BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 1855 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT 150	Case 49 No. 54045 A-5478
and	
KRC HEWITT, INC.	

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Mr. Frederick Perillo, on behalf of the Union.
Godfrey & Kahn, S.C., by Mr. Dennis W. Rader, on behalf of the Company.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "Company", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Neenah, Wisconsin on July 2, 1996. The hearing was transcribed and the parties thereafter filed briefs and reply briefs which were received by August 26, 1996. Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

> Did the Company properly terminate grievant Joseph A. Wilfling and, if not, what is the appropriate remedy?

BACKGROUND

The Company maintains a plant in Neenah, Wisconsin, where grievant Wilfling has been employed since 1967.

Wilfling, the Union's then-Chief Steward and former Union president, missed work on Tuesday, February 6, 1996 1/. He telephoned in his absence that morning to Account Clerk Lois

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1/ Unless otherwise stated, all dates hereinafter refer to 1996.

Kahler, who is unrepresented and not in the bargaining unit. Kahler said that Wilfling told her that he would not be in that day and to "Give the message to Greg", i.e., Greg Siebers, his supervisor. Kahler said that this marked the first time that she ever had taken a message from an employe to a supervisor and that she subsequently had Siebers paged to relate Wilfling's absence.

There is a sharp testimonial conflict between Wilfling and Kahler over whether Wilfling also told Kahler that he would be out sick for the next several days with Wilfling claiming, and Kahler denying, that he did so. There is no taped transcription of their telephone call and Kahler admits that she subsequently destroyed the message relating to Wilfling's call which she wrote on a note pad.

Siebers corroborated part of Kahler's testimony by saying he was paged on February 6 and that she subsequently told him that Wilfling would not be coming in for work that day and that he had not given any explanation for his absence. Siebers then filled out an "Absence Report" regarding Wilfling's absence on February 6, where he wrote, "Called…Said he would not be in…Gave no reason."

Wilfling also missed work on February 7, 8 and 9 and he did not call in on any of those days to explain his absences. Siebers on those dates recorded his absences in memos to manufacturing manager Gerald Poss.

Because of his absences, Poss on February 7 asked Union steward Jerry Riehl, then the Union's Committee Man, to telephone Wilfling to inquire why he was absent from work. Poss explained that he spoke to Riehl because he had been told about Wilfling's unexcused absences on February 6 and 7 and "Because I was concerned that if he didn't call in and he didn't have a legitimate reason that there could be a problem." That "problem" referred to the requirement in Article VII, Section 5,(D), of the contract which states that an employe is automatically terminated if he/she misses three (3) or more consecutive days of work without notifying the Company and without giving a reason for his/her absence. Poss said he told Riehl "Joe's reason for just not coming in is not acceptable" and that is why he suggested that Riehl telephone him. Poss stated that Riehl "never did" tell him that he spoke to Wilfling until February 12.

Riehl telephoned Wilfling on the next day, February 8, said, "Greg Siebers asked me where you were and Jerry Poss has been asking." Riehl then asked, "Have you been calling in?", to which Wilfling replied, 'Yes, I called in on Tuesday and talked to Lois.'" Riehl replied, "Well, as long as you're calling in, that's okay. Well, what are you saying?", to which Wilfling replied: "I'm sick and I won't be in for awhile." Wilfling then told him that he had told Kahler two days earlier that he was ill and that he would be absent from work for several days. Riehl added that Wilfling never told him in their telephone conversation that he should tell Poss why he was absent.

For his part, Wilfling testified that he had the flu between February 6-9 and that he telephoned Kahler on February 6 and told her, "Lois, I am sick and I wouldn't be in until further notice", after which he hung up the telephone. Nothing else, said he, was said at that time. Wilfling also said that his wife Beverly witnessed his call to Kahler that morning and that he

originally had asked her that morning to call the plant for him, but that "she said no."

Beverly Wilfling testified that she was present in the kitchen during her husband's February 6 telephone conversation with Kahler and that she heard him say: "Lois, this is Joe Wilfling. I'm not feeling very well. I'll be off until further notice." She was then asked, "Did Mr. Wilfling, your husband, ask you to place that call yourself?" She answered, "No".

