State of Wisconsin
Before the Arbitrator

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In the matter of the arbitration
of a dispute between

Local Lodge 487, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO

~~Case 25 No. 47563 MA- 7309~~

[Case 26 No. 50281 A-5161]

and

Kewaunee Engineering Corporation

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Appearances:

Godfrey & Kahn, S.C., Post Office Box 13067, Green Bay, WI 54307-3067 by **Ms. Angela Samsa**, Attorney at Law appearing on behalf of the Kewaunee Engineering Corporation.

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO by **Mr. James Pressley**, International Representative appearing on behalf of Local Lodge 487.

Arbitration Award

Local Lodge 487, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (hereinafter referred to as the Union) and Kewaunee Engineering Corporation (hereinafter referred to as the Company) requested that the Wisconsin Employment Relations Commission designate a member of its staff as arbitrator of a dispute over the discharge of Raymond Kaye. The undersigned was designated. A hearing was held on May 27, 1994 in Kewaunee, Wisconsin at which time the parties were afforded full opportunity to present such testimony, exhibits, stipulations, other evidence and arguments as were relevant to the dispute. A stenographic record was made, and a transcript was received on June 18, 1994. The parties submitted post-hearing briefs. The Company submitted a reply brief, while the Union rested on its initial brief. The record was closed on August 12, 1994.

Now, having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following Award.

I. Issue

The contract allows the Company to discharge employees for cause.[1] The parties agreed that the following issue should be determined herein:

> "Was the discharge of Raymond Kaye on November 30, 1993 for proper cause? If not, what should the remedy be?"

II. Background

The grievant was employed as a metal fabricator at the Company's northeastern Wisconsin plant for twenty-five years, from October 1968 until his discharge in November of 1993.

On November 12, 1993, a meeting was held with the grievant and Union representatives at which the Company presented a warning to him regarding his work habits, attendance and performance:

> Dear Raymond:
>
> A review of your work record indicates the following:

1993 as of November 10		22 days absent from work
11/8/93	oral warning	left work early
11/4/93	counseling	harassment of fellow employee
9/17/93	insubordinate action	refused to do work
3/22/93	written warning	inappropriate language to fellow employee / moving locker

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[1] The predecessor contract also contained, at Article X - GRIEVANCE PROCEDURE, §11 a limitation on the duration of warnings:

> Section 11. Any written warning will be removed from the employee's file after a period of twelve (12) months providing no other violations are on file for the same offense. Should there be additional warning for the same violation or offense, they will not be removed from the employee's file until a period of twelve (12) months have lapsed from the date of last warning.

This language was inadvertently left out of the printed version of the current contract, although both parties agreed that it was not their intent to delete the language and that the contract is still administered according to this restriction. For the purpose of analysis in this Award, this language is therefore treated as being binding on both parties.

1992		24 days absent from work
1/16/92		counseling meeting with Vice President John Schaefer
1991		44 days absent from work
4/22/91		counseling meeting with Plant Manager Paul Anderson
3/5/91	suspension	insubordination

> Attached are copies of information that support the above information. None of the absences cited are in conflict with the Family and Medical Leave Act.
>
> This letter is to give you notice that your work performance at Kewaunee Engineering is sub-standard due to the totality and the accumulation of individual instances. Kewaunee Engineering cannot tolerate this kind of sub-standard work performance. Any repeated activity of any kind that is sub-standard will result in your discharge from employment.

Attached to the letter were supporting documents. These included (1) a notice of suspension dated 3/5/91 for insubordination for refusing a to sign an attendance sheet for a meeting on Lockout/Tagout procedures; (2) notes of a counseling session on April 22, 1991 during which the plant manager orally reprimanded the grievant for wasting time, and warned the grievant that the Company would not tolerate wasting time, spending time away from his job, unsafe practices and insubordination; (3) the grievant's attendance record for 1991; (4) notes of a meeting on January 6, 1992 between the grievant, Company Vice-President John Schaefer to counsel him about his attitude and work habits; (5) the grievant's 1992 attendance record; (6) a written reprimand from March 18, 1993 for using abusive language to a fellow employee; (7) a memo to the personnel file from Supervisor Jim Stangel, reciting an incident on September 17, 1993 in which the grievant initially refused to straighten parts manually as directed rather than using a straightening press, then agreed to perform the work manually but threw his grinder on the floor; (8) a November 4, 1993 disciplinary action form showing counseling for a harassment dispute involving a fellow employee; (9) a disciplinary action form dated November 8th, showing a verbal reprimand for being out of his department waiting to punch out near the end of his shift, and a warning not to leave the department until the whistle blew; and (10) the grievant's 1993 attendance record.

