

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:
of a Dispute Between	:
	:
NORTHLAND CONCRETE & MASONRY COMPANY	: Case 1
	: No. 48305
and	: A-5003
	:
GENERAL LABORER'S LOCAL NO. 317	:
LABORERS' INTERNATIONAL UNION OF	:
NORTH AMERICA, AFL-CIO	:
	:

Appearances:

Ross & Stevens, S.C., by Ms. Lynn M. Stathas, First Wisconsin Plaza, P.O. Box 2599, Madison Wisconsin 53701-2599, on behalf of the Company.
Mr. Jon J. Welke, Business Manager, General Laborers' Union Local 317, 2233 Birch Street, Eau Claire, Wisconsin 54703, on behalf of the Union.

ARBITRATION AWARD

The above-captioned parties, hereinafter referred to as the Company and the Union respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to said agreement, the parties requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear the instant dispute. The undersigned was designated by the Commission to hear the matter. Prior to the hearing, the parties agreed to submit a stipulation and letter briefs regarding the procedural arbitrability of the instant grievance. They submitted said stipulation on March 5, 1993, and completed their limited briefing schedule on March 15, 1993. Based upon the stipulation and exhibits admitted herein and the arguments of the parties, the undersigned issues the following decision.

ISSUE

The parties have agreed that the issue for preliminary determination by the undersigned is procedural arbitrability based upon timeliness of the grievance.

RELEVANT CONTRACT PROVISIONS

ARTICLE XIV - Grievance Procedure

(1) In the event of a grievance arises, a joint Arbitration Committee shall be established consisting of three (3) Employers and three (3) Representatives of the Union for the purpose of deciding disputes, which may arise in connection with the Application of Agreement.

(2) A grievance must be filed in writing by either Employer or Union within twenty (20) days of the date of the occurrence of the grievance, except that grievances over discharge or suspension shall be filed no later than ten (10) calendar days, after the matter is brought to the attention of the Business Representative of the Union. When a grievance is filed in writing and received by either the Employers Representative or the Union Representative the joint

arbitration committee shall meet within forty-eight (48) hours, of the party filing the grievance may then refer this grievance to the Wisconsin Employment Relations Commission.

(3) In the event the Joint Arbitration Committee is unable to arrive at a decision by the majority vote, within forty-eight (48) hours, then the grievance shall be referred to the Wisconsin Employment Relations Commission, with the request that it immediately appoint an Arbitrator.

. . .

FACTS

This case involves a hiring hall dispute where the Company allegedly hired an employe without going through the Union's hiring hall. The Company and Union stipulated to some underlying facts and request the undersigned to premise a determination as to timeliness thereon.

STIPULATED FACTS

Brian Clements started working for Northland Concrete & Masonry Co. on October 15, 1993 and worked through December 23, 1992. The Union's Business Agent, Jon Welke claims that Clement's employment first came to his attention on or about October 26, 1993 when Clements informed Welke that he had been hired by the Company and asked Welke to permit him to join the Union. Welke refused to permit Clements to Join despite his willingness to pay initiation fees and periodic dues, and instead contact Ray Axt, a Company representative to notify him that Clements should be replaced. By letter dated October 29, 1993, Welke informed the Company that he intended to file a grievance relating to the October 15 hiring of Clements on November 3, 1992, unless something could be worked out. On November 2, 1993, Northland Concrete & Masonry Co. notified Welke orally that it believed the hiring of Clements on October 15, 1993 was justified and did not violated the contract. This oral communication was confirmed by letter on November 3, 1993. Welke did not receive weekly notification of all men hired, but instead received monthly notification through vacation report forms. Neither Welke nor any other representative of the Union has been denied access to visit the Company projects. Welke has on occasion visited the Company's project site.

ADDITIONAL FACTS

A Request to Initiate Grievance Arbitration Form was filed with the Wisconsin Employment Relations Commission. Said form has two date stamps for the date of its receipt, November 6, 1993 and November 11, 1993.

POSITIONS OF THE PARTIES

Union

The Union maintains that the grievance is timely. In response to assertions by the Company that it was operating under strict time constraints, and hired Clements as a replacement for a laborer who quit, the Union asserts that it received a call on October 16 for a mason tender and sent a union member, Richard Thomas from the hiring hall who began work the following Monday. The Union claims that it was unaware that the Company had hired anyone

outside of the hiring hall until October 26, when it received the call from Clements asking permission to join the Union. According to the Union, Article XIV(2) begins to run at the time that the Union becomes aware of an alleged violation. In any event the Union maintains that the grievance is a continuing violation because Clements continued to be employed as of the date that the grievance was filed.

