BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	Case 20 No. 52033 A-5322
LOCAL 1488, MIDWEST INDUSTRIAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA	Case 21 No. 52263 A-5337
and	
LINCOLN WOOD PRODUCTS, INC.	

Appearances:

Mr. Mike Kenny, Business Agent, Carpenters Union, appearing on behalf of the Union.
Mr. James Rodgers, Attorney at Law, appearing on behalf of the Company.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the Company or Employer, respectively, 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 hear two grievances. A hearing was held on both grievances on March 15, 1995, at Merrill, Wisconsin. The hearing was not transcribed and the parties did not file briefs. Both grievances have been consolidated into this Award. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

> Were grievants Randy Miles and Tony Ellenbecker terminated for cause? If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISION

The parties' 1993-96 collective bargaining agreement contains the following pertinent provision:

ARTICLE IX - SENIORITY

. . .

D. Loss of seniority shall result under the following conditions:

. . .

2. Discharge for cause. . . .

PERTINENT WORK RULE

GROUP 1

Violation of the following rules will result in a discharge for the first offense.

. . .

5. **STEALING:** Stealing property from the company or from fellow employees.

. . .

FACTS

The Company is a manufacturer of windows and doors. It has four plants in Merrill, Wisconsin, which are known as Plants 1, 2, 3 and 4. The Union is the exclusive bargaining representative for the Company's production and maintenance workers. Prior to being discharged, grievants Randy Miles and Tony Ellenbecker were both employes of the Company. Miles was an Inventory Control Clerk (a/k/a a stock chaser) and Ellenbecker worked in the Machine Department. Neither Miles nor Ellenbecker held supervisory positions. As a result, neither was authorized as part of their job to tell employes to make products.

Six months prior to the incident involved here, Miles was fired and subsequently reinstated. He was fired for theft after window parts were found in Ellenbecker's truck. When it took this action the Company alleged that Miles was involved with Ellenbecker in a scheme to steal Company property. Miles grieved his discharge. Plant Manager Bill Check testified that the Company's case against Miles subsequently "fell apart" when witnesses the Company was relying on to substantiate their case against Miles "backed out." The parties resolved Miles' grievance by

agreeing to reinstate him with no back pay. As part of a return-to-work agreement, the following three conditions were imposed upon Miles: 1) he was suspended for two weeks; 2) in the future neither Miles nor his wife Dawn (who also works for the Company) could purchase scrap items from the Company; and 3) he would be immediately suspended if he was found outside of his regular department without his supervisor's permission. Assistant Plant Manager Tom Radloff testified that the reason the Company insisted on the second condition noted above was that while the Company allows employes to purchase scrap items at reduced prices, it did not want Miles to do so because once Company material was in Miles' possession outside the Company's premises, the Company could not tell if it was purchased legitimately or stolen. Radloff also testified that the reason the Company insisted on the third condition noted above was that it wanted to keep Miles from going to other parts of the Company's premises. In Radloff's words, the Company wanted "to keep an eye on him (i.e. Miles) so that he did not walk off with Company products in the future."

In November, 1994, employe Dawn Miles, wife of Randy Miles, purchased various scrap production material from the Employer on five separate occasions. These purchases were all authorized by Company officials. Insofar as the record shows, the Company officials who authorized these purchases by Dawn Miles were not aware of the second condition to Randy Miles' reinstatement noted above that neither Randy nor Dawn Miles was to purchase scrap production material from the Company. The record does not indicate whether Dawn Miles ever received notice that, as a condition of her husband's reinstatement to work, she was prohibited from purchasing scrap production materials from the Company.

In December, 1994, 1/ Company supervisors heard a rumor via the plant grapevine that a window was going to be made in one of the plants and stolen afterwards by Miles. Company officials took the rumor seriously.

After hearing the above-noted rumor, John Heldt, a supervisor in Plant 2, closely monitored the window maker in his department, Brian Kleinschmidt. On December 8, Heldt saw that Kleinschmidt had started making a 20" x 60" low E, white clad, old style bead window. Heldt knew from his work experience with the Company that this particular window is not normally made in Plant 2 (where Kleinschmidt was working), but rather is made in Plant 4 were the sash line is located. Heldt also knew from his work experience with the Company that the parts needed to make this particular window were not located in the part of the plant where Kleinschmidt worked. This meant that someone had to have brought Kleinschmidt the parts needed to make this particular window. Additionally, Heldt knew that he had not ordered Kleinschmidt to make this particular window and that no work order existed for it.