Two and a half weeks later, the grievant was discharged. The Company provided its reasons for discharge in a letter dated November 30th:

This letter is being written as a follow up to your suspension with pay on November 30, 1993.

Your file has been reviewed in detail. This review included the November 12, 1993 letter to you stating: "Any repeated activity of any kind that is substandard will result in your discharge from employment." This letter was read to you at the November 12, 1993 meeting and a copy was given to you and the Union. At that meeting a lengthy review and discussion was held on this matter, including all of the attachments.

Since November 12, 1993, the following has occurred:

1. On November 18, 1993 you provided a doctors excuse (dated September 1, 1993) to remove an unexcused absence for September 1, 1993. Between September 1 and November 18, production time had been spent in meetings with you on this issue that would not have been needed if you had simply produced the excuse.

2. After not punching in and out of work on different dates, on November 17, 1993 you were given special training by Supervisor Jim Stangel and Human Resource Coordinator Betty Kinjerski. You were advised by your supervisor to let someone in Human Resources or your Supervisor know if you have problems with punching in or out.

3. On November 22, 1993 Supervisor Jim Stangel met with you and Union President Jim Lutzen. At that meeting you were told by Supervisor Stangel to let Human Resources or himself know if you have a problem punching in or out. You then told Supervisor Stangel that you refused and would not do that.

4. On November 30, 1993 you received a written warning for "failure to punch out" on November 29, 1993.

Based on this total information, your work record is substandard. Due to the totality and the accumulation of individual instances, you are hereby discharged from employment with Kewaunee Engineering effective at the end of your shift on November 30, 1993. Any personal items you may have at work will be shipped to your residence. Insurance, final pay and vacation information will be provided by separate letter.

The instant grievance was thereafter filed. It was not resolved in the lower steps of the grievance procedure, and was referred to arbitration. Additional facts as necessary will be set forth below.

III. Positions of the Parties

A. The Position of the Company

The Company takes the position that the grievant was discharged for just cause, after all reasonable efforts to change his behavior had been exhausted. Using the seven tests of just cause developed by Arbitrator Carroll Daugherty in the Enterprise Wire Company case, (46 LA 359 (1966)), the Company provides an analysis of the case in support of the discharge.

The grievant was given clear and unequivocal notice that his insubordination, poor work performance and general inability to conform his behavior to the demands of the work place had reached the point at which the Company would have to dispense with his services unless improvement was shown. He was repeatedly counseled, reprimanded and warned by the Company and the Union in an effort to rehabilitate him. On November 12th he received a summary of his deficiencies over the past three years, with a warning of what would happen if he did not improve. The Company and the Union met with him on that date to drive home the seriousness of the situation, and he said that he understood that he would be discharged for any further substandard performance. The grievant obviously had notice of the possibility of discipline.

The record shows that, despite all of the warnings, the grievant established a record of continuing insubordination, poor work and problems with other employees. In April of 1991, he was suspended for refusing to sign a sheet indicating attendance at an OSHA required training seminar. The suspension was sustained by an arbitrator. In that same month, he was counseled about his poor work habits and safety record, a situation bad enough that the personnel director advised him there was not a single supervisor who wanted to work with him. In January of 1992, the Company and Union met with him once again, repeating the warnings about his attitude, irresponsibility and unreliability. In March of 1993, he was given a written reprimand for initiating a confrontation with another employee over the moving of a locker to install fire extinguishers. Six months later, in September, he was counseled about his refusal to perform work as assigned and his attempt to damage a grinder by tossing it off his work bench during a fit of pique.

Finally, in the space of eight days in November of 1993, the grievant received counseling for using abusive language to a co-worker (calling him a "cunt"), a verbal warning about leaving his station early to punch out, and a final warning about these problems and poor attendance. After these three separate warnings, which included a meeting with

Company officials and the Union President and a written summary of his deficiencies over a three year period, the grievant engaged in additional misconduct. On November 18th, he finally produced a doctor's slip that had been requested in September to resolve an unexcused absence. The grievant refused to provide this slip for two and a half months, resulting in lost time for numerous meetings over the issue. He had no justification for refusing to provide the slip.

On November 17th, the Company gave him special training in using the newly installed time card system, because he claimed his failure to punch out was due to an inability to find or use his time card. He was ordered to notify his supervisor if there was any problem. This order was repeated in another meeting on November 22nd, during which he said he would refuse to notify his supervisor or the personnel office if it meant that he could not leave the plant by the 3:30 p.m. quitting time.

On November 29th, the grievant left without punching out. He claimed to have forgotten, although another employee said he heard the grievant say that he could not find his card and would not therefore punch out. This was directly contrary to the orders he had been given twice in the preceding two weeks, and was the last straw for the Company.

The Company points to arbitral authority supporting the notion that a history of poor performance and misconduct will support the discharge of even a long term employee when the Company has attempted corrective discipline without success. The grievant fits this description. The Company argues that he was given ample warning and full procedural protection. The rules involved are reasonable, the Company established his guilt with a fair investigation, there was no evidence of discrimination in imposing discipline, and discharge is the only appropriate response. For all of these reasons, the Company urges that the grievance be denied.

B. The Position of the Union

The Union asserts that the discharge was not supported by just cause. While the Company has attempted to portray the grievant as a troublemaker and an unproductive employee, the record evidence tells a different story. The Company has attempted to use old and distorted events to discharge the grievant, and these supposed transgressions should either be given no weight, or at least put in their proper context.

The suspension for refusing to sign the sheet after an OSHA safety training seminar was the result of a misunderstanding by the grievant, who did not realize that his signature on the attendance sheet had any importance to the Company. The counseling sessions with the Company in April of 1991 and January of 1992 are both stale for disciplinary purposes. The parties have agreed that warnings are removed from an employee's file after one year if the conduct is not repeated. Even assuming that the 1992 counseling session kept the April 1991 counseling session "alive" for another year, there is no evidence of further concerns or problems until March of 1993, fourteen months later.

Even if the counseling sessions had any relevance, the Company has ignored the fact that they also had the desired result. The grievant was encouraged to improve his overall conduct as an employee, and he did so. He became involved in work improvement and safety committees, and developed a system for improving productivity by using a Bentley Welding Helmet. This generated a savings of $5500 for the Company in the first year. He also designed several fixtures and methods that led to significant improvements in the fabrication of ladders. The Company has attempted to minimize the benefits it received from the grievant's efforts, but they were undeniable, and prove his sincere desire to improve.

The reprimands for using abusive language towards other employees were much ado about nothing. In both March and November of 1993, the grievant was provoked into using strong language, and in the March incident the other employee received more serious discipline than did the grievant (five day suspension vs. a written warning). In the November incident, another employee mocked the grievant, rubbing his eyes and making sounds similar to a baby crying, and the grievant responded by calling him a "cunt". The conduct of the grievant may have been inappropriate, but it was understandable and hardly proves that he was a problem employee. The Union also notes that the language employed by the grievant was not uncommon on the shop floor.

The claimed insubordination in September of 1993 is likewise overblown. The grievant had concerns about the safety of manually bending stock, and after further instruction in the proper methods accepted the directions given by Company officials. As for his supposed tossing of a grinder, the supervisor admitted on cross-examination that the grinder might have fallen off of the table.

The supposed poor attendance record cited on November 12th is no basis for discharge. The grievant was not disciplined for attendance, and the Union provided evidence at the hearing demonstrating that the grievant's attendance record was no worse than that of other employees, and was in fact better than some. Those employees were not disciplined. Much the same can be said of his warning for leaving work early on November 8th. The evidence establishes that he was standing in line at the time clock with other employees at the end of the shift. There is no evidence that the other employees were in any way disciplined, even though they were engaged in precisely the same conduct as the grievant.

As for the matters cited in the November 30th discharge letter, the Union asserts that these incidents were not entirely the grievant's fault. While he did not produce a doctor's slip for a September absence until November, the grievant did not know that he was being charged with an absence until he saw the November attendance report. The Union had challenged the Company's attempt to charge absences caused by a change in starting times in September, and the grievant believed the Company had dropped the matter. As soon as he knew otherwise, he submitted the doctor's slip.

The problems cited in the November 12th letter related to punching out at the end of the shift all resulted from the Company's change to a new time clock system. These problems were not unique to the grievant. Many employees experienced difficulties with the new magnetic stripe reader, before and after the grievant's discharge, and the vendor ultimately replaced the card readers. Compounding the problem with the card reader was the fact that someone regularly took the grievant's time card from the rack, and management refused to make any effort to help solve this problem. For all of management's concern about the grievant's problems in punching out properly, there was unrefuted evidence that other employees left the plant at lunch time and re-entered without ever punching out or in.

In summary, the grievant was making significant progress in his efforts to become a more acceptable employee. The Company ignores his efforts, and the overall good quality of his work, and focuses only on negative events during his last three years. Yet the record shows that he made significant contributions to the Company and that his alleged failings were, in many cases, no more serious than the conduct of other employees who have not been disciplined. An employee of more than 25 years of service should not be

discharged on such flimsy grounds. For these reasons, the Union asks that he be reinstated and made whole.

IV. Discussion

The grievant was discharged for poor performance as an employee, an accumulation of problems and disciplinary events. A good deal of time was spent at the hearing attempting to establish his conduct during 1991, 1992 and 1993. As explained below, much of the evidence produced by management concerning discipline prior to 1993 is irrelevant to the merits of this dispute, and much of the grievant's testimony attempting to justify his actions likewise has no bearing on this grievance.

A. The Relevant Incidents

While a great deal of the Company's evidence concerned the grievant's poor work habits and history of difficult and unpleasant relations with management and other workers over the years 1991, 1992 and 1993, the contract contains a statute of limitations on prior discipline. The parties inadvertently failed to print Article X, §11 in the current version of the contract, but they agree that this provision is still in effect:

> Section 11. Any written warning will be removed from the employee's file after a period of twelve (12) months providing no other violations are on file for the same offense. Should there be additional warning for the same violation or offense, they will not be removed from the employee's file until a period of twelve (12) months have lapsed from the date of last warning.

This clause does not mean that past acts of discipline did not occur. Certainly they may be raised for purposes of proving that an employee was aware of Company rules and expectations. Beyond the substantive issue of notice, the grievant's past disciplinary record may be relevant in considering the question of penalty, as a counter weight to any general arguments over whether long and faithful service makes discharge too severe a response to misconduct. The clause does, however, prevent the Company from relying on stale past discipline to justify the decision to impose later discipline, or to support a claim that the grievant had, through these old disciplines, been advanced through the stages of progressive discipline.

Given Article X, §11, the relevant events that might support discharge in this case, assuming that he was guilty of the precipitating offense of failing to follow instructions by leaving without punching out or informing management on November 29th, are:

1. The March 1993 written warning for engaging in an altercation with another employee;

2. The September 17th reprimand for insubordination in refusing to manually straighten metal bars, and tossing his grinder on the floor;

3. The November 4th reprimand for calling a fellow employee a "cunt";

4. The November 8th oral warning for leaving his work station early;

5. The November 18th production of a doctor's slip that had been requested in September;

6. The November 22nd statement that he would not advise management of problems with his time card if it required him to stay after 3:30 p.m.;

7. The November 29th failure to punch out before leaving work;

8. His overall attendance record in 1993.

With respect to items 1 through 4 on the list, the grievant gave testimony intended to explain that he was not at fault. These arguments come too late. The contract allows for the filing of a grievance within five days of the employee's becoming aware that he has a cause to grieve. There is no evidence in the record that grievances were filed or pursued over the reprimands issued through November 8th, and these reprimands are conclusively presumed to have been justified.

B. The November 29th Incident

The grievant was discharged for his overall record. The incident precipitating the discharge was his failure to punch out on November 29th. The Company installed a new time clock system on November 1st, which required employees to swipe a time card with a magnetic stripe through a reader. The reader would flash a message indicating that the card was accepted. The grievant experienced some problems with his card, which he attributed to the equipment, as well as frequently finding that his card was missing from the rack. The Company provided additional training to him and directed him to contact his supervisor or the human resources office if he had problems rather than simply leaving the plant. These instructions were repeated to him in a meeting on November 22nd. He proposed that he be allowed to carry his card with him during the day so that it could not be taken, but supervisor Jim Stangel told him that carrying the card might affect the magnetic stripe. The grievant then asked Stangel if the Company would pay him overtime if he had to stay after 3:30 p.m. to report time card problems. Stangel told him it was his responsibility, and he replied that he would not stay past quitting time to report a problem with his time card.

On November 29th, the grievant stood in line to punch out, and saw that his card was again missing. According to his testimony, he went out into the parking lot to show a fellow employee some deer horns he had in his car. Although he had announced a week earlier that he would not report time card problems to management on his own time, he testified that he had changed his mind, and fully intended to go back inside when he was done with the deer horns. Once outside, however, he forgot and was half way home before he realized that he had neither punched out nor informed the human resources office. The next morning he went to the human resources office to report the problem, and he was discharged.

The grievant's version of the incident on November 29th is not believable. The employee behind him in line was brought to the grievance meeting on November 30th, and said that when the grievant saw that his card was missing he said that if they wanted to fuck around with him he didn't have to punch out. Moreover, it is inconceivable that an employee who had two weeks earlier been warned that he was on the verge of discharge for, among other things, failing to punch out, and had been retrained on the procedures and told twice that he must report time card problems to management, could simply have forgotten to do it. This was an ongoing controversy between the grievant and the Company, and the suggestion that it simply slipped his mind is simply implausible. It is far more probable that the grievant carried through on his stated intention not to report problems if it would require him to tarry after his normal shift. The weight of the evidence supports this interpretation, and I conclude that this is what actually occurred. It necessarily follows that the Company had cause to impose some level of discipline on him in response to his failure to follow the procedures he had specifically been ordered to use.[2]

C. The Appropriateness of the Penalty

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[2] The grievant offered explanations for his troubles with the time card system, and the evidence indicates that there were problems with the cards issued to employees and with the card reader installed on November 1st. However, the discipline imposed on November 30th was not caused by the problems with the system. Whether his card was missing or the reader was not registering the card, the grievant had been ordered to report problems to management instead of engaging in self-help by leaving without punching out, and it was his refusal to obey this order that motivated the discipline.

The grievant ignored management's directive not to leave work without either punching out or reporting to management. The Company argues that this was the proverbial last straw. For its part, the Union argues that discharge is a disproportionately harsh response given the grievant's twenty-five years of service.

In the year preceding his discharge, the grievant had four reprimands and warnings, as well as informal counseling and retraining related to his problems with the time card system, all of which led to the November 12th letter warning him that he would be discharged for future occurrences.[3] Ten days after the letter was issued, he informed his supervisor that he would refuse to obey the order to inform management of problems with the time card system, and one week after that he carried through with his stated intention.

An employee of the grievant's seniority is entitled to the benefit of the doubt when faced with the loss of his job and all of the benefits that go with it. Certainly the November 29th refusal to check with management or punch out before leaving would not, by itself, justify the discharge of an otherwise good employee with 25 years of service. As discussed above, the November 29th incident does not stand alone. The Company engaged in corrective discipline to drive home the need for a change in attitude and behavior by the grievant. Company representatives counseled him and warned him. He was given formal written notice that he would be discharged for his next offense. In the face of all of this, he announced to management that he would ignore the order to avoid self-help when he could not find his card or make it work in the reader. He then made good on the threat. This confirmed the general theme of his misbehavior, an inability to submit to the authority of management or to conform to the demands of working with others.

Having repeatedly counseled and disciplined the grievant to the point of a final warning, the Company could have reasonably concluded that his actions on November 29th were proof that he had no intention of changing his ways. In fact, there was virtually no other

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[3] The Company also cited his attendance as a defect in the November 12th letter, but the record shows that the Company uses a no-fault point system to address attendance problems and that the grievant had apparently not received any discipline for his attendance. His attendance record does him no credit, and diminishes his claims to have been a good employee. However, since the grievant had not reached the point of discipline under the Company's own standards for attendance, his attendance record cannot be used as an independent justification for imposing the discharge.

reasonable conclusion. The purpose of corrective discipline is to offer an employee a chance to understand his shortcomings and show improvement. The grievant clearly knew what was expected of him, and declined several chances to show improvement. He could not have had clearer notice of how tenuous a hold he had on his job. As noted above, his long tenure entitles him to the benefit of the doubt, but the grievant appears to have viewed it as an absolute shield against serious discipline. That view was in error.

The Company had just cause to impose discipline on the grievant for willfully ignoring the order to report time card problems to management before leaving the plant. Although the Company has in some respects overstated his deficiencies, and thus undermined its own credibility in this case, the record does establish that he was a problem employee, and that the Company had made repeated and reasonable efforts to salvage him. His refusal to take advantage of the chances for improvement, his multiple offenses in the period before the discharge, and his disregard of the written final warning issued just two weeks earlier serve to offset the mitigating effect of his long service. On this basis, I have concluded that the Company was within its rights when it decided on discharge as the appropriate measure of discipline.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The discharge of Raymond Kaye on November 30, 1993 was for proper cause. The grievance is denied.

Signed this 10th day of November, 1994 at Racine, Wisconsin:

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Daniel Nielsen, Arbitrator