BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between MILWAUKEE AND SOUTHERN WISCONSIN DISTRICT COUNCIL OF CARPENTERS and PLATT CONSTRUCTION COMPANY	Case 1 No. 53110 A-5400

Appearances:

Mr. Matthew Robbins, Attorney at Law, appearing on behalf of the Union.
Mr. Thomas Scrivner, Attorney at Law, appearing on behalf of the Company.

INTERIM ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the Company, 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 a grievance. An arbitration hearing was convened January 17, 1996, in Madison, Wisconsin. No witness testimony was presented at the hearing. Instead, the Company raised several procedural objections to the grievance, whereupon the Union requested a postponement of the hearing. The arbitrator granted the Union's postponement request over the Company's objection. On February 7, 1996, the Company filed a motion to dismiss the grievance, along with an accompanying brief, to which the Union responded on February 27, 1996. On March 7, 1996, the Company filed a motion to strike the Union's brief. The Union responded to same on March 8, 1996. On March 28, 1996, the arbitrator denied the Company's motion to strike the Union's brief. Based on the record developed to date, the undersigned enters the following Interim Award on the Company's motion to dismiss the grievance.

DISCUSSION

The Company's motion to dismiss the grievance is based on four procedural objections which can be summarized as follows: (1) The Union's failure to prosecute the grievance at the scheduled arbitration hearing; (2) A determination that the grievance before the arbitrator is limited to the Truax Field project; (3) A request to stay this case pending the final resolution of another arbitration case involving the Carpenters Union; and (4) The alleged untimeliness of the grievance. Each of these matters is addressed below.

The Company's first contention is that the Union's request to postpone the January 17, 1996 arbitration hearing constitutes a failure to prosecute the grievance which, in its view, should warrant dismissing same. The undersigned disagrees. It is common for parties who are surprised by developments at arbitration hearings to ask for a postponement. That is what happened here. Prior to going on the record the Company inquired of the Union which projects were covered by the Union's grievance. The Company took the position that the Union's grievance was limited to just one project (namely the Truax Field project), while the Union took the position that additional jobs were involved which it did not specify. The Union then asked for a postponement in order to determine which other projects were covered by the grievance. The Company opposed this request. The standard which arbitrators routinely apply in deciding whether to grant a request for a continuance where one party objects is whether "good cause" is shown to exist. 1/ The undersigned concluded at the hearing that given the then unanswered question concerning what projects were covered by the Union's grievance, "good cause" existed for a continuance. The undersigned holds here that requesting a postponement under the circumstances just noted does not constitute a failure to prosecute the grievance. As a result, the Company's first objection to the grievance is denied.

The Company's second objection concerns the number of projects covered by this grievance. The record indicates that on February 12, 1996, the Union's counsel responded in writing to the Company's counsel regarding the inquiry raised at the arbitration hearing concerning what projects were covered by the Union's grievance. This letter indicated, inter alia, that the Union believed there to be three projects covered by the grievance, to wit: (1) the Truax Field project; (2) the Gregg VA Hospital project; and (3) the steam tunnel access project at Park and University. The Company seeks a determination from the arbitrator that the Union should be estopped from contending that jobs other than just the Truax Field job are encompassed by the original grievance. To support this contention, the Company relies on the fact that when the Union filed the grievance with the Company, the caption on the grievance letter was referenced "RE: Truax Field." The Company believes this caption limits the instant grievance to just that one job site. Based on the rationale which follows, the undersigned concludes it does not. My discussion begins with a review of the grievance letter itself. It provides as follows:

1/ See, Elkouri and Elkouri, How Arbitration Works, Fourth Ed., at page 253:

> Arbitrators may grant continuances or adjourn the hearing from time to time upon their own motion or upon joint request of the parties. Moreover, arbitrators do not hesitate to do so upon the application of only one party for good cause shown. Indeed, failure to grant a continuance for good cause may make the proceedings vulnerable to court challenge.

August 23, 1995

FAXED AND MAILED

Platt Construction, Inc.
7407 South 27th Street
P O Box 21763
Milwaukee, WI. 53221-0763

RE: Truax Field
Madison, WI.

Attention: R. A. Platt, President

Dear Mr. Platt:

You are hereby notified that the Milwaukee & Southern WI. District Council of Carpenters is filing a grievance as per the 1993-1996 Carpenter's Agreement as per ARTICLE V - GRIEVANCE AND ARBITRATION, SECTIONS 5.1, 5.2, 5.3, 5.4 AND 5.5. regarding the referenced project.

We feel your company has violated the following provisions under the 1993-1996 Carpenter's Agreement.

1. ARTICLE IV - REFERRAL OF APPLICANTS FOR EMPLOYMENT
   SECTION 4.3. DRUG/ALCOHOL TESTING.
   (EXHIBIT D)

As per ARTICLE V, SECTION 5.1., we are available to meet with you in order to attempt to dispose of this grievance. Please call me at your earliest convenience. If I do not hear from you I will have no other alternative than to proceed to file this grievance with the WISCONSIN EMPLOYMENT RELATIONS COMMISSION.

Sincerely yours,

James R. Weiss /s/

James R. Weiss

Business Representative

As can be seen from the letter itself, the only reference to the Truax Field project is contained in the "RE" line. It is not mentioned anywhere else in the letter nor are any facts whatsoever. Most of the letter is boilerplate except for the indented part which identifies the section of the contract which was allegedly violated. Next, nothing in the contractual grievance procedure prevents the Union from clarifying or redefining its grievance at any stage of the grievance process. As a practical matter, this means that the scope of a grievance can be limited or expanded as the case proceeds. Next, it is noted that this contract does not have a provision establishing grievance meetings prior to the arbitration step. It can be inferred from this that the parties contemplated that grievances would be processed in an informal manner. It appears from the record that no meeting was ever held between the parties wherein they discussed the scope of the instant grievance. Instead, after the grievance was filed, they exchanged letters concerning pre-employment substance abuse testing. Specifically, the Union requested information concerning the Company's use of drug testing throughout all the counties covered by the collective bargaining agreement. This request was not limited to just the Truax Field project, and the Company's response to the Union's request for information was not limited to just the Truax Field project either. Given the foregoing, the undersigned is persuaded that the Union's grievance challenges drug testing of employe applicants in general, and is not limited to one specific site. It is therefore held that the grievance is not limited to just the Truax Field project.

The Company's third contention is that this case should be stayed until a final resolution has occurred in another case involving the Carpenters Union. The other case involves D.G. Beyer of Milwaukee. According to the Company, the grievances in both cases relate to pre-employment testing under the terms of a substance abuse testing and assistance program that is identical to the one contained in the contract involved here. The submissions contained in the record regarding the Beyer case and this one indicate that there are indeed similarities between them in terms of the issue and the applicable contract language. The following shows this. It appears that the issue in the Beyer arbitration is whether a contractor may choose to conduct, and whether applicants may refuse, pre-employment drug tests. If that is the issue in the Beyer case, it is certainly similar to the issue which the Union proposed in the instant case, namely "Did the Employer violate the collective bargaining agreement by pre-employment drug testing employes?" With respect to the contract language, it is undisputed that the Beyer arbitration involves the same contract language as is involved here. Notwithstanding these similarities between the two cases, the undersigned is persuaded they are outweighed by the following differences. To begin with, there is the obvious point that a completely different contractor is involved. Second, Beyer is signatory to a different collective bargaining agreement with the Carpenters than is Platt. The Carpenters have different collective bargaining agreements with the (Milwaukee) Allied Constructors Association and the Wisconsin Chapter, AGC. Each is a multi-employer association. Beyer is signatory to the former collective bargaining agreement and Platt to the latter collective bargaining agreement. Although both agreements contain identical contract language relating to drug testing, it appears from the Union's submissions herein that these associations have taken different positions concerning the

meaning of that language. If that is the case, the associations have differing interpretations of the same language. Finally, in the Beyer case the Employer is apparently relying on practices which exist in the Milwaukee area. The Union avers that the practices it has with the AGC are different. In the opinion of the undersigned, the differences just noted between the two cases outweigh their similarities. As a result, the undersigned declines to stay this matter pending the resolution of the Beyer arbitration. This case will therefore proceed independently of the Beyer arbitration.

The Company's fourth contention is that the grievance is untimely. The parties' contractual grievance and arbitration provision (Article V) contains timelines for filing grievances. Section 5.1 of that provision provides that grievances "must be filed within ten (10) days of the incident giving rise to the grievance . . ." It appears from the parties' briefs that they do not disagree about the meaning of this provision. Instead, the question here is when the ten day time period specified in Section 5.01 started to run. In other words, what factual occurrence started the proverbial clock running? The Company contends it was when the Union was told about the Company's substance abuse program in a telephone conversation that occurred on June 19, 1995. The Union disagrees. In its view, the applicable occurrence was when it became aware that the Company was drug testing applicants referred by the Union for employment for work to be performed within the geographical coverage of the collective bargaining agreement. According to the Union, it learned this in August, 1995. The undersigned finds that given the limited record which exists thus far, he cannot yet determine which of these occurrences, if either, started the running of the ten day time period. As a result, the undersigned cannot make a determination herein concerning whether the grievance is timely. Resolution of the grievance's timeliness can be determined only after a full and complete evidentiary hearing.

Based on the foregoing and the record developed thus far, the undersigned enters the following

INTERIM AWARD

The Company's motion to dismiss is denied.

The undersigned will contact the parties to reschedule this case for hearing.

Dated at Madison, Wisconsin, this 2nd day of July, 1996.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator