BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

WISCONSIN BOX COMPANY

and

THE MIDWESTERN INDUSTRIAL COUNCIL,
UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, LOCAL 3157

Case 13
No. 54188
A-5495

Appearances:

George F. Graf, Attorney at Law, Murphy, Gillick, Wicht and Prachthauser, 300 North Corporate Drive, Suite 260, Brookfield, Wisconsin 53045, on behalf of the Union.

Ronald J. Rutlin, Ruder, Ware & Michler, 500 Third Street, Wausau, Wisconsin 54403, on behalf of the Employer.

ARBITRATION AWARD

According to the terms of the 1995-98 collective bargaining agreement between Wisconsin Box Company (Company) and Midwestern Industrial Council, United Brotherhood of Carpenters and Joiners of America, Local Union 3157 (Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding the termination of Hilda Kalbes. The Commission designated Sharon A. Gallagher to hear and resolve the dispute. A hearing was conducted at Wausau, Wisconsin on October 7, 1996. A stenographic transcript of the proceedings was made and received by November 11, 1996. The parties agreed to submit their post-hearing briefs by December 16, 1996.

Stipulated Issue: 1/

The parties stipulated that the following issue should be determined in this case:

> Did the Company violate the collective bargaining agreement when it terminated the Grievant?
>
> If so, what is the appropriate remedy?

1/ In its brief, the Company asserted that there had been no stipulation of the issue herein. The Company's assertion is not supported by the transcript. In any event, the issue stated in the Company's brief is not substantively different from the above.

Relevant Contract Provisions:

ARTICLE 17 - LEAVE OF ABSENCE

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B. Any employee with less than five (5) years seniority will be granted a six (6) month leave under doctor's care. An employee with five (5) years or more seniority will be granted a twelve (12) month leave under doctor's care. During this disability leave, the Company will pay 50% of the premiums due under the group medical insurance plan and one hundred percent (100%) of the premiums due under the life insurance plan. If the employee is also eligible for state/federal family medical leave, the state/federal medical leave shall run concurrently with the leave provided under this provision. The Company may require, at reasonable intervals and prior to return to work, a doctor's statement or other evidence of proof of ability to return to work.

C. Employees returning from a leave of absence shall be entitled to reinstatement to the same, or substantially similar classification without loss of seniority. In the event they are not able to perform all the duties of the same or substantially similar classification they shall:

1. Be assigned other suitable work, if available, at that job rate pay, or
2. If they are unable to perform any available work, they will be deemed terminated.

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Background:

The Grievant, Hilda Kalbes, worked for the Company from 1976 until the Company terminated her on May 22, 1996. Kalbes had suffered an industrial accident on September 12, 1994 and went on Workers' Compensation leave thereafter. Prior to her accident, Kalbes had

filled the position of Stock-Up Helper (hereafter SUP). 2/

2/ The contract prior to that relevant here referred to Stock-Up Helper positions. In the effective agreement the same position is referred to as Stock-Up Position (SUP).

At its factory in Wausau, Wisconsin the Company makes wirebound boxes and crates and employs 75 employes. Since 1980, the Company has been run by its President Jeff Davis. For the past 25 years, Robert Schultz has been the Company's Plant Manager. An employe senior to Kalbes, Dorothy Klatt, filled a SUP since approximately 1992. 3/ Kalbes posted into the job of SUP in approximately 1993.

Schultz stated that the SUP puts loads into machines for the Stock Layer employes; that the SUP gets loads of veneer using an electric hand lift and also goes to the saw line to get cleats and boards; the SUP then takes these materials to the machines, puts them on different racks and piles so that the Stock Layers can lay the materials properly to make the product; the SUP stands approximately 90 percent of the day and walks between 80 and 90 percent of the work day; the SUP must be able to bend and twist, walk and lift up to 30 pounds. The SUP also relieves the Stock Layers when they go on breaks or need to go to the bathroom. At these times, the SUP takes the place of these employes on the production line.

On September 12, 1994 Kalbes was operating the electric hand lift and got her right heel caught under the lift. This resulted in a sprain of her right foot. The Grievant filed a report of injury which was submitted to the Company's Workers' Compensation carrier, Wausau Insurance Company. From September 12, 1994 until early March, 1995, the Grievant was off work with her industrial injury receiving Workers' Compensation. During this time, Kalbes saw more than six doctors, took various medications and received various types of physical therapy.

On February 14, 1995 Kalbes' primary physician regarding her injury, Dr. Laurie Wolf, released Kalbes to return to work performing sedentary duty for up to eight hours a day and recommended a course of therapy to begin in early March, 1995. On March 1, 1995 Kalbes went to another doctor, Dr. Choucair, who reported that Kalbes was not interested in curative treatment for the swelling and the pain in her ankle and foot and confirmed the wisdom of Dr. Wolf's diagnosis and course of treatment and therapy. Also on March 1, 1995 the Company sent Kalbes a letter stating that it was offering her a sit-down position at the factory beginning on March 6, 1995 for two to four hours per day. 4/ This was done, apparently, because Dr. Wolf had issued the February 14, 1995 return to work release for Kalbes.

3/ Kalbes asserted that Klatt had not posted into her SUP. Plant Manager Schultz stated that he believed that Klatt had posted into that position. Schultz also stated that it is possible that no one signed the posting for that SUP and that the job was then offered to Dorothy Klatt.

4/ The Company gave a copy of this letter to Kalbes' husband to hand-deliver to Kalbes.

On March 6, 1995 Kalbes returned to work. Kalbes was given the option to work between two and four hours per day. Kalbes chose to work two-hour days. During the time she worked (March 6 through March 17), Kalbes worked in a windowless inner plant office preparing time cards: Recording work time on each job for billing purposes. Kalbes was given a desk at which to work in this office; she was not required to stand and she had a drawer which

she opened so that she could elevate her foot. On March 10 and March 15, 1995, Kalbes called in sick. As of March 17, 1995, Kalbes completed twelve hours of work at the sit-down office position she had been given on March 6th.

After March 17, 1995 Kalbes did not return to work at the Company. 5/ On March 20, 27 and April 17, 1995 another doctor (who Kalbes saw for the first time after March 17, 1995), Dr. Davis, submitted forms indicating that Kalbes was unable to return to work. Also during this time, Kalbes rejected Dr. Wolf's recommended course of treatment and therapies and did not show up for her therapy sessions with Dr. Wolf's rehab therapist. On April 2, 1995, another doctor, Dr. Choucair issued a form indicating that Kalbes was able to return to work at a sit-down position for eight hours per day.

By letter dated March 17, 1995 the Company offered Kalbes a full-time (eight hours per day) job within her medical restrictions to begin on March 20, 1995. The Company attempted to give Kalbes' husband a copy of this letter to deliver to his wife but Kalbes' husband refused. The Company then sent a copy of this letter to Kalbes' Workers' Compensation attorney and to Kalbes at her home. On March 23, 1995 Kalbes hand-delivered Dr. Davis' March 20, 1995 excuse form, which stated that Kalbes was unable to return to work. Kalbes did not respond to the Company's March 17, 1995 letter and she did not return to work at the Company. 6/

After April, 1995 the Company and Kalbes' attorneys attempted to negotiate a settlement regarding her employment status. On November 30, 1995 the Company Attorney Rutlin advised the Employer that if settlement negotiations broke down, the Company should have Kalbes subjected to a work capacity evaluation test.

In November and December, 1995, Company President Davis and Attorney Rutlin met with Kalbes, Attorney Gray (Kalbes' attorney) and Union Representative Lowell Schultz to try to work out an appropriate settlement or her return to work. The parties analyzed the possible jobs that Kalbes could perform during these meetings. One such job, not available in November, 1995, was the Diagonal Saw position. It is undisputed that not much walking is involved in that job but that continuous standing is involved and that the occupant of the position must twist, turn and lift

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5/ On or about March 17, 1995, the Company hired Counsel of record in this case to deal with the issues raised by Kalbes' Workers' Compensation, disability leave of absence (DLOA) and her employment status.

6/ Kalbes claimed she never received the Company's letter dated march 17, 1997.

material to feed the saw. Also unavailable in November and December, 1995 was a Printer job which the parties discussed. The Printer job involves putting wood in a machine that prints customer-requested logos or straight line printing, and this job requires standing most of the time. The parties also discussed Veneer Rip work at their meetings. Veneer Rip involves operation of a saw, standing and feeding the saw, bending, lifting and turning. This position was also not available in November and December, 1995.

Also at these meetings, Kalbes and the Company discussed the possibility of her getting retrained in a computer/secretarial position. Because none of the jobs which Kalbes believed she might be able to fill were open during November or December of 1995, the Company and Kalbes came to a tentative settlement agreement on December 20, 1995, which did not include her return to work at the Company. Kalbes' attorney confirmed this tentative agreement in writing by letter dated December 22, 1995, which stated in relevant part, that the Company was ". . . willing to provide tuition and books up to approximately $2,500 for Ms. Kalbes to be retrained . . . in either the secretarial field or in computers."

Thereafter, on January 30, 1996 the Company Attorney Rutlin set a formal settlement agreement including the above items and a release of claims form. However, Attorney Gray did not respond thereto. On March 15, 1996 Rutlin wrote to Gray and asked for a response to the January 30th letter. Sometime prior to May 1, 1996, Gray orally advised Rutlin that Kalbes was unwilling to sign the settlement agreement and general release of claims which Rutlin had forwarded to Gray at the end of January, 1996. By letter dated May 6, 1996, Attorney Gray advised the Company's attorney that Kalbes had rejected the settlement agreement, that he was withdrawing as counsel for Kalbes and that he had forwarded a medical authorization form to Kalbes so that the Company could receive an independent work capacity evaluation on her. On May 9, 1996, Rutlin wrote to Union Business Agent Lowell Schultz and indicated that Attorney Gray had withdrawn from representing Kalbes; and that Kalbes had been unwilling to sign the settlement agreement purposed in December, 1996. The letter also stated:

> Since Ms. Kalbes is unwilling to sign the severance agreement we discussed at our meeting in December, 1995, it is the Company's position that we are going to require Ms. Kalbes to undergo a work capacity evaluation. The purpose of the evaluation will be to determine what, if any, current restrictions she has so we can make a determination as to whether or not she is currently able to perform the essential functions of her job with or without accommodation or whether or not there are vacant positions within the Company that she can perform.
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> I am forwarding directly to Ms. Kalbes the enclosed medical authorization form. Ms. Kalbes should sign the form and return it

to me as soon as possible. We are providing Ms. Kalbes with a self-addressed, stamped envelope for her convenience. We intend to use the medical authorization to obtain medical records from those physicians who have treated her for her condition and obtain the results of the work capacity evaluation that we will have conducted. Therefore, we also seek that Ms. Kalbes provide us the names and addresses of all her treating physicians so we can obtain those medical records.

> We are also advising Ms. Kalbes, by copy of this letter, that her refusal to provide the Company with a signed medical authorization or her failure to undergo an independent work capacity evaluation so that the Company can determine what, if any, obligation it has to provide her continued employment will be considered insubordination and will result in her dismissal.

The Company also sent Ms. Kalbes its May 9, 1996 letter by certified mail. However the letter was returned unclaimed to the Company's attorney. It is undisputed that Union Agent Schultz received the above-quoted letter.

On May 16, 1996 Dr. Harrange issued a return to work/physical capacity form for Kalbes indicating that Kalbes could return to light work four hours per day beginning May 22, 1996. This physical capacity form also stated that she could climb from one to ten percent of the time; that she could stand, walk, bend, work overhead, twist and squat, approximately 11 to 33 percent of her work time; that between 34 to 66 percent of her work time she could sit/drive and work at shoulder level. These restrictions on Kalbes' work and movement were stated to be for a three-month period of time.

Having failed to reach Kalbes by certified mail and having heard nothing from Union Representative Schultz, Company Attorney Rutlin wrote a letter dated May 22, 1996 to Ms. Kalbes which read in relevant part as follows:

. . .

> You have been unable and/or unwilling to perform your job since you were injured on September 12, 1994. We have been more than patient by extending you a leave of absence during this period. Last year we offered you light duty work which you refused to accept. You have now provided us with a work/physical capacity form which indicates that you are still unable to perform the duties of your job. In addition, we do not have work available for you within your current restrictions.
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> In December 1995, we met with you, your attorney, and Union Representative Lowell Schultz. At that time, we discussed the fact that there was no way we could accommodate your restrictions. Your restrictions have not changed. In addition, you have not responded to the letter we sent to you and your Union Representative on May 9.
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> Therefore, we have decided to terminate your employment effective immediately. We wish you the best of luck in the future.

. . .

It should be noted that Kalbes did not return a copy of the medical authorization form to the Company prior to May 22, 1996. During all times relevant hereto, Kalbes had no telephone. During the period when she was off work following her September 12, 1994 injury, her husband (who also works for the Company) refused to hand-deliver letters from the Company to his wife. In addition, after Kalbes' injury, the Company agreed to the Union's request not to post and permanently fill Kalbes' position and to temporarily fill Kalbes' SUP with other unit employes.

Hilda Kalbes testified in this proceeding as follows: Kalbes admitted that the SUP requires lifting, walking and standing. Kalbes asserted that Dorothy Klatt had not posted into the job of SUP but that she was offered that position. 7/ Kalbes claimed that Klatt has been allowed to rest whenever she had a back ache or needed to rest during her work day. Kalbes stated that she believed at the time of the instant hearing that she could work in the SUP if she were given the same accommodations as Dorothy Klatt -- that whenever she got tired or had problems she could sit down. At the instant hearing, Kalbes stated, for the first time, that she believed she could work as a Printer Helper, a Diagonal Saw Helper or a Veneer Rip Helper. Kalbes explained that the Printer Helper has the responsibility of helping the Printer and can sit on a chair during working time; that the Diagonal Saw Helper also has a chair upon which he/she can rest while helping the saw operator; and that the Veneer Rip Helper can rest while if he/she is not taking material off the machine after the Veneer Rip worker has put it into the machine and processed it.

Kalbes stated that she believed it is the Company's past practice to allow people to be off work for long periods of time on Workers' Compensation and that when they return to work, they are given light work/helper positions. For example, Kalbes stated that employe Delmar Klatt was off work for two years on Workers' Compensation with a back injury; that he had been allowed to come back to work as a night security person and that thereafter he returned to his original bidded job. Also, Kalbes stated that employe Darlene Bouvat had been allowed to return as a Printer Helper after she had undergone carpel tunnel surgery. Kalbes stated that her husband, Mark Kalbes had had a Workers' Compensation injury and surgery and that the Company had made accommodations for him so that he did not have to lift heavy objects when he returned to work after his surgery. Finally, Kalbes stated that the Company had accommodated employe Kenny Goreoke after he had suffered an injury by allowing him to work where he would not have to lift more than twenty pounds.