Grievant Wilfling said that Riehl telephoned him on February 8 to say that Poss was questioning him about not calling in and that Riehl asked, "Did you call in?" Wilfling testified he told Riehl that he had called on Tuesday, to which Riehl said: "Well, as long as you called in, that's fine." On cross-examination, Wilfling acknowledged that he did not ask Riehl on February 8 to report his illness to the Company and that he thereafter did not contact the Company that week because, "I was so sick at that time, I wasn't worried what the Company was thinking."

Wilfling subsequently reported for work on Monday, February 12, at 7:00 a.m., but was sent home by Shop Superintendent David Senecal who testified that he pulled Wilfling's time card and that he told Wilfling when he reported for work that morning that he should punch a work card (Union Exhibit 2). Senecal also said: "Joe, punch in on this until we figure out what we're going to do with you."

Poss subsequently met with Wilfling later in that afternoon, at which point he told Wilfling that he was being removed from the payroll for failing to notify the Company about his unexplained absences. Asked what Wilfling did wrong, Poss replied: "He didn't do anything. He didn't call. He wasn't off work. He was gone." He testified that he never told Wilfling on February 12 that he was being discharged and that Wilfling there claimed that he had been sick. He further testified that Wilfling insisted on receiving written verification of his termination and that he provided it (Joint Exhibit 5).

Poss admitted on cross-examination that the Company had Wilfling's telephone number; that Wilfling never submitted an oral or written resignation to the Company; and that Wilfling is the first employe he knows who was fired for failing to report for work for three (3) or more consecutive days.

Grievant Wilfling confirmed that Senecal on Monday, February 12, told him to go home when he reported for work that morning and that he did so; that he was called into the plant in the afternoon; that Poss then said that he was terminating Wilfling's employment; and that he, Wilfling, made it "very clear that I did not quit." Riehl corroborated Wilfling's testimony by stating that the Company in that meeting claimed that Wilfling had quit, to which Wilfling replied, "No, I didn't quit, I'm here to work", and that Wilfling also said that he had been absent the week before because "I was sick."

In response to the Union's complaint of disparate treatment, Poss testified that the

Company earlier had terminated employe Gordon Dain because he failed to report to work as ordered when he was in jail 45 days and after his sister, "I think", called in the reason for his absence. Poss also acknowledged that the Company gave Dain an extra five (5) days to report for work or be fired. He also said that the Company in 1990 did not terminate employe James Lyons when he missed work for three (3) or more consecutive days after his wife's death even though Lyons never reported his absence to the Company and that the Company learned through others why Lyons had missed work.

Senecal testified that Dain was not immediately discharged over the absence caused by his incarceration because Dain's daughter telephoned and told him about her father's problem. That is why, he said, proper notice was received in that situation. On cross-examination, he acknowledged that Dain was in jail for about 45 days; that his did not call in every day or so to report his absence; that the Company ultimately gave Dain five (5) days to report for work; and that it then fired him when he failed to do so.

Lyons was called by the Union and testified that he missed more than three (3) consecutive days of work in 1990 without calling in after his wife became ill and died and after he had taken funeral leave. On cross-examination, he explained, "My wife had been sick, and I suppose they [i.e., management personnel] assumed [that she had died] because they all showed up at the funeral." The Company at that time sent flowers to the funeral.

Employe William Gerhardt testified that he was accused in 1996 of having been absent without leave; that Senecal told him that the Company had no record of him having asked for time off; and that Senecal said, "We checked it next door and Lois [Kahler] couldn't find anything." Gerhardt added that after he produced his vacation request, the matter was dropped when Senecal said, "I'm sorry. She just made a mistake." He added that that was the only such error he was aware of in his 31 years of employment.

Wilfling grieved his termination on February 15, hence leading to the instant proceeding.

POSITIONS OF THE PARTIES

The Union argues that Wilfling was discharged and did not quit; that he did not violate the three-day no-call, no-show provision of the contract; that Kahler's testimony cannot be credited in light of her other past errors; that the Company has failed to produce any evidence showing that Wilfling's absence caused "an actual disruption of production"; and that the Company is guilty of disparate treatment of Wilfling because he is the shop chairman and Union president. As a remedy, it asks for a traditional make-whole order providing for Wilfling's reinstatement and backpay.

The Company contends that the issue herein is not disciplinary, but rather, whether Wilfling lost his seniority rights under the contract for not giving a reason for his absence; that

Kahler's testimony is credible; that its concern over Wilfling's absence was "genuine"; that it put the Union on notice of its concern when Poss spoke to Riehl; that Wilfling deliberately did not call in; that it must enforce the contract here because the Union in the future might claim that the Company in the past has waived the contractual language relating to notification; that Wilfling's union activities played no role in his discharge; and that it is not guilty of disparate treatment.

DISCUSSION

Given the head-on credibility clash between Wilfling and Kahler over the content of their disputed February 6 telephone call, both parties recognize that Wilfling's termination depends on whose testimony should be credited. That is why this case turns on the word "No".

That was Beverly Wilfling's response when she was asked whether her husband asked her on February 6 to telephone the Company to explain that he was ill and that was why he was missing work.

Her "No" flatly contradicted grievant Wilfling's assertion that he asked her on February 6 to telephone the Company and report his illness, but that she refused to do so. Wilfling's assertion represents a key part of his defense because the Union relies upon it in support of its claim that she overheard his telephone conversation with Kahler that day.

Wilfling never tried to explain this major discrepancy after his wife testified. His failure to do so leads to the reasonable inference that he, in fact, never asked his wife to telephone the Company and that his contrary testimony was false.

The Union sidesteps this credibility problem by attacking Kahler's credibility and by asserting that Kahler's admitted destruction of her February 6 hand-written note relating to Wilfling's telephone call creates an "adverse inference" that the note would have supported Wilfling's testimony. That certainly would be true if she had a history of keeping such messages. But, the record fails to establish that she routinely kept them. Furthermore, Kahler on February 6 had no idea that her conversation with Wilfling should have been memorialized, as this marks the first time that any employe has been terminated for not calling in. No adverse inference therefore can be drawn over the destruction of her note.

The Union also asserts that Kahler must be discredited because Siebers contradicted her assertion that she before February 6 never took messages for him. Kahler said that no employes before that date ever asked her to tell a supervisor that he/she would not be in when that person's supervisor was available to take the call. Siebers said that he was unaware of any prior instances of where absent employes have left messages with a secretary when he was available, and that "I've gotten messages before from Kahler." These messages, however, apparently involved situations where he was not able to immediately take them. His testimony hence does not contradict Kahler's. Furthermore, the Union has not offered any evidence showing that Kahler's

representation was not true. Hence, there is no basis for discrediting her on this point.

The Union further attacks her credibility by pointing out that she in the past erred in not properly recording Gerhardt's vacation request and by committing other errors. While the record shows that she did make an error involving Gerhardt, that one error alone is insufficient to discredit her testimony here since she testified in such a credible manner and since the Union has not proven that Kahler made any other errors on February 6 when Wilfling telephoned her. Furthermore, the record fails to show that she made certain other errors which the Union attributes to her. However, even if she did, the fact remains that Kahler's testimony was consistent during both direct and cross-examination.

The same cannot be said for Wilfling. The aforementioned major discrepancy between him and his wife blows apart his defense regarding what he supposedly told Kahler on February 6. As a result, I discredit his account of what he told Kahler and, instead, credit Kahler's testimony that Wilfling never told her that he was ill and that he would be missing work for the next several days.

It is true, as the Union correctly points out, that Wilfling never quit his employment since the record shows that he made it very clear to Poss on February 12 that he was willing and able to return to work. Hence, his termination constituted a discharge rather than a quit.

It also is clear that if it wanted to, the Company could have waived enforcement of Article VII, Section 5(D), of the contract, which states in pertinent part:

> **Section 5.** Loss of Seniority. Seniority rights shall cease and an employee be removed from the records if:
>
> A. The employee resigns;
> B. He is discharged for just cause;
> C. He makes a false statement in obtaining a leave of absence;
> D. He is absent for three (3) consecutive working days without notifying the Company; (emphasis added)
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> . . .

The Union certainly would have agreed to such a waiver and an agreement could have been reached between the parties to the effect that Wilfling's return to work would be on a non-precedent basis. That would have protected the Company's rights in the future if a similar situation ever again arose.

Hence, there is no merit to the Company's assertion that it was required to sever Wilfling from employment. It, in fact, had discretion to waive Article VII, Section 5(D), just as it has discretion to waive almost any other contractual provision when the Union is willing to do so.

The Company's determination to terminate Wilfling thus is somewhat puzzling, particularly since - as the Union again correctly points out - it has failed to prove that his absence caused any major disruption of production.

The Union asserts that there can be only one motivation for the Company's actions; i.e., the fact that Wilfling has been a major Union figure and that the Company chose to discriminate against him. But, the problem with this assertion is that there is not one iota of union animus in this record. To the contrary, the record shows that Wilfling was allowed to engage in union activities with total impunity. Moreover, while the Union brushes it aside, the fact remains that Poss spoke to Riehl about Wilfling's situation on February 7, which is something he was not required to do. Hence, it is difficult to see how the Company could have been out to "get" Wilfling when Poss extended himself and searched out Riehl so that Riehl would call Wilfling and thereby give him the chance to report in his illness and to comply with Article VII, Section 5(D). 2/

As for the Union's claim of disparate treatment, the record shows that Dain's situation centered on when, if ever, he would return to work after he got out of jail. That situation differs from the issue here because Dain's sister or daughter reported in the reason for his absence, thereby complying with the notice provision in Article VII, Section 5(D). Here, by contrast, Wilfling was not terminated because he did not come to work; he, instead, was terminated for not calling in on February 7, 8 and 9 and for not giving any reason for his absence as he was required to do under Article VII, Section 5(D), of the contract.

More on point is Lyons' situation since he did not call in his absence after his wife's funeral. Yet despite such lack of calling, the Company chose not to discipline him even though he too, like Wilfling, was absent three (3) or more consecutive work days without giving a reason for his absence.

There, the Company knew that Lyons' wife had died because he had been granted funeral leave right before his absence and because some management personnel attended his wife's funeral. It therefore was reasonable for the Company to then conclude that Lyons was too grieved to report his subsequent absence, which is why it in effect gave him a free pass.

Here, the Company tried to learn about Wilfling's whereabouts when Poss talked to Riehl on February 7. That shows that the Company viewed Wilfling's situation differently from Lyons'

2/ The Union's argument also suffers from the fact that Lyons was a Union official and that the Company never tried to discipline him when he did not call in after his wife died.

and that the Union and Wilfling were then put on notice that there was a problem regarding Wilfling's absence, which is something that did not happen with Lyons.

All this is why the ball fell into Wilfling's court to explain his absence after Riehl telephoned him on February 8. For reasons known only to himself, Wilfling chose to drop that ball when he subsequently refused to report to the Company that he was sick and that he would be out for the next several days and when he failed to ask Riehl to relate that crucial fact to the Company.

The Union, however, points out that if Wilfling's "telephone call was ambiguous about the duration of his absence, he was similarly entitled to the same consideration as Lyons."

In support of this view, the Union cites several arbitration cases where employes were reinstated after they failed to call in and report their absences under contract language similar to that found here. See Elkem Metals, 98 LA 1601 (Duda, 1992); Mission Industries, 98 LA 688 (Weiss, 1991). In Elkem Metals, Arbitrator Nicholas Duda, Jr., found that the grievant had telephoned in his sickness to the company's nurse; that he later told the nurse that he was seeing a doctor and that he would continue to miss work; and that the Manager of Employee Relations was "told that the Grievant would not come to work and the reasons." In Mission Industries, Arbitrator Leo Weiss ruled that the company lacked just cause to terminate an employe who had a miscarriage and who did not report that she would be out for the next three weeks. In so ruling, he found that the company knew about her "medical problems with the pregnancy" and that she had been in a hospital.

Here, by contrast, the Company was never told before February 12 about Wilfling's illness. The facts here thus are somewhat different from those in Elkem Metals and Mission Industries.

Nevertheless, no employe here has ever been terminated for not properly calling in. Moreover, the Company gave Lyons a free pass when he failed to call in. Having chosen to issue a free pass there, it is unfair to terminate Wilfling since he did call in on February 6 and since he made it very clear to the Company on February 12 that he wanted to return to work. When these facts are coupled with his 29 years of seniority, and the fact that the Company was not harmed by his absence, I find that termination is too draconian a penalty for not calling in after February 6.

Hence, he is to be immediately reinstated to his former or substantially equivalent position, but without any back pay, benefits, or seniority for the time that he has missed work. His termination therefore shall be converted to an unpaid suspension and he shall retain the same seniority that he had on February 12.

In light of the above, it is my

AWARD

1. That grievant Joseph A. Wilfling's termination is converted to an unpaid suspension.

2. That he is to be immediately reinstated to his former or substantially equivalent position, but without any backpay, benefits or seniority for the duration of his suspension.

3. That to resolve any questions over application of this Award, I shall retain my jurisdiction for at least thirty (30) days.

Dated at Madison, Wisconsin, this 19th day of November, 1996.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator