BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between CARPENTERS LOCAL #1488, MIDWESTERN INDUSTRIAL COUNCIL OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA and LINCOLN WOOD PRODUCTS	Case 24 No. 55129 A-5578

Appearances:

Mr. Michael A. Kenny, Union Business Agent, appearing on behalf of the Union.

Mr. Tim Diels, Assistant Plant Manager, and Ms. Janet Clark, Human Resources Manager, appearing on behalf of the Company.

ARBITRATION AWARD

Carpenters Local #1488, Midwestern Industrial Council of the United Brotherhood of Carpenters and Joiners of America, hereinafter referred to as the Union, and Lincoln Wood Products, hereinafter referred to as the Company, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The parties jointly requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a discharge. The undersigned was so designated. Hearing was held in Merrill, Wisconsin, on June 11, 1997. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on July 1, 1997.

BACKGROUND:

The facts underlying the instant grievance are essentially undisputed. Corey Meyer, a supervisory employe, observed the grievant, Chris Wyland, eating chips on January 31, 1997, during regular work hours, a violation of the work rules. Meyer wrote up a written warning to the grievant for violating the work rules. Meyer contacted the Union Steward, Rodney Young, to be present when he issued the written warning to the grievant. Meyer presented the written warning to the grievant in the presence of Union Steward Young and asked him to sign it. The grievant refused and would not sign the written warning. Meyer then went to Virgil Kleinschmidt, Shipping Supervisor, and told him that the grievant refused to sign the written warning. Kleinschmidt and Meyer went to the grievant, and with the Union Steward present, asked him

twice to sign the written warning. Kleinschmidt informed the grievant that by signing the document, he was not agreeing with it and had the right to grieve it. The grievant still refused to sign it. In October, 1996, the grievant had been given a two-day suspension which he signed, noting he did so "under protest." Meyer and Kleinschmidt went to talk to Tim Diels who told them the refusal to sign was a form of insubordination and to terminate the grievant. At 2:30 p.m. on January 31, 1997, the grievant punched out because his work day had ended. The grievant's time card was pulled and when he came in on Monday, February 3, 1997, he was immediately terminated. The grievant grieved his termination which was appealed to the instant arbitration.

ISSUE:

The parties stipulated to the following:

Was Chris Wyland terminated for cause?

If not, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE IX: SENIORITY

. . .

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

. . .

2. Discharge for cause. (The Company shall immediately notify the Union in writing with the reason or reasons for such discharge.)

. . .

COMPANY'S POSITION:

The Company contends that it justly terminated the grievant for insubordination of a Group 1, Sub-rule 1 offense, which under Company rules results in discharge for the first offense. It argues that the grievant intentionally refused his supervisor's instructions by not signing a written warning for his violating Company Rule, Group 3, Sub-rule 9. It observes that Meyer

properly wrote the grievant up for "lunching" and the grievant refused many times to sign the written warning for lunching. It submits that merely because the grievant agreed to stay at work longer on January 31, 1997, does not excuse his lunching. It points out that the grievant had been given a written warning in the past and signed it "under protest" and he could have done the same with the January 31, 1997 warning.

The Company asks a series of questions as to why the grievant and his steward did not testify and why certain evidence was presented by the Union. It insists that the grievant knew the consequences of what would happen but he just tried to "play the game." It claims that by not listening to anyone, the grievant showed disrespect to the Company.

The Company asserts that its rules must be enforced to help continue its main purpose: manufacturing quality windows and patio doors. The Company notes that the grievant received a verbal warning on May 18, 1995, a written warning on December 20, 1995 and a two-day suspension on October 3, 1996. It states that the January 31, 1997 written warning was his fourth. It argues that it has proven that the grievant continued to intentionally violate the rules by disregarding the standard of behavior the Company expects of its employes.

UNION'S POSITION:

The Union contends that the Company's version of what took place lacks credibility and there was no violation of any Company rule. It submits that no Company witness could state that it is an automatic termination for failure to sign any kind of written notice if asked to do so. It disputes the Company's claim that no one ever failed to sign a written warning by its evidence that an employe had refused to do so. It maintains that the Company has not proved that all employes must sign written warnings.

The Union alleges that it was not given a complete definition of what "insubordination" really is. Using the dictionary definition as "disobedient to authority," the Union insists the grievant was not disobedient to anyone. It claims that he felt that if he signed the document he would be admitting guilt and was only doing what he felt was correct and was not trying to cause trouble.

The Union argues that the Company created the situation in which it failed to inform the grievant as to the penalties if he failed to sign. It states that the grievant was not told he would be terminated for failing to sign this slip and there is no rule that provides for automatic termination for failing to sign a slip. It submits that there is no such rule or penalty. It contends that no employe, if faced with termination, would refuse to sign a slip if asked to do so. It claims that the grievant felt it was no big deal and his actions would have been different had he been informed of the consequences. It concludes the grievance should be upheld and the grievant made whole.

DISCUSSION:

The Company has the burden of proving that it had cause to discharge the grievant for insubordination. The undersigned equals cause and just cause. In order to prove insubordination to sustain a termination, an employer has to show that the employe was given a clear and direct order and the employe was informed of the consequences for failure to comply with such an order. Illustrative of these principles are the following decisions:

In SYNTEC INDUSTRIES, 99 LA 105 (Stanton, 1992), the arbitrator stated:

> It is generally recognized that in order to conclude that just cause exists for the imposition of disciplinary action for Insubordinate conduct, the following events must occur:
>
> 1. An authorized Managerial Employee, understood as such by the Employees under whom they work, issues a clear and explicit order or directive that a reasonable Employee would understand both its meaning and that it was indeed such a directive;
> 2. Followed by a clear and explicit pronouncement of the penalty that may be imposed for the Employee's failure to comply therewith; and
> 3. The Employee's clear and explicit refusal to follow the order or directive.

In Tension Envelope Corp., 99 LA 1208 (Bankston, 1992), the arbitrator stated:

> "Insubordination is universally recognized as misconduct for which employees can be penalized even in the absence of formal notice." Koven and Smith, *Just Cause: The Seven Tests*, 2d ed., BNA, (1992) p. 79. "Most cases of insubordination involve a worker's refusal or failure to follow the directive of a duly designated member of management or comply with an established procedure." *Grievance Guide*, 6th ed., BNA, (1982) p. 29. It is not unusual for insubordination to result in discharge. But, where the discharge is challenged, management must be able to show that: (1) the order or instruction was clearly expressed; and (2) the employee was made aware of the possible consequences of failure or refusal to comply. *Id.*, p. 29. According to Arbitrator Young, the requirement is for "very clear

> instructions," and "even more *explicit statements* about the penalty for failure to comply." *Micro Precision Gear & Machine Corp.*, 31 LA 575, 579-80 (1958). (emphasis added)

Applying these principles to the facts of the instant case reveals that the evidence failed to establish the two requirements necessary to conclude there was just cause to discharge the grievant.

First, the grievant was never given a direct order to sign the written warning. The evidence establishes that the grievant was asked to sign the document several times and refused. There is a difference between being asked to do something and being directed to do something. Employes may be asked to work overtime and a refusal would not be insubordination, but if directed or ordered to work overtime followed by a refusal may very well be insubordination. The Company alleges that the grievant was simply "playing the game," inferring that the grievant knew and understood the request to sign was an instruction to sign. But even assuming this is true, the second requirement is completely lacking.

As to the second requirement, the evidence established that no one in management for the Company told the grievant the consequences for failing to sign. Neither Meyer nor Kleinschmidt told the grievant that discharge might be the consequence of his failure to sign. They may not have known the consequences until they checked with Tim Diels, but by then the grievant had punched out and left. Immediately Monday morning he was discharged without such a warning. The grievant's steward may have told him he could be discharged, but the Company cannot rely on what the Union steward says and is not bound by any Union statement to the grievant. It was the Company's obligation to inform the grievant of the consequences of his refusal to sign because a warning of the consequences allows the grievant the opportunity for sober reflection and possible correction of his conduct such that disciplinary action need not be taken. Inasmuch as the Company failed to prove that it met the general requirements of cause to discipline for insubordination, discharge is inappropriate.

Even if the Company had proved that the grievant was insubordinate, discharge would not be appropriate. The refusal to sign the written warning, although somewhat related to work, did not involve production or job performance in manufacturing quality windows and patio doors and did not affect the Company's operations. The grievant's conduct was not a flagrant and unjustified refusal to follow a work order. The Union argued that the grievant felt it was no big deal, however, the grievant never testified so how he felt or what he thought cannot be considered by the undersigned. The evidence presented at the hearing as to what occurred is unrefuted by the grievant. What is important here is that the grievant's signature on the written notice wasn't required to complete the discipline. The discipline was complete when it was given to him and he could grieve it later. The record does not establish that the written warning was grieved and even if it was, it is not before the undersigned and stands whether the grievant signed it or not. The

point is that the receipt could be proved by two Company supervisors and the Union steward. The above discourse is a long way of saying that a refusal to sign, even if given a direct order to do so and a notice of the consequences for failure to sign, would be misconduct but would not justify termination as the penalty is considerably out of proportion to the misconduct. 1/

The undersigned finds that the Company lacked cause to terminate the grievant based on the facts presented and the grievance is upheld.

On the basis of the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

Chris Wyland was not terminated for cause. The Company shall immediately offer to reinstate the grievant to his former job and make him whole for any lost wages and benefits less any unemployment compensation and interim earnings. The undersigned will retain jurisdiction for a period of thirty (30) days from the date hereof solely for the purpose of resolving any dispute with respect to the remedy herein.

Dated at Madison, Wisconsin, this 11th day of August, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

1/ See Kilsby Tubesupply Co., 76 LA 921 (Weiss, 1981).