In response to a question whether she had ever turned down any mail or communications from the Company, Kalbes stated "not to my knowledge". Kalbes asserted that she had signed and dated a return to work/physical capability form from Dr. Harrage (described above) prior to the issuance of the Company's May 22, 1996 discharge letter. Kalbes asserted that she went through an independent medical evaluation done by a Dr. Fred Yuhas and that she believed the

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7/ Bob Schultz specifically denied this assertion.

results had been forwarded either to the Company or to Wausau Insurance. 8/ Kalbes stated that she had been unaware that she had been released to return to work full-time in February and April, 1995; and that she was sent to Dr. Spurgeon by another doctor for another opinion regarding her condition at around this time.

Kalbes acknowledged receiving the letter from the Company stating that she was to return to work on March 6, 1995. Kalbes confirmed that all of her work in March, 1995 was done at a desk and that no walking or standing was required. Kalbes stated that she decided to work only two hours per day during early March, 1995 because she felt she could not work more than this due to the pain she was having in her foot and the chills that she was experiencing. Kalbes stated that no one was in the office when she was working there in March, 1995. Kalbes confirmed that she propped her foot up on a drawer of her desk, but she stated that no one from the Company offered her this option or assisted her in propping up her foot. Kalbes admitted that in the first week she returned to work in March, 1995, she called in sick on Friday because she had been up all night with the chills and could not sleep. During the next week (March 13 through March 17, 1995), Kalbes admitted she did not work on Wednesday because she was having medical problems. The following week, Kalbes stated she went on vacation and this was why she did not go to work on March 20, 1995.

After March 17, 1995, Kalbes stated that she did not continue working because she was having side effects from the medications she was taking at the time, because she was sick and not sleeping well and because her foot was cold and swollen. Kalbes stated that during the period March 6 through 17, 1995 when she worked at the Company for two hours a day, she worked in an office room which had no windows; that the Company supervisor (Lamphier), present in that office had turned two air conditioners on in the room and left her alone in the room to work; and that the coldness of the room exacerbated her condition. Kalbes stated that her medical condition has improved greatly since March, 1995.

Company President Davis stated that prior to May 22, 1996, the Company did not have a doctor examine the jobs Kalbes had said she could perform because those jobs were not available and they were beyond her ability to perform according to her doctors. Davis also stated that the two SUP's were filled by Dorothy Klatt and with other fill-in employes who were senior to Kalbes at this time. In addition, Davis stated that Kalbes could not perform the SUP according to her work release information received prior to May 22, 1996. During their December 20, 1995 meeting, Davis stated that neither Kalbes nor her attorney sought to have the Company assign her to a helper position or any light duty take-off job. Davis stated that these jobs are not posted jobs

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8/ President Davis stated that he never received any independent medical evaluation from Dr. Yuhas prior to May 22, 1996.

and are occasionally assigned only as they are needed by the Company. Davis stated that the Company has in the past assigned employes, who have been released by their doctors to work with light duty restrictions, to work as fill-ins for other employes or to work on slower jobs that they are capable of performing until they return to full strength; and that, in fact, this is the type of work that Kalbes was given on March 6, 1996.

Plant Manager Bob Schultz stated that Dorothy Klatt has greater seniority than Kalbes. Schultz further stated that the Company has not made any special accommodations for Klatt; and that both Dorothy Klatt and Hilda Kalbes could sit down on a load and visit or rest if they finished their set-up work and had a long run of product in the machine already stacked up. Finally, Schultz stated that there was no way anyone could perform the SUP if they could not stand or walk at least 75 to 80 percent of the time and that long runs are not available consistently so that sitting down is generally not possible on the SUP.

Materials Manager Eugene Lamphier stated that in March, 1995 he regularly worked in the plant office where Hilda Kalbes was assigned from March 6 through 17, 1995; that Kalbes was in that office for approximately 80 percent of the time that she worked; that the office has one air conditioning unit which was placed in the office because there is no air circulation, there being no windows in the room. Lamphier stated that if the air conditioning unit is not on in the office it becomes very hot (85 degrees and humid) and it is difficult for him to work with the papers he must process. Lamphier stated that he keeps the air conditioning unit in that office on 90 percent of the time throughout the year.

Lamphier stated that when Kalbes came to work in March, 1995, he told her to put her foot up on the drawer in the desk 9/ and that she could come and go as she pleased while working. Lamphier confirmed that Kalbes complained more than once that she was cold. He stated that he told her that it was 74 degrees in the room. Kalbes asked what could be done about the cold and Lamphier told her that the air conditioner was needed for air circulation and that he could not do anything about it. Lamphier stated that he felt that Kalbes should not have been cold as she was wearing several layers of clothing while working. Lamphier stated that Kalbes told him she had been on medication and that it was hard for her to stay awake because she was used to sleeping at that time of day. Lamphier stated that Kalbes nodded off a couple of times while working but woke up right away. Lamphier stated that he believed that Kalbes received the same kind of light duty that other employes had received in similar circumstances while she was working in his office in March, 1995. Finally, Lamphier stated that Mark Kalbes, the Grievant's husband, had told him on March 17, 1995 that he had been instructed not to accept any letters or notes for his wife from the Company.

At the end of March, 1995, Kalbes stated that she went back to see a new doctor, Dr. Davis, because she was ill and in great pain and that Dr. Davis told her that she was not capable of working. Kalbes admitted that she saw a total of at lease five doctors during the period

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9/ Kalbes denied that Lamphier made this statement to her.

after her injury and during her convalescence therefrom. Kalbes asserted that when she saw Dr. Wolf in February, 1995 Dr. Wolf had said nothing to Kalbes about releasing her to return to work and that Dr. Wolf gave her no forms or paperwork at that time.

Kalbes stated that she was not informed of her termination by the Company but that Lowell Schultz called her and told her about it. On cross-examination, Kalbes stated that as of May 15, 1996 when Dr. Harrage had issued her a return to work/physical capacity form, she believed she could perform the SUP if she got the same accommodations as Dorothy Klatt and other employes. However, Kalbes admitted that she never requested that the Company make any accommodations for her to perform the SUP and that she did not know if her attorney had ever done so.

Kalbes stated that the paperwork job she received in March, 1995 for two hours a day was not a posted job at the Company but one that the Company made up for her so that she could return to work. Kalbes admitted that there was probably no work in the plant she could have been assigned that was easier or lighter duty than the office job she received in March, 1995. Kalbes stated that she believed that the Company's agents had turned on the air conditioning in that inner office in March, 1995 intentionally so as to make her uncomfortable. Kalbes asserted that during March, 1995, she should have been allowed to work in the Company's main office, not in the windowless office in the plant.

Kalbes stated that the Printer Helper job and the Diagonal Saw Helper job were not posted jobs nor were they full-time at the Company. Kalbes stated that she never told her husband Mark Kalbes not to take documents from the Company for her. Kalbes stated that she was aware that in May, 1996 no jobs were posted prior to her termination. However, Kalbes asserted that she could have performed an office job in the Company's main office in May, 1995. 10/ Kalbes also stated that at the December 20, 1995 settlement meeting, the parties talked about her returning to the Technical College for retraining, but Kalbes stated she was not given a choice of courses under the settlement agreement proposed by the Company and that the agreement provided that she had to pay the tuition up front and hope to get reimbursement from the Company. Kalbes stated that she never agreed to give up her job at the Company for $2,500 in technical school courses.

Positions of the Parties:

Company:

The Company asserted that the Grievant had failed to cooperate with her doctors making her recovery more prolonged and difficult. The Company noted that Kalbes refused to consider any injections for her condition and did not show up for the rehabilitation evaluation in March, 1995 ordered by Dr. Wolf. In addition, the Company noted that at least one doctor (Dr. Choucair) had found in his written communications with the Company's insurance carrier that Kalbes was "highly critical" of almost every physician that she was sent to.

10/ The office jobs at the Company are not bargaining unit positions.

The Company argued that Kalbes' change of attorneys and doctors and her refusal or neglect to pick up her mail made it difficult for the Company to promptly deal with the ramifications of Kalbes' injury. The Company further contended that it had done all it could to reach a fair settlement with Kalbes but that Kalbes had frustrated these efforts. For example, the Company observed, a tentative agreement reached on December 20, 1995 and confirmed in writing by Kalbes' attorney, Robert Gray, and by the Company in its January 30, 1996 letter, was rejected by Kalbes. The Company was not advised of this until early May, 1996 when Kalbes' attorney, Attorney Gray advised that he had withdrawn from the case.

Thereafter, by letter dated May 9, 1996, the Company advised Union Representative Schultz of Kalbes' situation and it cautioned that Kalbes' refusal to do as the Company requested could lead to her dismissal. Again, the Company could not get delivery of this letter to Kalbes, despite its efforts. Company President Davis stated that he then reviewed the return to work slip submitted by Dr. Harrage and noted that the restrictions that were contained on it would not have allowed Kalbes to return to the SUP; that he considered the fact that Kalbes had not responded to the Company's letters by submitting the information the Company had requested prior to this time as well as the fact that there were no jobs available for her at that time which she was capable of performing, and that he therefore decided to terminate Kalbes' employment by letter dated May 22, 1996.

The Company argued that the grievance should be dismissed because it terminated Kalbes' employment pursuant to the clear language of Article 17B and C. In this regard, the Company noted that there is no dispute that Kalbes was unable to perform any available work after a twelve-month leave of absence due to her work-related injury. The Company contended that because Article 17, Sections B and C are clear and unambiguous, the undersigned should not substitute her opinion of what might be fair and equitable in this case for the language contained in the agreement. The Company noted that Article 17, Section C(2) states that "if (employees) are unable to perform any available work, they will be deemed terminated" after a twelve-month leave under doctor's care has been granted. As Kalbes was not able to return and perform any available job after her twelve-month leave of absence, the Company was privileged to terminate her even though it did so sometime after that twelve-month leave period expired.

The Company pointed out that it had made every effort to accommodate Kalbes with light duty in March of 1995 and that despite her failure to return to work thereafter, the Company attempted to work out a settlement agreement some fifteen months after her leave of absence had begun. The Company took exception to Kalbes' list of helper jobs, mentioned by her for the first time at the arbitration hearing, which she claimed were light duty assignments which she could perform. The Company implied that it had not been given proper notice or the opportunity to consider this information prior to the instant hearing.

The Company took the position that Kalbes' post-discharge ability to work should not be

considered in arriving at this Award. Rather, the Company urged that the Arbitrator should consider only the information available to the Company at the time of termination and apply the terms of the labor agreement to determine whether a violation of the contract has occurred. Thus, the Company asserted that at the time of Kalbes' termination she had been out on leave of absence for more than twelve months and she had proven herself unable to perform any available work so that the Company's termination of Kalbes' employment was appropriate.

The Company contended that it had just cause to terminate Kalbes' employment for her failure to return to work even if Kalbes' failure to return was based upon medical reasons. The Company urged that its action in terminating Kalbes was reasonable, not discriminatory, capricious or arbitrary; that there was no reason to believe that Kalbes' excessive leave behavior would be corrected after May, 1996; and that the Company had tried over many months to resolve Kalbes' employment status and to no avail. In this regard, the Company noted that it had provided Kalbes with a clear warning that her lack of cooperation in returning to her regular job as well as a lack of cooperation in giving the Company information it requested could lead to her termination. The Company noted that the Grievant had consistently failed to cooperate with her treating physicians as well as the Company and that Kalbes had been assigned the lightest possible work in March, 1995 which she refused to perform based upon her perception of her medical condition.

The Company also noted that two doctors (Dr. Wolf and Dr. Choucair) had determined in mid-February and early April, 1995 that Kalbes was able to return to full-time sedentary work, yet Kalbes chose to seek another doctor's opinion to the contrary in response to the Company's request that she return to work. The Company argued that for a period of time there was no resolution to be had regarding Kalbes' physical ability to return to work because Wausau Insurance and Doctors Wolf and Choucair had found that Kalbes was able to come back to work, while Dr. Davis had stated that she was unable to return to work. The Company also observed that Kalbes admitted that she had never asked the Company to make any accommodation for her so that she could return to work at the SUP prior to the Company's issuance of her termination letter and Kalbes conceded that although she believed she was able to do a variety of light duty work at the Company in May, 1995, she could not then perform her regular bidded position. Thus, the Company urged that it was not obligated to create a position for Kalbes; that it was only required by the contract to reinstate her to "any available work" which she could fully perform after she had been on a twelve-month leave of absence for her injury.

The Company also argued that Kalbes failed to prove that the Company violated any alleged past practice by its treatment of her. The Company noted that Kalbes failed to recognize that she was offered a light-duty assignment within her work restrictions on March 6, 1995 and that she was unable to perform in this job past March 17, 1995. Thus, even if there were a past practice involved (which the Company denies) Kalbes was offered a light-duty assignment in March, 1995. Thus, the Company urged, it had just cause to discharge Kalbes and it sought an Award denying and dismissing the grievance in its entirety.

Union:

The Union asserted that Kalbes could perform the SUP with accommodations, the Diagonal Saw Helper job, the Printer Helper job, or any office job at the Company. The Union stated that Kalbes had been both physically and mentally disabled by her injury in September, 1994. The Union stated that although the Company's action is understandable, it is not permitted by the contract. The Union noted that although the Company believed that Kalbes was unable to work in March, 1995, it waited more than twelve months thereafter, before discharging her under Article 17, Section C.

The Union asserted that in May, 1996, Kalbes' injury had improved and as other employes had been accommodated in the past, so should the Company have accommodated Kalbes. The Union asserted that the Company was not justified in terminating Kalbes under either Article 17 or Article 10, Section G. Therefore, the Union sought an order from the Arbitrator that Kalbes be given an opportunity to try some jobs at the Company that she is able to perform; that thereafter, if she could perform on the job, she should be made whole; but that if she is unable to return to work after a reasonable test period on available jobs, then the Employer would be justified in terminating her employment. In the alternative, the Union suggested that the Company could simply live up to the settlement agreement if Kalbes were unable to return to work after a reasonable test period on the job.

Discussion:

It is undisputed that the Grievant was eligible for and received an Article 17B disability leave of absence (DLOA). It is also undisputed that Kalbes was allowed to remain on DLOA for a period of time longer than the twelve months provided for in Article 17B. In addition, it is clear that Article 17B gives the Company the discretion to require ". . . at reasonable intervals. . ." and prior to the employe's return to work from DLOA ". . . a doctor's statement or other evidence of proof of ability to return to work." Furthermore, Article 17C describes the type of work that must be offered to employes who properly return from a DLOA -- ". . . the same or substantially similar classification." It is significant that this language does not guarantee that the Company place an employe who returns from DLOA in the same job or a substantially similar job. I note that the effective labor agreement, in Article 20 - Wage Rate and Classification lists six separate classifications and that the SUP Kalbes held prior to her DLOA is one of twelve Class 3 jobs listed in Article 20. 11/ Article 17C also states that if the employe returning from a DLOA cannot perform "all the duties of the same or substantially similar classification," the employe should then be assigned to "other suitable work, if available at the job rate pay." In the alternative and assuming the employe is "unable to perform any available," the employe will be "deemed terminated."

11/ The eleven other jobs listed under Class 3 are: Nailer "B", Night Watchman, Hand Rip, Veneer Rip, Planer Operator, Printer, Shipper Helper "B", on-the-road Truck Driver, Chip Person, Wirebound Set-Up "C", and Wirebound Operator.

In this case, although the evidence failed to show when Kalbes' DLOA actually began, there is no dispute between the parties that Kalbes was granted a DLOA and that that DLOA went on well beyond the twelve months provided for such leaves in Article 17. 12/ It is also clear that the Company was under no contractual obligation to extend Kalbes' DLOA beyond the twelve-month period provided in Article 17.

In regard to the type of work the Company was required to offer Kalbes, I believe the record showed that the Company met both its contractual obligations and its obligation to comply with Kalbes' return to work restrictions. In this regard, I note that on March 1, 1995 the Company offered Kalbes a sedentary job for less than eight hours per day, even though on February 14, 1995, Dr. Wolf had released Kalbes to work in a sedentary position up to eight hours per day. Indeed, Kalbes admitted that the job the Company gave her beginning on March 6, 1995 was the easiest and lightest duty available at the Company and that the Company had given her a choice whether she wished to work two or four hours per day at this sedentary job. Kalbes also admitted that at this time she was not able to perform "all the duties" of the SUP or of other class 3 jobs. The Company's creation and offer of the sedentary position to Kalbes beginning on March 6, 1995 went beyond the letter of Article 17, as the Company was only required under Article 17C(1) to give Kalbes "other suitable work, if available. . . ."

12/ I note in this regard, that the Union made no claim that the Company failed to provide the insurance payments described in Article 17B after Kalbes' injury. Kalbes (under the documentary evidence herein) was paid for time lost from work beginning on the date of her injury (September 12, 1994) forward. Thus, based on the evidence herein Kalbes' DLOA must have begun on September 13, 1994 so that she was on DLOA for more than eighteen months at the time the Company discharged her.

Despite the admitted ease of the sedentary job Kalbes was given from March 6 through March 17, 1995, Kalbes did not work two full weeks at this job because she called in sick one day during each of the two weeks. In addition, Kalbes did not return to her sedentary job at the Company after Friday, March 17, 1995. On this point, I note that the Company sent Kalbes an offer of full-time work within her medical restrictions (as stated by Dr. Wolf) to begin Monday, March 20, 1995. 13/ Although the Company sent this letter to Kalbes and to her attorney and attempted to get Kalbes' husband to deliver this letter in person to his wife, Kalbes stated that she did not receive this letter or notice of it. Rather, Kalbes stated that she went on vacation during the week of March 20th. The documentary evidence showed that at this time, Kalbes also went to a new doctor, Dr. Davis, who issued her a slip stating that she was unable to return to work as of that date (March 20, 1995). I note that Dr. Davis issued similar slips to Kalbes on March 27 and April 17. In contrast, on April 2, 1995, Dr. Choucair issued Kalbes a return to work slip in a sedentary position for up to eight hours per day. At the very least, Kalbes' actions made it extremely difficult for the Company to determine Kalbes' medical condition and they delayed any resolution of Kalbes' employment status for a period of several months.

In the Fall of 1995, the Company and Kalbes' attorney, Robert Gray, entered into negotiations regarding what if any positions at the Company Kalbes could perform. It is undisputed that during these negotiations, the parties discussed only the SUP, Veneer Rip, Diagonal Saw Operator, and Printer positions and that they concluded that Kalbes was not able to fully perform any of these jobs as of December 20, 1995 when negotiations ceased. In addition, it is clear that of the jobs discussed, only the SUP was available on or before December 20, 1995, as the Company had agreed to the Union's request not to fill Kalbes' SUP after her September 12, 1994 injury. Furthermore, Doctor Wolf and Choucair's return-to-work/physical capacity slips for Kalbes demonstrated that Kalbes was not capable of fully performing SUP duties in the period from February 14 through April 2, 1995.

However, these facts have somewhat limited relevance herein as the ultimate question in this case is whether the Company was justified in discharging Kalbes on May 22, 1996. To determine this ultimate question, several issues must be addressed first: 1) Were any jobs

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13/ Kalbes claimed that she did not receive the Company's March 17, 1995 notice to return to work on March 20, 1995 to sedentary work eight hours per day. I find Kalbes' testimony incredible. The Company mailed one copy of its March 17, 1995 notice to Kalbes, a second copy to her attorney and it attempted to give a third copy to Kalbes' husband to be hand-delivered to Kalbes. Kalbes' husband specifically told Company agents that he was told to refuse to accept any further mail for his wife from Company agents. Kalbes' statements that she had not, to her knowledge, refused to receive any mail from the Company, her belief that the Company had put her to work in a cold office in March, 1995 to make her uncomfortable, Kalbes' stated reasons herein for not returning to work on March 20, 1995 and her submission of Dr. Davis' March 20th excuse at that time, her lack of a telephone at home during this period of time, the fact that she switched both doctors and attorneys repeatedly during her DLOA and her refusal to follow her doctor's advice all contribute to a conclusion that Kalbes was not a credible witness.

available at the Company prior to May 22, 1996 in the same or substantially similar classification; 2) was Kalbes capable of performing "all the duties" of any of these jobs; and 3) if not, was other suitable work "available" at that time.

Two issues which Kalbes mentioned in her testimony must be addressed at this juncture. Kalbes stated that she believed that in May, 1996, she could have performed a clerical job in the Company's main office. In this regard, I note that the office jobs at the Company are outside the Union's bargaining unit and that therefore, the Company had no responsibility to offer Kalbes one of these positions had one been available in May, 1996.

Kalbes also stated that she believed that in May, 1996 she could have performed a "helper" job in her classification. On this point, I note that it is undisputed that the Helper positions which Kalbes referred to are not posted bargaining unit positions. Rather, these are positions that the Company has determined it has a need for from time to time. No evidence was offered to show that the parties had ever discussed Kalbes' filling a Helper position prior to May 22, 1996 and no evidence was offered to show that any such Helper positions actually were available prior to May 22, 1996. Therefore, I find that the evidence herein failed to show that any helper jobs were "available" in May, 1996 pursuant to Article 17C.

In regard to what other jobs were available on or before May 22, 1996, both Company President Davis and Kalbes stated that in May, 1996, prior to Kalbes' termination no jobs had been vacated and posted at the Company. Only the SUP was available at this time. As no jobs in the same or similar classification were available prior to May 22, 1996 except the SUP, the question must be answered whether Kalbes possessed the ability to perform all the duties of the SUP as of May 22, 1996. In deciding this question, Dr. Harrage's return-to-work/physical capacity form dated May 15, 1996 is critical. This slip demonstrates that Kalbes could not have performed all of the duties of the SUP in May, 1996, as she was then able to stand, walk, bend, work overhead and twist only occasionally (11 to 33 percent of her work time). Furthermore, it should be noted that Dr. Harrage's May 15, 1996 slip released Kalbes to work at light duty up to four hours per day. In these circumstances, it is reasonable to conclude that Kalbes was not able to perform all the duties of the SUP on or before May 22, 1996. 14/

Kalbes gave examples regarding what she believed to be the Company's past accommodations of employes returning after completing DLOA's which she believed should have been applied to her case. In analyzing this evidence, even assuming that Kalbes' examples were accurate, they do not demonstrate that the Company discriminated against Kalbes or treated her in an arbitrary or capricious manner. In this regard, I note that all of the employes Kalbes named, although released to return to work under some (unknown) medical restrictions at the time the Company accommodated those employes' restrictions, those restrictions must not have been severe enough to lead to a conclusion that those employes were unable to perform any available work. In

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14/ Furthermore, contrary to Kalbes' statements, the evidence failed to show that Dorothy Klatt had ever been accommodated to the extend Kalbes claimed -- that she could sit down and rest whenever she pleased while working in her SUP.

addition, the cases described by Kalbes gave no details regarding the medical restrictions under which each employe had been released and gave no specifics regarding the type of work that was then available at the Company when these employes were returned from DLOA. In addition, I note that Kalbes was offered very light sedentary work initially upon her release to return to work in early March, 1995 and that that work was well within Kalbes' medical restrictions at the time. 15/ The fact that the Company assessed the facts before it in May, 1996 and determined to discharge Kalbes rather than again offering her a sedentary position at less than eight hours per day does not demonstrate that the Company thereby violated Article 17 of the collective bargaining agreement. Rather, given the facts it had at the time, the Company made a reasonable conclusion that Kalbes was unable to perform all the duties of the same or similar classification and that there was no suitable other work in the plant available for Kalbes which she could perform.

Based upon all of the relevant evidence and argument in this case as well as my evaluation of the credibility of Kalbes, I issue the following

AWARD

The Company did not violate the collective bargaining agreement when it terminated the Grievant. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 18th day of March, 1997.

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

15/ Although Kalbes stated herein that she should have been allowed to perform the inner office job she was given beginning on March 5, 1995, in the Company's main office, I note that she never asked Supervisor Lamphier or any other agent of the Company to be allowed to move to the Company's main office.