

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
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 LABORER'S UNION LOCAL NO. 1086 : Case 7
 : No. 49279
 and : A-5075
 :
 ADVANCE CAST STONE COMPANY :
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Appearances:

- Mr. Thomas Klein, Business Manager, Laborer's Union Local No. 1086, appearing on behalf of the Union.
- Mr. Matthew Garni, Vice President, Advance Cast Stone Company, appearing on behalf of the Company.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and Company, or Employer, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to resolve the instant grievance filed by the Union. A hearing was held on June 24, 1993 in Random Lake, Wisconsin. The hearing was not transcribed. The Union filed a letter brief which was received on July 2, 1993 at which time the record was closed. Based upon the entire record, the undersigned issues the following award.

ISSUES:

The parties stipulated to the following issues:

1. Was the contract violated when the grievant was discharged by the Employer?
 If so, what is the remedy?
2. Were the wage provisions of the contract violated during the grievant's period of employment?
 If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS:

The parties' 1991-93 collective bargaining agreement contains the following pertinent provisions:

ARTICLE VII
GRIEVANCE PROCEDURE

Section 7.1. Grievances.

Any dispute, claim or controversy arising under or directly involving the provisions of this Agreement between the Union and the Employer, or between an employee represented by the Union and the Employer, shall be a "grievance" within the meaning of this Agreement.

Section 7.2.

A grievance shall be presented within ten (10) working days (a) from the time of occurrence upon which the same is based or (b) from the time such occurrence becomes known to the employee and/or the Union, but in any event not more than ten (10) working days after such occurrence. Failure to submit a grievance within such period shall constitute a bar to further action thereon.

Section 7.3. Adjustment of Grievances.

All grievances shall be handled and adjusted in the following manner:

- (a) Step 1. The aggrieved employee or employees, or the Union, shall present the grievance in writing to the immediate supervisor, at which time the Steward may be present. If the grievance is not satisfactorily settled or adjusted within three (3) working days, it shall be referred to Step 2.
- (b) Step 2. Upon referral from Step 1, the grievance shall be taken up between the plant superintendent or other management designee and the Steward, with or without the aggrieved employee and the Union's Business Manager or field representative.
- (c) Step 3. If no satisfactory settlement or adjustment of the grievance is had in Step 2 within five (5) working days after having been taken up in such Step 2, the

grievance shall be referred to a conference or conferences between the plant manager and/or other representatives of the Company and the Business Manager and/or other representatives of the Union who shall endeavor to settle and adjust the grievance.

- (d) Should the Employer wish to meet with the employee and Steward during regular working hours, all time spent by the employee and Steward shall be paid for by the Employer at their regular rate of pay.

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ARTICLE X
SENIORITY

Section 10.1.

All new employees shall serve a probationary period of sixty (60) days worked during which period they may be discharged without further recourse; provided, however the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. Such probationary period may be extended for an additional thirty (30) days by mutual agreement between the Employer and the Union. After successful completion of such probationary period, the employee shall acquire seniority retroactive to his original date of hire.

Section 10.2.

- (a) Seniority is defined as an employee's total length of continuous service with the Employer, beginning with such employee's most recent date of hire as a regular employee. As may be provided in this Agreement, such continuous service shall include absence due to authorized vacations, authorized leaves of absence or absence due to bona fide illness and sickness.

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ARTICLE XII
DISCHARGE OR SUSPENSION

Section 12.1.

The Employer shall not discharge an employee having seniority without just cause, and shall give at least one (1) written notice of complaint or warning against such employee. A copy of such notice shall be delivered or mailed to the Steward as well as to the Business Representative of the Union. No such warning notice need be given to an employee before he is discharged if the cause of such discharge is dishonesty, drunkenness, possession or use of controlled substances on Company property or while on duty or recklessness while on duty, or the carrying of unauthorized passengers. The warning notice as herein provided shall not remain in effect for more than six (6) months.

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ARTICLE XX

WAGES

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Section 20.2.

- (a) The hourly wage rates for employees covered by this Agreement shall be as follows:

<u>9/1/92</u>	<u>Effective 9/1/91</u>	<u>Effective</u>
New Employees	\$ 8.80	\$ 9.05
After 8 Weeks	9.00	9.25
After 16 Weeks	9.30	9.55
After 32 Weeks	9.60	9.85
After 52 Weeks	10.00	10.25

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ARTICLE XXII
INSURANCE

Section 22.1.

The Employer shall pay to the Trustees of the Wisconsin Laborers Health Fund the sum of One Dollar

and Sixty-Five Cents (\$1.65) per hour for each hour worked on or after September 1, 1991 by all employees represented by the Union and covered by this Agreement and payments as to any one such employee shall not exceed 2080 hours worked in a calendar year; on and after September 1, 1992 the hourly insurance contribution by the Employer shall be One Dollar and Ninety Cents (\$1.90) and payments as to any one such employee shall not exceed 2080 hours worked in a calendar year. These payments shall be mailed to the Health Fund no later than on the fifteenth (15th) day of each month following the month for which payment is being made. In the event such hourly contribution rate is increased during the life of this Agreement beyond the Employer's agreed hourly contribution rate in effect at the time of such increase the employees will pay all of such increase.

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ARTICLE XXIII
PENSION FUND

Section 23.1.

The Employer shall pay to the Trustees of the Wisconsin Laborers Pension Fund the sum of Sixty Cents (\$.60) per hour for each hour worked, for not to exceed forty-eight (48) hours per week, by all employees represented by the Union who have completed thirty (30) days of employment with the Employer. These payments shall be mailed to the Pension Fund no later than on the last day of each month following the month for which payment is being made.

FACTS:

The Company manufactures and installs precast concrete panels for use in the construction industry. Laborers' Local 1086 represents the production workers. The grievant, George Foras, was discharged by the Company on May 5, 1993. The reason for the discharge was excessive tardiness, absenteeism and unexcused absences.

The Company's work force fluctuates based upon available work. When orders are down, employees are subject to layoff. Conversely, when orders are up, the Company provides overtime and relies upon temporary employees provided by temporary help firms. The Company contracts with U.S. Tech Force, Inc. for temporary employees. U.S. Tech Force supplies general laborers as well as skilled employees, including carpenters, to the Company. The

Company notifies U.S. Tech Force of its specific needs and U.S. Tech Force supplies individuals with the background requested when possible. The Company and the temporary employes keep track of the time worked. These time records are submitted to U.S. Tech Force on a weekly basis. U.S. Tech Force pays the employes directly, and submits periodic bills to the Company for payment. The temporary employes working at the Company are paid \$8.00 per hour, while U.S. Tech Force bills the Company \$12.80 for each hour worked. If the Company is dissatisfied with the work performance of a temporary employe, the Company contacts U.S. Tech Force and requests that the individual not be returned. The Company does not directly discuss performance issues with individual temporary employes. If a temporary employe is injured while working at the Company, U.S. Tech Force is contacted and the employe reports to a medical facility designated by U.S. Tech Force. U.S. Tech Force is responsible for the temporary employe's medical expenses and lost wages. An injured employe unable to work would generally be replaced by another temporary employe. When a temporary employe is no longer used by the Company, the Company has no unemployment compensation responsibility. Any payment of unemployment compensation for temporary employes comes from U.S. Tech Force account.

George Foras began working at the Company on January 6, 1993 as a U.S. Tech Force temporary employe. Mr. Foras received paychecks from U.S. Tech Force from January 6, 1993 through the week ending February 14, 1993. During this period of time Mr. Foras was paid at the rate of \$8.00 per hour for straight time work. Effective February 15, 1993, the grievant began receiving paychecks from the Company. For the next eight weeks the grievant was paid at the straight time hourly rate of \$9.05 per hour. Effective with the 9th week (the pay period beginning April 18, 1993), the grievant received \$9.25 per hour, which was the rate he was receiving at the time he was terminated. During the time the grievant was paid by the Company, he worked a total of 52 days.

On February 10, 1993 George Foras applied for membership in Local 1086 and completed the necessary check off authorization forms. On February 22, 1993 the grievant completed an Employee's Withholding Allowance Certificate Form (W-4). On February 22, 1993, the grievant completed an Employment Eligibility Verification Form (I-9). The Company is obligated by the contract to make payments on behalf of employes for each hour worked to the Wisconsin Laborer's Health Fund. The January 19, 1993 monthly remittance report does not contain the name of George Foras. The remittance reports for February, March, April and May do include Mr. Foras. Payments were made to the fund on his behalf based on the number of hours he was paid by the Company. The Employer is also required to make payments on behalf of employes to the Wisconsin Laborer's Pension Fund. These payments, based on each hour worked, are required to be submitted after employes complete 30 days of employment. The March 1993 report does not contain the grievant's name. The grievant is listed, however, on the April and May 1993 monthly remittance reports. Company employes who incur on-the-job injuries are referred by the Company for medical treatment and receive worker's compensation benefits supplied by the Company. Company employes who are laid off receive unemployment compensation benefits from the Company's account.

New employes must serve a probationary period of sixty (60) days worked during which time an employe can be discharged without recourse. Employes who complete probation can only be discharged for just cause. Except for certain specific reasons, at least one written warning must precede a discharge.

POSITIONS OF THE PARTIES:

The Union asserts that the grievant was improperly discharged. The Union points to the contract language which requires at least a written warning prior to discharge except for specifically identified reasons. The Union argues that the grievant's seniority begins when the person begins working and doing bargaining unit work. As such, the grievant had completed his

probationary period and was subject to the just cause standard contained in the contract.

The Union also argues that the grievant was paid at an improper pay rate for a six-week period. The check stubs received by the grievant indicate he was paid at the rate of \$8.00 per hour, rather than the \$9.05 rate provided for in the contract.

The Company contends that the grievant was hired on February 15, 1993, at which time he began receiving \$9.05 per hour, the contract rate. The Company also identifies that the grievant was terminated effective May 5, 1993, on his 52nd day of employment. As a result, Mr. Foras had not gained seniority and was not subject to the just cause provision in the contract.

Prior to his February 15, 1993 hire date, the Company asserts Mr. Foras was employed by U.S. Tech Force, a temporary help Company located in Fond du Lac, Wisconsin. Because of the workload, the Company contracted U.S. Tech Force for temporary employes. George Foras was sent by U.S. Tech Force and began working on January 6, 1993. In addition to Mr. Foras, other temporary employes were provided to the Company by U.S. Tech Force. During his period of temporary employment Mr. Foras received checks from U.S. Tech Force and was paid \$8.00 per hour. U.S. Tech Force sent invoices to the Company which reflect that the Company paid U.S. Tech Force \$12.80 per hour for each hour worked by Mr. Foras and others.

DISCUSSION:

The underlying dispute in this matter is whether or not the grievant completed his probationary period. The parties stipulated, during the hearing, that if the grievant was terminated during his probationary period, then the action was appropriate and the contract was not violated. The parties further stipulated that if it is determined that the grievant had successfully completed his probationary period, his termination would not be for just cause because the written warning, as required by the contract, had not been provided. The crux of the matter, therefore, is determining when the grievant became an employe of Advance Cast Stone.

Time records show that the grievant began working at the Company on January 6, 1993. However, the record clearly demonstrates that he received payment for that work on checks issued by U.S. Tech Force. During the time from January 6, 1993 until February 15, 1993, the Company forwarded time-reporting documents for the grievant to U.S. Tech Force. Based upon these documents, two things occurred: first, the individuals identified on the time-reporting sheets, including the grievant, received compensation from U.S. Tech Force at the rate of \$8.00 per hour; second, the Company was billed for services rendered by U.S. Tech

Force at the rate of \$12.80 per hour. The difference between the rate paid to the employe and the rate charged the Company accounts for overhead expenses and profit. The payment arrangement with U.S. Tech Force demonstrates that the grievant was an employe of U.S. Tech Force from January 6, 1993 to February 14, 1993.

The record establishes that the Company had a bona fide contractual arrangement with U.S. Tech Force to supply temporary employes. The Company did not have an employment relationship with the individuals, but rather had a contractual relationship with U.S. Tech Force as demonstrated by the documents and testimony.

Other record evidence also supports this conclusion. When the grievant became an employe of the Company, on February 15, 1993, normal employment documents were processed. On February 22, 1993 the grievant completed a W-4 Withholding Form and an I-9 Unemployment Eligibility Verification Form. Effective February 15, 1993, the grievant began receiving payment directly from the Company at the entry level rate of pay of \$9.05 per hour. He received this rate of pay for eight (8) weeks as required by the contract. With the pay period beginning April 18, 1993, the grievant began receiving \$9.25 per hour, the rate required after 8 weeks of employment. Consistent with the conclusion that the grievant became an employe on February 15, 1993, the Company began making the contractually required payments to the Union's Health and Welfare Fund. Thirty (30) days after the grievant's date of hire, the Company began making pension contributions as required by the contract. All of the evidence involving required employment forms and contractual compliance with salary and benefit provisions support the conclusion that the grievant was hired as an employe of the Company effective February 15, 1993.

The contract requires that grievances regarding disputes be presented within ten (10) working days from the time such occurrence becomes known to the employe or the Union. In this matter, the grievant clearly knew that he was being paid \$8.00 per hour rather than the \$9.05 provided for in the labor contract. The grievant clearly knew that he was receiving paychecks from U.S. Tech Force. If the grievant had a dispute regarding his wage rate or employment relationship, he should have filed a grievance as provided for in the contract. It is clear, based on the documents submitted, that the grievant only disputed these matters when he was terminated by Advance Cast Stone.

The undersigned concludes that the grievant was hired as a regular employe of Advance Cast Stone effective February 15, 1993.

The grievant was terminated on his 52nd day of employment. Since this termination occurred during his probationary period, the grievant was not covered by the just-cause provision of the labor agreement. Therefore, the Company was not obligated to provide a written warning. Additionally, the grievant was paid at the

contractually established rate while serving as a regular employe of the Company.

Based on the foregoing and the record as a whole, it is my decision and

AWARD

1. That the Company did not violate the contract when the grievant was discharged.
2. That the wage provisions of the contract were not violated.
3. That the grievance is denied.

Dated at Madison, Wisconsin this 14th day of September, 1993.

By: William K. Strycker /s/
William K. Strycker, Arbitrator