

BEFORE THE ARBITRATOR

In the Matter of the Arbitration :
of a Dispute Between :
 :
TEAMSTERS LOCAL UNION NO. 43 :Case 24
 :No. 49712
 and :A-5115
 :
MODERN BUILDING MATERIALS, INC. :
 :

Appearances:

Mr. Charles G. Schwanke, President, appearing on behalf of
the Union.
Mr. William J. Sweeney, Representative, appearing on behalf
of the Company.

ARBITRATION AWARD

The Company and Union are parties to a 1993-96 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve the discharge grievance of Jeff Ricchio.

The undersigned was appointed and held a hearing on October 12, 1993, in Kenosha, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on November 2, 1993.

Stipulated Issues:

1. Is the grievance timely?
2. Did the Company discharge Jeff Ricchio for just cause?
3. If not, what is the remedy?

Relevant Contractual Provisions:

Article 12. SENIORITY

. . . .

An employee's seniority and recall rights shall terminate if the employee:

- A. Quits or retires.

B. Is terminated for just cause.

- C. Is not recalled from layoff before the first to occur of: nine (9) months or the length of an employee's seniority at layoff.
- D. Fails to return from an approved leave of absence.
- E. Works for another employer during a leave of absence or gives a false reason for a leave of absence.
- F. Continues to be absent from work for three (3) working days without notification to the company.

. . .

ARTICLE 16. DISCIPLINE AND DISCHARGE

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

. . .

ARTICLE 30. GRIEVANCE PROCEDURE

A grievance is defined as a good faith complaint by an employee, arising during the term of this Agreement, that an express term of this Agreement was violated by the Employer. During the term of this Agreement, a grievance shall be processed as follows (it is understood that an employee may discuss a grievance with the employee's supervisor prior to the filing of a grievance, but such discussion, which the foreman may delay until after the employees are punched out, shall not be considered a formal step in the grievance procedure):

- A. If an employee has a complaint, the employee shall first take the matter up with the employee's foreman. The employee may or may not request the foreman to send for the steward for the purpose of assisting and settling the complaint.

- B. If such issue is not settled with the foreman, then the issue shall be considered a grievance, reduced to writing and signed by the employee and the steward, whereupon the company shall write its decision of the issue and sign the same. All grievances must be reduced to written form within five (5) working days of its occurrence.
- C. Any decision between the union and the company shall be final and binding at any step of the grievance procedure.
- D. Such decision is final unless within five (5) working days of the date of the decision a request is made to the company for a review.

EXHIBIT "B"

WORK RULES

The work rules which follow have been established for your benefit and protection. These rules are not intended to restrict or impose on the privileges of anyone. They are installed to insure the right and safety of all employees.

<u>RULES</u>	<u>FIRST OFFENSE</u>	<u>SECOND OFFENSE</u>	<u>THIRD OFFENSE</u>
. . .			
18. Failure to report accidents and personal injury promptly.	1 week off	Subject to discharge	
. . .			

Discussion:

Grievant Jeff Ricchio had worked as a plant laborer for the Company for seven years when, on July 14, 1993, he was discharged. On June 28, the grievant, who worked the third shift when no foreman is present, had been injured while at work by falling into

a hole. The grievant testified that he had notified Dispatcher Jeff Matty and had also called in a replacement before he left work. The grievant testified that he went to the Kenosha Occupational Clinic for treatment, and that the clinic staff informed him that they would report the injury to the Company and its insurance agency. The grievant stated that he heard nothing more about the matter until two weeks later.

The Company introduced a letter, mailed to the grievant on July 8 and signed on the certified receipt July 10, stating:

We have had some indication from the Kenosha Occupational Medicine Clinic that you have had an on-the-job injury. If so, please provide us with the necessary information to substantiate the claim.

(As you know, Company policy and Work Rule #18 require you to report all accidents and personal injuries promptly.)

The grievant testified that he relied on Kenosha Occupational Clinic to make the phone call, and went back three times to them, thinking that this was a routine matter: Kenosha Occupational Clinic is where the Company normally sends people who have work-related injuries. The grievant also testified that the employe he called in to replace him was a salaried employe in management, Cesar Lopez. The grievant contended that for this reason, he had in effect reported the injury to management.

Bill Sweeney stated that while the grievant is a good worker when he is present, he did not properly report the injury and did not reply to the July 8 letter. The Company offered into evidence a second letter mailed July 14 and signed for (perhaps incorrectly) on the same date by the grievant:

Pursuant to Article 12F of the current Union Contract "An employee's seniority and recall rights shall terminate if the employee continues to be absent from work for three (3) working days without notification to the company.

You have been absent from work since June 30, 1993, without notification (sic) to Modern Building Materials, Inc., therefore your seniority and recall rights with the company have terminated.

Effective Wednesday, July 14, 1993, you are discharged from Modern Building Materials, Inc.

The grievant admitted calling Sweeney on July 14, but stated that he did not really believe that the Company was planning to discharge him. The grievant called Steward Norman Mieloszyk two days later and discussed the discharge letter with him, but did not file a grievance with Mieloszyk or the Company at that time. On August 11, the grievant delivered his grievance, dated July 14, to Union President Schwanke's house. Schwanke signed on the grievance form that the grievance was delivered on that date, and he forwarded it to Sweeney the following day requesting that it be processed. Sweeney replied by letter dated August 18, as follows:

On Friday, August 13, 1993, I received a grievance via certified mail from you that was dated July 14, 1993. As noted on the grievance, it was delivered to your house August 11, 1993. No one in our office received this grievance until August 13, 1993.

Mr. Ricchio was notified via certified mail of his discharge from Modern Building Materials on July 14, 1993.

This is an untimely grievance pursuant to Article 30, Section B of the Union Contract which states "All grievances must be reduced to written form within five (5) working days of its occurrence." Mr. Ricchio's discharge from Modern Building Materials still stands.

The grievant testified that the reason for his delay was that he did not really believe the Company intended to fire him over this matter, and that he thought he might get a week off.

The Company contends that the grievant had written and oral notice of his discharge on July 14, and despite these and a discussion with the Steward on July 16, he did not file a written grievance with the Company until August 12. The Company points to the five-day requirement for filing a grievance under Article 30, Section B of the contract, and contends that the grievance is clearly untimely under this clause. With respect to the merits, the Company argues that the grievant was absent from work for more than three working days without notification to the Company, in violation of Article 12, Section F, and therefore justified discharge. The Company contends that no member of management was notified and the Company did not give permission for him to leave.

The Company concedes that its bookkeeper received a call from Kenosha Occupational Medical Clinic on June 29 indicating that Ricchio had visited their clinic to be treated for a claimed on-the-job injury, but contends that the Company tried to contact Ricchio via telephone many times, without success. The Company contends that the grievant had no legitimate reason for not contacting the Company for two weeks, and that the grievant acknowledged in his testimony that he did not contact anyone at the Company until July 14, 1993. The Company further argues that employees at that time were working extremely long hours, so that the grievant's absence without notice or excuse was significant. The Company contends that its practice and policy for work-related injuries is for the employe to notify the Company office of the injury, go and have it treated, and then return to the office so that the bookkeeper can complete the Worker's Compensation report forms and perform an investigation. The Company argues that the grievant simply disappeared from the workplace for over 14 days without notifying the Company of his status, and that the Company discharged him out of frustration over its repeated and unsuccessful attempts to reach him.

The Union contends that the grievant did notify the Company of the injury on the day it occurred, and that the reason for his late filing of the grievance was simply that he did not realize that he really was discharged immediately upon receipt of the letter. The Union contends that the grievant was genuinely injured, and that he should be reinstated when he is found physically capable, with back wages and insurance.

While the Union alluded in general terms at the hearing to the Company's past informality in a number of its working conditions and relationships with employes, I note that there is no evidence that the Company waived its right to rely on the timeliness provisions of Article 30, either by its conduct in this case or by past conduct in other cases. The record is clear that the grievant was informed both orally and in writing on July 14 that he was discharged. The record is also clear that the grievant did not file any written grievance on this matter until his August 11 presentation of a grievance (dated July 14) to Union President Schwanke, who forwarded it promptly to the Company. There is nothing whatever in the sequence of events to explain or justify the grievant's delay, and I can find nothing that would indicate that the Company should be held partly responsible for that delay so as to excuse the grievant from

application of the five-day time limit. I am accordingly bound by that time limit, and have no jurisdiction to reach the question of whether the Company originally had merit for the discharge or not. The grievance is simply untimely.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

That the grievance is denied as untimely.

Dated at Madison, Wisconsin this 15th day of December, 1993.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator