the Company in effect prior to 1985, did not allow for voluntary layoffs. At that time, layoffs were accomplished by laying off employes from the least senior up the seniority list. The parties to the 1984 contract negotiated a change in the 1984 contract which allowed employes to request a layoff which the Company could (but was not required to) consider in determining its labor force needs.

Between 1985 and 1987, employes, including dischargee Mike Karl, made requests for layoffs and the Company considered these, granting some of these requests to senior employes like Karl. As part of its voluntary layoff procedure, the Company then used the following form for employes to request and

receive such layoffs.

> IT IS MUTUALLY AGREED AND RECOGNIZED THAT _____
>
> HEREBY VOLUNTARILY ACCEPTS A LAY-OFF FOR A PERIOD FROM _____ UNTIL _____ AND NOT TO EXCEED SUCH PERIOD.
>
> THE EMPLOYER (BADGER FIXTURES, INC.) AGREES THAT _____ _____ SHALL BE REINSTATED TO ACTIVE WORK STATUS ON _____ AND IN THE EVENT SUCH REINSTATEMENT DOES NOT OCCUR, THE EMPLOYER AGREES TO COMPENSATE _____ FOR 40 HOURS PER WEEK AT HIS USUAL (REGULAR) RATE OF PAY ON A CONTINUING BASIS FROM _____ AND FORWARD.

Notably, Mike Karl requested and received a voluntary layoff using the above form for the period February 24, 1986 to February 28, 1986. On the form, the Company stated that Karl would be returned to active work status on March 3, 1986 and if the Company did not return him to such status as of that date, it would pay Karl 40 hours pay per week from that point forward. The form was signed by Karl and one of the new owners of the Company, Dennis Michalski.

In 1987, the parties to this case negotiated the language of Article XVI Employee Status, quoted above in the "Relevant Contract Provisions" section of this Award. That language has remained unchanged since 1987 and neither party has proposed to make any changes therein during negotiations for the 1987-89, 1989-91 or the 1991-94 labor agreements.

The parties submitted the following information regarding the parties' interpretation and application of Article XVI prior to the occurrence of the circumstances giving rise to this case. Company records showed that employes had been on layoff for longer than three months and returned to the Company in the past. Bruce Krause, then an employe of the Company, was laid off from the pay period ending October 2, 1982 through the pay period ending January 29, 1983. Company records did not showed that Krause was terminated at that time. Rather, Company records show that Krause thereafter resumed working for the Company on April 16, 1983. Dave Bubolz, an employe of the Company at the time of the hearing, was also laid off by the Company effective the pay period ending October 2, 1982 through the pay period ending January 29, 1983. Company records showed that some time after the pay period ending January 29, 1983, Bubolz "quit" his job with the Company but that he was later rehired by the Company. Grievant Karl also testified that he recalled that Krause and Bubolz had been in layoff status for more than four months in 1982-83.

The Company proffered evidence regarding the case of Randy Weir which it asserted was the only precedent applicable to this case. On July 16, 1984, Randy Weir, who had worked for the Company since November, 1983, was laid off by the Company. The Company thereafter hired Thomas Wilatoski on July 25, 1984 and it hired Paul Jordon on August 13, 1984. Weir did not file a grievance over having his recall rights and employment status terminated by the Company effective on the date of hire of Wilatoski and Jordan.

Since 1987 as well as under the effective labor agreement, the following layoff procedures have been consistently followed by the Company until the instant grievance arose. The Company would post a voluntary layoff sign up sheet on the bulletin board above the time clock when the Company could determine, in advance, that it needed to layoff employes. If the need to layoff arose on short notice, Company officials would ask employes, from most

senior to least senior, if they wished a voluntary layoff. An exception was made for those senior employes currently fabricating or installing fixtures; these senior employes were retained. If no senior employe chose a layoff the least senior employe(s) would be laid off in order of reverse seniority. Senior employes who had the right to choose a layoff and did so would then remain on layoff until the Company recalled all employes who were on layoff status. If the Company determined it needed to recall less than all employes on layoff, senior employes would be given the option to either return to work or remain on layoff, without this decision affecting their recall rights or employment status with the Company. If the Company recalled all employes on layoff status, then all employes were required to return to work or they would be discharged.

Grievant Karl stated that over the fifteen years he had been employed by the Company prior to May 6, 1992, he had taken voluntary layoffs ten to twelve times. These layoffs normally lasted from one day up to 3 to 5 weeks. Grievant Beil stated that in his seven years of employment at the Company, he took voluntary layoffs six or seven times. Beil also stated that in his first year of employment with the Company he was on a layoff status for three months, after which he was recalled to work by the Company.

FACTS:

In February, 1992, twenty employes in the Union's bargaining unit were employed by the Company. The Company analyzed its labor needs and determined that it needed to layoff six employes. On March 2, 1992, Mike Karl, Larry Bowe and Jerry Biel 1/ were offered and took voluntary layoffs pursuant to Article XVI of the labor agreement. The layoff procedures applied to them were those that had been consistently in effect up until that time. Karl then had fifteen years' seniority with the Company and Beil had seven years' seniority. Because Larry Bowe was the least senior employe, he was laid off involuntarily.

On March 31, 1992 Company official Dan Vehrs called Beil and Karl and offered them work. Because Vehrs indicated that only three of the six employes then on layoff were being recalled, both Beil and Karl decided not to return to work but chose to remain on layoff, pursuant to their understanding of past practice on this point. The Company recalled the next three senior employes, leaving Bowe still out on layoff.

On May 6, 1992, the Company sent Beil, Bowe and Karl identical letters which read as follows in relevant part:

> We are sorry to advise you that your lay-off status has become permanent. Upon review of our current work load, our upcoming work load and our current fabrication abilities, we do not expect to rehire your services. Of course, all benefits will be terminated as of Friday, May 8, 1992. We advise, therefore, that you begin (sic) search for other employment.
>
> Your past performance has been very much appreciated and (sic) are sorry to have to let you go. Do not

1/ Grievant Bowe did not testify herein. The evidence demonstrated that Bowe must have been the least senior employe at the time of the March 2, 1992 layoff; that he had not requested a layoff but that he was laid off due to his low seniority.

hesitate to call with any questions or concerns.

This action by the Company took Beil, Bowe and Karl off the Company's recall list and extinguished their rights to recall in the future.

On October 7, 1992 the Company laid off six additional employes for one day (for reasons not stated on the record). On October 8, 1992 the Company recalled all six of these employes but it did not recall Beil, Bowe or Karl or otherwise offer them work.

POSITIONS OF THE PARTIES:

Union Position:

The Union asserted that the real issue in this case is whether Karl, Beil and Bowe were discharged for just cause, as provided in Article XVI of the labor agreement. In this regard, the Union noted that the Employer did not submit any evidence to show that it had applied a just cause standard in this case.

The Union observed that the Employer appeared to be more concerned about retaining its junior employes than its senior employes. The Union asserted that it had never taken the position that the Company must replace junior employes in the plant when it recalls senior employes on voluntary layoff; that senior employes must return only if the Employer recalls all employes in response to an Employer determined upturn in business; and that if the contract had no voluntary layoff procedure, junior employes would have to be laid off first in any event.

The Union asserted the Employer lacked cause to terminate Karl, Beil and Bowe. The Company's asserted reliance on the Randy Weir layoff as justification for these layoffs, the Union implied, was not done in good faith. In this regard, the Union noted that the Company did not fully research past layoffs and that the Union submitted evidence to show that layoffs had occurred in the past which were longer than those in issue in this case.

The Union objected to the Company's proffer of 1990 work hours as relevant evidence affecting Karl, Bowe and Beil's "terminations". Because Karl, Bowe and Beil did not quit and were not discharged for just cause, the Union contended their seniority/ recall rights remained in tact and these rights should be recognized. Given the fact that a layoff occurred on October 7th and a partial recall took place on October 8, 1992, the Union argued that Karl, Bowe and Beil should have been given a recall opportunity due to their seniority at that time; that Karl, Bowe and Beil's seniority and recall rights should be reinstated and that they be made whole.

Company Position:

The Company argued that it followed the requirements of the labor agreement when it laid off Karl, Beil and Bowe on March 3, 1992. The Company admitted that Karl and Beil had requested to be laid off but that Larry Bowe who was low in seniority "had to accept lay-off" on March 3rd. The Company contended that because nothing in the labor agreement allows an employe to refuse to return to work, that when Karl and Beil refused recall when contacted on March 31st, they lost all rights to return to their jobs. In addition, the Company urged that its actions here were consistent with its past practice, as evidenced by the case of Randy Weir.

The Company also asserted that it properly followed the express provisions of the labor agreement and that it exercised its management right to

determine staffing levels by its actions concerning the Grievants. The Company argued that less senior employes have demonstrated a desire to work by remaining on the job. As such, these employes are valuable to the Company and the Company should be able to retain them if it chooses. The Company also claimed that the laid off workers lose the efficiency/skill levels they formerly possessed after a prolonged layoff.

The Company denied that it had discharged the Grievants. Rather, it stated that it had permanently laid them off "due to lack of work." The Company urged that a ruling in favor of the Union would result in senior employes retaining unlimited recall rights. Therefore, the Company urged, the grievance should be denied and dismissed in its entirety.

DISCUSSION:

Article XVI describes a procedure for employe-requested layoffs. This Article provides that senior employes may voluntarily take layoffs if they are not involved in the fabrication or installation of fixtures at the time the Company decides to layoff workers. However, Article XVI does not specifically delineate how layoffs should occur if there is a lack of senior employe volunteers, although Article XVI states that "generally accepted standards of seniority" shall apply. And although Article XVI states that "recall from layoff" must be performed "on a seniority basis," the contract is otherwise silent regarding a procedure for recalling employes from layoff when the Company deems it necessary.

It is axiomatic in grievance arbitration cases that absent specific contract language on a point of contract procedure in dispute, extrinsic evidence is relevant and admissible to fill in the blanks in the contract. Therefore, evidence outside the four corners of the labor agreement, such as evidence of a long-established past practice of the parties and evidence of bargaining history, may constitute admissible extrinsic evidence which may be relied upon as indicating the parties' true intentions regarding the operation and application of the contract language in dispute.

In the instant case, the Union proffered sufficient evidence to show that a clear, long-standing and agreed-upon past practice existed whereby senior employes could request layoff and they could then choose not to return to work from layoff if the Company were recalling less than the full employe compliment then on layoff. Indeed, the evidence herein showed that the Company followed this practice in laying off the Grievants. In this regard, the facts of this case clearly demonstrate that on or about March 2, 1992, the Company determined that it needed to layoff six employes. At this time, Karl and Beil requested voluntary layoff due to their seniority status. The Company granted their requests, pursuant to Article XVI. Also at this time, the Company involuntarily laid off four other employes who were the lowest four on the seniority list. One of these employes lowest in seniority was Larry Bowe.

Nothing of significance occurred between March 2 and March 31, 1992, there being no evidence that the Company hired any new employes or that it recalled any laid off employes during this time period. On March 31, 1992, the Company requested Beil and Karl to return to work, stating that three employes of the six were being recalled. Pursuant to the above-described past practice, Beil and Karl responded that they wished to remain on layoff status following the partial recall of employes. The Company then recalled the three next senior employes, which left Bowe, the least senior laid off employe, still on layoff.

On May 6, 1992, the Company sent Beil, Karl and Bowe identical letters permanently laying them off. These letters extinguished the Grievants' recall rights and formally removed them from the recall list. These letters did not

discharge the Grievants, contrary to the Union's assertions. Because the Company never discharged the Grievants, the just cause provision of the labor agreement is not involved in this case. Only the layoff and recall language of Article XVI is in question here.

Thus, the real issue in this case, then, is whether the Company was privileged to extinguish Karl, Beil and Bowe's recall rights on May 6, 1992. In this regard, I note that the labor agreement does not contain a specific procedure for recall and unlike most labor contracts which place specific limits on laid off employes' recall rights, there is no such provision in the effective labor agreement.

However, Article XVI specifically states:

> . . . The generally accepted standards of seniority shall at all times apply . . . .
>
> and
>
> . . . At no time shall the seniority list be by-passed in favor of employees or employee with lowest seniority . . . .
>
> and
>
> . . . Recall from layoff shall be performed on a seniority basis . . . .

The above quoted language demonstrates that the parties were committed to apply accepted seniority principles to situations similar to the instant case.

Furthermore, the contract specifically lists only three circumstances in which employes "shall lose" their seniority rights: when employes quit, retire or are discharged for just cause. None of these circumstances was present in the instant case. Given the express language of the agreement, it is clear that the parties intended to preserve employe seniority/recall rights in all circumstances except those specifically listed in Article XVI as terminating such rights. In these circumstances, the undersigned would exceed her authority were she to imply any additional limitations on employe seniority/recall rights.

In addition, the evidence supports a conclusion that employes in the past have retained their seniority and recall rights over time periods in excess of two months. Documents were placed in evidence regarding the layoffs of Krause and Bubolz in 1982-83. Krause and Bubolz's layoffs had been in excess of three months and the Company records demonstrated that Krause had been recalled by the Company after his (approximately) four month layoff and that Bubolz quit employment with the Company after January 29, 1983, the ending date of his four month layoff, per Company records.

Furthermore, the case of Randy Weir is neither persuasive nor relevant to the instant case. Additional evidence offered by the Company regarding overtime hours worked in 1990 is also wholly irrelevant to this case. Even if it were true that Karl, Beil and Bowe worked fewer hours in 1990 than did other employes, it does not follow that their seniority/recall rights should therefore be extinguished.

As stated above, the Company offered no evidence to show that a recall procedure or practice existed which was different from the one the Union

proved to be in effect prior to March, 1992. 2/ Rather, the Company argued that because the labor agreement is silent on recall, the Company was free to decide to retain its least senior employes over its more senior workers based on reasons of efficiency and economy. As discussed above, the labor agreement clearly recognizes and makes effective accepted seniority rights and the parties' layoff and recall practices conform to the contract and these rights. Thus, the Company's arguments on this point must fail.

The Company made the assertion that senior employes on layoff lose their work skills over time. I am not persuaded that fifteen and seven year journeyman employes like Karl and Beil would lose their skills over the period of a seven month layoff (March 2, 1992 to October 7, 1992). Hence, I also find this Company argument unpersuasive.

The Union has argued that the Company's May 6, 1992 letter triggered the Grievants' rights to return to work and to a remedy in this case. This is incorrect. As discussed above, the May 6th letter merely improperly extinguished the Grievants' seniority and recall rights. This had no practical effect on the Grievants until the Company laid off six additional employes on October 7, 1992 and then recalled just six of the nine laid off employes on October 8, 1992, without offering the Grievants work based on their seniority. Thus, on October 8th, the Company should have called Karl and Beil 3/ as they were then entitled to recall at that time and the Company should have offered Karl and Beil work (assuming that Karl and Beil were among the six most senior employes then on layoff).

Based upon the relevant evidence and argument herein and because the Company failed to offer recall to Karl and Beil on October 8th as required by the contract and past practice, the Company must now immediately offer Karl and Beil recall and it must immediately restore Bowe's seniority and recall rights, as detailed in the following

AWARD

The Company violated Article XVI - Status of Employees when it

2/ The evidence regarding bargaining history also generally supports the Union's arguments in this case regarding past practice.

3/ The evidence in this case demonstrated that Larry Bowe would not have been eligible for recall on March 31, 1992. Therefore the only remedy appropriately applied to Bowe is the restoration of his seniority and his recall rights. Had the Company hired new employes after March 31, 1992 but prior to the filing of the grievance, Bowe would have been entitled to reinstatement. The record failed to show that this occurred and any hiring done after the filing of the instant grievance would, of necessity, be the subject of a new grievance.

extinguished Grievants Karl, Beil and Bowe's recall rights and seniority by letter dated May 6, 1992.

As a remedy, the Company shall therefore immediately restore Karl, Beil and Bowe's seniority and recall rights and place Larry Bowe's name on its recall list for future recall should his seniority entitle him to same.

The Company shall, in addition, immediately recall Karl and Beil, restore their benefits as of October 8, 1992 and pay them full backpay (less any interim earnings and Unemployment Compensation they have received) from October 8, 1992 forward. 4/

Dated at Madison, Wisconsin this 25th day of January, 1993.

By _____
Sharon A. Gallagher, Arbitrator

4/ I shall retain jurisdiction of this case for thirty (30) days from the date of issuance hereof for sole purposes of the remedy only.