Company

The Company argues that when an issue of timeliness of a grievance is raised, the arbitrator must consider it before evaluating the merits of the case. According to the Company, the collective bargaining agreement imposes a limitation period for the filing of grievances. Said grievance must be filed in writing by either Employer or Union within twenty (20) days of the date of the occurrence of the grievance. Because Northland hired Clements on October 15, 1992, any grievance must be filed within 20 days of October 15, 1992, i.e., by November 3, 1992. This deadline, it asserts, was acknowledged by Welke in his letter of October 29, 1992. Because the grievance was not received by the Wisconsin Employment Relations Commission until either November 11 or 6, 1992, it was filed after the 20-day limitations period imposed under the agreement.

The Company submits that the terms of the collective bargaining agreement are plain and unambiguous; and therefore, the agreement must be construed as written. Because the 20 day time period for filing a grievance is clearly set forth, the grievance is not arbitrable.

Even if the agreement is found to be ambiguous, the Company claims that established rules of contract construction must be applied which require that the collective bargaining agreement be interpreted according to the common and ordinary meaning of the words used. The arbitrator must look at what, in a legal sense, the parties in fact agreed to do as evidenced by the language used. Insertion of what has been omitted or rewriting the agreement is forbidden. The basic rule of construction is to give the words used in the agreement their common and ordinary meaning. Days, the Company asserts, should mean calendar days, the common and ordinary definition of "days". Under the express terms of the agreement, any grievance challenging the hiring of Clements had to be filed by November 3, 1992. Welke's conduct, in stating that a grievance would be filed by November 3, makes it clear that he interpreted and understood the agreement to require him to fill the grievance by November 3, 1992. Because the parties did not agree to mutually waive the limitation period and there is no evidence of a history of lax enforcement of the time limits between the parties, the grievance is not arbitrable.

DISCUSSION

As both parties correctly note, Article XIV (2) controls the instant dispute. Said provision is clear and unambiguous on its face. It provides that with regard to grievances which do not involve discharge or suspension said grievance must be filed in writing by either the Employer or the Union within twenty days of the date of the occurrence. The Company is, therefore, correct in its assertions that the date of the occurrence is the triggering date for non-discharge/suspension grievances; and Union arguments to the contrary are rejected.

The language does not, however, require that said grievance be filed with the Wisconsin Employment Relations Commission within the twenty days of the date of occurrence, as the Company asserts. Rather, it provides that when a grievance is filed in writing and received by either the Employer's Representative or the Union Representative, the joint arbitration committee

shall meet within forty-eight hours or the party filing the grievance may then refer this grievance to the Wisconsin Employment Relations Commission.

The real issue for determination in this matter is: "What document constitutes the grievance?" Is it Welke's letter of October 29, 1992, or the Request to Initiate Grievance Arbitration sent to the Wisconsin Employment Relations Commission? If it is the former, the grievance is clearly timely; if the latter, it is untimely. The undersigned concludes that Welke's letter is the grievance document in the instant case.

Here, the Union sent the Company a letter on October 29, 1992 protesting the Company's action of hiring Clements. This letter, stating the essence of the dispute reduced to writing and filed with the Employers Representative, is the grievance. It falls within the twenty-day time period set forth in the first sentence of Subsection (2) and is in harmony with the first phrase of the second sentence in Subsection (2). The document that was filed with the Wisconsin Employment Relations Commission is merely the Request to Initiate Grievance Arbitration form required by the Commission which a party files when it requests the Commission to appoint an arbitrator to hear the instant dispute. When Welke informed the Company in his October 29 letter that unless something could be worked out, a grievance would be filed with the Commission on November 3, he was unartfully stating that he would request grievance arbitration as of that date unless the grievance set forth in the letter could be informally resolved prior to that date.

Without strong evidence of a practice by the parties to the effect that only the Request for Grievance Arbitration has been considered the written grievance in the past, the Company's argument is not persuasive. The Company's insistence that the Request for Grievance Arbitration form constitutes the grievance in the instant case is rejected for another reason. Generally arbitrators have held that doubts as to the interpretation of contractual time limits or as to whether such time limits have been met should be resolved against forfeiture of the right to process the grievance. How Arbitration Works, Fourth Edition, p. 194, Elkouri and Elkouri. Here, the clear intent of the language is to require a party to reduce the grievance to writing and file it with the other party within the designated time period. Whether the grievance is then heard by a joint arbitration committee or a designee of the Wisconsin Employment Relations Commission pursuant to another designated time period is set forth in the final phrase of the second sentence of Subsection (2) and Subsection (3).

Accordingly, the undersigned finds that the instant grievance is timely filed and directs the parties to contact her to schedule hearing on the merits.

Dated at Madison, Wisconsin this 31st day of March, 1993.

By Mary Jo Schiavoni /s/
Mary Jo Schiavoni, Arbitrator