The next day, December 9, Kleinschmidt finished making the 20" x 60" window he had

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1/ All dates hereinafter refer to 1994.

started the day before. After he finished making the window, Kleinschmidt placed it on a scrap pile. The scrap pile is close to a door. Heldt saw the finished 20" x 60" window Kleinschmidt

had made on the scrap pile. The next time Heldt looked at the scrap pile though, the finished 20" x 60" window he had been monitoring was gone. Heldt had no idea as to the window's whereabouts.

About 2:30 p.m. that day, Company supervisors Elizabeth Woiten and Randy Peck happened to be returning by car to Plant 2 from Plant 4. As they drove up to Plant 2, Woiten noticed a single finished white window outside of a door leaning up against the side of the building. Woiten knew from her work experience with the Company that finished windows are not placed outside of the building as this one was. She also could tell from her work experience that this particular window was not a reject. Upon seeing this window outside, Woiten immediately suspected that someone was planning to steal it. She decided that rather than wait in the car with Peck to see what happened to the window, she would watch from the inside of the building. Woiten then got out of the car, ran into the plant, and then ran through the plant to a loading dock. Woiten testified that as she looked through a window on the garage door of the loading dock, she saw Tony Ellenbecker drive a pick-up truck next to the side of the building, get out of the truck and walk over to the finished white window leaning up against the building, take the window and load it on the back of the truck and then drive off. Woiten further testified that as she watched these events occur about eight feet away, she tried to get the garage door open so that she could confront Ellenbecker with the window in the back of his truck, but she could not get the garage door open. Woiten then reported the matter to her supervisors.

On Monday, December 12, Company officials began conducting an investigation into the matter. At the outset, they interviewed Ellenbecker and Kleinschmidt. In his interview, Ellenbecker denied taking a window from the Company the previous Friday. In his interview, Kleinschmidt admitted making a 20" x 60" low E, white clad window. He also admitted that he did not have a work order to make that specific window. He told Company officials the reason he made it (i.e. that specific window) was because Miles asked him to. Kleinschmidt also told Company officials that Miles and Ellenbecker had each asked him to make windows for them about four or five times previously, and that he had done so.

Company officials then interviewed Miles. In his interview, Miles told Company officials that a theft ring was operating at the Company. Miles also told Company officials that Ellenbecker was part of that theft ring.

Company officials then referred the matter to the Merrill Police Department who conducted their own investigation.

While the Police Department's investigation was ongoing, Ellenbecker and Miles were fired. Ellenbecker was fired on December 12. His discharge notice provided that the reason he was fired was for "stealing from Company property." Miles was fired on December 15. His discharge notice provided that the reason he was fired was for "aiding in a theft of property belonging to Lincoln Wood Products."

The Police Department's investigation took several weeks to complete. During their investigation, police obtained a search warrant and searched the property of Tony Ellenbecker's brother looking for stolen Company property. Their search found no stolen Company property. As part of their investigation, the police interviewed Ellenbecker. Ellenbecker apparently told the police that he had taken the window from the Company on December 12, but that someone else had, in turn, stolen it from him. The 20" x 60" window in question was never recovered by the police. As of the time of the arbitration hearing, no criminal charges had been filed against Ellenbecker or Miles.

After Miles was fired, Company officials learned from the Company's accountant that Dawn Miles had purchased scrap production materials from the Company in November, 1994. Plant Manager Bill Check testified at the hearing that a second reason Miles was fired, other than the one noted in his discharge notice, was Dawn Miles' purchase of scrap production materials in November, 1994. According to Check, her purchase of the foregoing materials violated one of the express terms of Randy Miles' return-to-work agreement.

Kleinschmidt testified at the hearing that he made the 20" x 60" white clad window for Miles at his (Miles') request. Kleinschmidt also testified that before he made that specific window, someone delivered the necessary parts to his work station. Kleinschmidt did not identify the individual who delivered the parts to his work station. Kleinschmidt also testified he put the finished 20" x 60" window on the scrap pile at Miles' request. Kleinschmidt further testified he does not know what happened to the window after he put it on the scrap pile.

POSITIONS OF THE PARTIES

The Union's position is that the Company did not have cause to discharge the grievants. The Union contends the Company has to prove that the grievants did what they were charged with doing, namely stealing a window from the Company (Ellenbecker) or aiding in the theft thereof (Miles). In the Union's view, the Company did not prove either charge. Additionally, with regards to Miles' discharge, it notes that the only reason he was given for his discharge at the time he was discharged was that he allegedly aided Ellenbecker in the theft of the window. The Union argues that the Company's contention that Miles was also discharged for allegedly violating the June, 1994 return-to-work agreement was added for the first time at the arbitration hearing. According to the Union, this new reason was simply added to add weight to his discharge. The Union therefore requests that both grievants be reinstated with a traditional make-whole remedy.

The Company's position is that it had cause to discharge the grievants. According to the Company, it proved that the grievants did what they were charged with doing, namely stealing a window from the Company (Ellenbecker) or aiding in the theft thereof (Miles). To support this premise, it cites the testimony of two witnesses. First, it cites Kleinschmidt's testimony that Miles

told him to make the window in question. It notes in this regard that Miles was not empowered to tell employes to make products, yet that is what he did. Second, it cites Supervisor Woiten's testimony that she saw Ellenbecker load the window that was leaning against the side of the building onto the back of his truck and drive off with it. The Company submits that the testimony of these two witnesses was unrebutted since neither Miles nor Ellenbecker testified at the hearing. With regard to the level of discipline which was imposed upon the grievants, the Company believes termination was appropriate under the circumstances. In support thereof, it relies on the fact that theft is a dischargeable Group 1 offense under the Company's work rules. The Company therefore contends that both grievances should be denied and the discharges upheld.

DISCUSSION

What happened here is that two employes, namely grievants Miles and Ellenbecker, were discharged by the Company. The contractual provision governing discharge is found in Article IX, D, 2 wherein it states: "loss of seniority shall result under the following conditions: . . . discharge for cause." This provision gives the Company the right to discharge an employe, but requires that "cause" exist for the discharge. The undersigned reads the word "cause" as being synonymous with the phrase "just cause."

As is normally the case, the term "cause" or "just cause" is not defined in the parties' labor agreement. While the term is undefined, a widely understood and applied analytical framework or standard has been developed over the years through the so-called common law of labor arbitration. That analytical framework or standard consists of two basic questions: the first is whether the Company demonstrated the misconduct of the employe, and the second, assuming the showing of wrongdoing is made, is whether the Company established that the discipline imposed was contractually appropriate.

As just noted, the first part of a just cause analysis requires a determination of the grievants' wrongdoing. Inasmuch as the parties dispute the exact reason for Miles' discharge, it follows that this, by necessity, is the threshold issue.

The Company contends that Miles was discharged for two reasons: 1) aiding (Ellenbecker) in the theft of a window and 2) violating one of the terms of the June, 1994 return-to-work agreement, namely the term which prohibited Miles or his wife from purchasing scrap production material from the Company. The Union asserts that this latter reason (i.e. that Miles allegedly violated a term of the return-to-work agreement) was not communicated to Miles at the time of his discharge so it should not be considered here. I agree with the Union on this point. It is a fundamental arbitral principle that a discharge must stand or fall upon the reason given at the time of the discharge. Here, the reason given to Miles on the official termination notice was aiding in a theft. No reference was made on that document whatsoever to his violating the June, 1994 return-to-work agreement because his wife purchased scrap production material from the

Company in November, 1994. In the context of this case, the Company certainly could have cited a violation of the return-to-work agreement as a reason for Miles' discharge. However, for whatever reason it did not do so. Instead, the Company chose to list just one reason, namely aiding in a theft. Such was its right. Having done so, though, it could not add a second reason for the discharge (namely violating the return-to-work agreement) at the arbitration hearing. Since that is what it did, Miles' alleged violation of the June, 1994 return- to-work agreement is disallowed from further consideration herein. As a practical matter, this finding leaves Miles with one charge against him, namely aiding Ellenbecker in the theft of a window from the Company. Accordingly then, the undersigned will not consider Miles alleged violation of the June, 1994 return-to-work agreement as a reason for his discharge.

The Company has a work rule prohibiting stealing, namely Group 1, #5. Even if there were no explicit work rule prohibiting stealing though, it is implicit that employes are not to steal from their employer. Theft is of such a nature that the mere occurrence of it gives rise to a general presumption that an employer's business is adversely affected. Certainly the Company has a legitimate and justifiable concern with preventing employe theft. With this interest in mind, the first element of a just cause determination turns on whether the grievants actually did what they were charged with doing, namely stealing a window from the Company (Ellenbecker) or aiding in the theft thereof (Miles).

At the hearing, each side addressed what degree of proof was needed for the arbitrator to make this call. Traditionally in the arbitration of theft cases, unions contend that the standard of proof is guilt beyond a reasonable doubt (as in criminal cases) while employers contend that a less stringent standard of proof is needed. The undersigned accepts the latter view. Although the charges against the grievants can certainly be characterized as criminal in nature, these are not criminal cases. The undersigned is not empowered to decide, and in point of fact will not decide, whether crimes were committed here. That being so, I believe the standard of proof applied in criminal cases (i.e. beyond a reasonable doubt) is not necessary here. Having said that, there is no question that the Company nevertheless has the burden of proof. The question here is what level or standard it has to meet. The undersigned believes that the degree of proof the Company has to meet is to persuade the arbitrator. In other words, the Company has to convince me that the grievants did what they were charged with doing. Obviously, the Company bears the risk of non-persuasion.

Attention is now turned to making that call. With regard to Miles, it is noted at the outset that Kleinschmidt's testimony that Miles asked him to make a 20" x 60" white clad window was unrebutted. The record indicates that Miles was not empowered to tell employes to make windows, yet he did just that. Additionally, no work order existed to make that particular window. Next, Kleinschmidt's testimony that Miles told him to put that particular finished window on the scrap pile was also unrebutted. Once again, Miles was not empowered to tell Kleinschmidt to put a finished window on the scrap pile, yet he did just that. Rhetorically speaking, why would Miles tell another employe to make a specific window for which no work

order existed and then to put that finished window on the scrap pile which is near an exit? I find, just as the Company did, that the reason Miles asked Kleinschmidt to do these things was because Miles was involved in a scheme to steal that particular window. Next, with regard to Ellenbecker, it is noted that Supervisor Woiten's testimony that she saw Ellenbecker put the window on the back of a truck and drive off with it was unrebutted. Given her unrebutted and uncontradicted testimony, there is no reason in the record to discount same. Accordingly, Woiten's testimony concerning Ellenbecker's conduct on December 9 is credited in its entirety. It is therefore held that the grievants did what they were accused of doing--Miles with aiding Ellenbecker in the theft of a window and Ellenbecker with actually stealing a window from the Company.

Having concluded that the grievants engaged in the conduct complained of, the next question is whether this conduct warrants discipline. As previously noted, Company work rule Group 1, #5 expressly prohibits "stealing property from the Company . . ." Inasmuch as that is exactly what happened here, it follows that the grievants' actions constituted misconduct warranting discipline.

The second part of a just cause analysis requires that the Company establish that the penalty imposed was contractually appropriate. Based on the following rationale, I conclude discharge was contractually appropriate for both grievants under the circumstances. First, while the normal progressive disciplinary sequence is for employes to receive warnings and suspensions prior to discharge, that does not mean that all discipline must follow this sequence. Some offenses are so serious they are grounds for summary discharge even if the employe has not been previously disciplined. Theft is one of the so-called cardinal offenses of employe misconduct that is grounds for immediate discharge. The Company's work rules recognize this because stealing is categorized as a Group 1 offense. When an employe violates a Group 1 work rule, the Company does not have to impose progressive discipline prior to discharge; instead, it can discharge immediately. Next, there is nothing in the record indicating that the Company knew of, or had tolerated, similar instances of employe theft. That being so, it does not appear that the grievants herein were subjected to any disparate treatment in terms of the punishment imposed for theft. Finally, the grievants' misconduct is indicative of what could happen again if they continued to work for the Company. The Company considers that prospect unappealing and the undersigned is hard pressed to disagree. Accordingly then, it is held that the severity of the discipline imposed upon the grievants (i.e. discharge) was neither disproportionate to their offenses nor an abuse of management discretion, but was reasonably related to the seriousness of the grievants' proven misconduct. The Company therefore had cause to discharge both grievants.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That grievants Randy Miles and Tony Ellenbecker were terminated for cause. Therefore, their grievances are denied.

Dated at Madison, Wisconsin, this 28th day of April, 1995.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator