BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**TEAMSTERS LOCAL 695**

and

**CITY OF MADISON**

Case 191
No. 54241
MA-9597

*(Grievance of Bruce B.)*

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Appearances:

**Mr. Larry W. O'Brien**, Assistant City Attorney, City of Madison, City-County Building, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53710, appearing on behalf of the City.

**Ms. Naomi E. Soldon**, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

## ARBITRATION AWARD

Teamsters Local 695 and the City of Madison are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances arising thereunder. The Teamsters filed a request, in which the City concurred, for the Wisconsin Employment Relations Commission to designate a member of its staff to hear and decide a dispute concerning the meaning and application of the terms of the agreement relating to discipline. The Commission appointed William C. Houlihan to serve as impartial arbitrator. Hearing in the matter was held on July 2, 1997, in Madison, Wisconsin. A stenographic transcript was available to the parties by July 18, 1997. The parties submitted written arguments and replies, the last of which was received on September 16, 1997.

## BACKGROUND

This grievance concerns the City's termination of Bruce B., a transit procurement specialist with the City's Madison Metro transit utility, for six days' absences in February, 1996. The City contends that the grievant, an office worker, left the workplace without authorization

and thereafter became subject to the contractual provision authorizing discharge for being absent without notice. The Union contends that the grievant left the workplace legitimately when he determined that the City was not applying the proper return-to-work restrictions following his partial recovery from a work-related injury.

B., a Metro employe since 1978, began suffering from carpal tunnel syndrome in 1994, and was placed on work restrictions on November 9, 1995. A report on that date from Dr. Richard G. Schmelzer recommended B. use wrist splints, and noted that he "needs 10 minute breaks per hour from repetitive hand activities - typing mouse work (and) writing."

The November 9 report gave B. a return-to-work date of November 10, 1995. He was not returned to work on that date, however, because a determination was made that the wrist splints effectively prevented B. from performing any tasks, even on light-duty assignment.

B. was placed on workers' compensation leave on December 1, 1995, due to carpal tunnel syndrome. On that date, Schmelzer issued new restrictions, which he sent to the employer by facsimile transmission, as follows:

> Mr. B. is advised to limit work duties requiring repetitive use of forearms, wrists and hands. 22 bilateral flexon tendonitis and mild bilateral carpal tunnel syndrome. He will need an appropriate restrictive limited work duties to allow healing. He is actively engaged in physical/occupational treatments. Limitations will continue until evaluation on 12/15/95.

The City of Madison is self-insured for worker's compensation, and contracts with Crawford and Company to administer the benefits. Jane Warnecke is the Crawford employe assigned to the Madison contract, and the primary Crawford contact relevant to this proceeding.

On February 7, 1996, Jane Warnecke wrote to B. as follows:

> Please be advised that your treating physician has outlined specific physical work restrictions and has advised that you have been authorized to return to work utilizing the restrictions as outlined. To that end, we have contacted Madison Metro Transit and have confirmed that there is a limited duty assignment available for you at this time. Therefore, I would request that you <u>contact Frances Taylor at Madison Metro Transit within the next two (2) working days to discuss this assignment</u>. (emphasis in original).

On February 14, 1996, Warnecke wrote B. as follows:



> I have been advised from Madison Metro Transit that you have not as yet reported for your light duty assignment. I refer you to my letter of February 7, 1996 in which I advised you to contact Frances Taylor at the Madison Metro Transit Division in order to make arrangements to return to work/light duty.
>
> I am again advising you to contact Frances Taylor at your employer in order to discuss your return to work. Failure to do so will jeopardize your continuing Worker's Compensation benefits.

Frances Taylor is the Madison Metro official in charge of coordinating, assisting and assigning light duty assignments to employes returning from Worker's Compensation. B's immediate supervisor at his normal position is Elizabeth Boehinger. Based on information she receives either from Jane Warnecke, the employe or the employe's supervisor, Taylor provides information on the physician-imposed restrictions to the particular Madison Metro employe preparing a work assignment for the returning employe.

On February 15, 1996, B. presented himself for work. Taylor, acting on the restrictions indicated in the Schmelzer letter of November 9, 1995, and the utility's work needs, notified B. he was being assigned to light duty with the Para-Transit Unit. B. was uneasy and inattentive, sought a 24-hour notice period before his hours were changed, and said he would be unable to do the work Taylor had indicated he would be assigned.

Taylor then brought B. to a nearby office and presented him to Jayne Ninedorf, of the Para-Transit Unit, to whom she had previously given a copy of B.'s work restrictions. Ninedorf had previously said she had appropriate work for B., consistent with the restrictions. Taylor noted that B. would need a ten-minute break each hour for any type of repetitive work, consistent with her understanding of the restrictions noted. According to Taylor, B. did not raise any objections to the accuracy of the restrictions which Taylor and Ninedorf were discussing at that time. Taylor testified that she advised B. that if he had problems, to let her know or if he needed breaks they could be accommodated.

While Ninedorf finished a task, B. successfully performed some photocopying on behalf of another employe. Upon his return to Ninedorf's office about 20 minutes later, Ninedorf gave B. a handwritten list of clerical tasks such as entering dollar figures in a ledger, checking voucher numbers against charges, stuffing envelopes, entering notations for cancellations, no shows and transfers from a schedule, and removing outdated data from envelopes. Ninedorf testified that she

wrote down a series of tasks "of different variety. . .in no particular order. I did tell him what was most important to me." She indicated that she set no deadlines, and that she encouraged him to take breaks, if needed. She indicated that she advised B. ". . .if he felt that it was something he didn't want to do, stop doing that and go on to something else, rotate



it, move it, do it in the way he wanted to." She indicated that she attempted to avoid repetitious behavior. She indicated that the task of writing dollar amounts involves little hand motion since much of the work time is spent searching for numbers. B. testified that Ninedorf directed: "I think what we're going to have you do is stuff envelopes. We have a lot of envelopes to stuff, and there is a deadline." He also testified that the proposed work setting would have been detrimental to a pre-existing back condition. I credit Ninedorf's account of the directions given, which was corborrated by a co-worker sitting nearby.

During this period, B. was on a prescribed regimen of several psychotropic drugs, including the stimulant Ritalin, and an anti-depressant, to combat the effects of adult Attention Deficit Disorder. B. eventually evidenced such agitation that Ninedorf requested a co-worker with whom she shared the office to move to a desk immediately behind hers.

There is no evidence B. attempted to perform any of the tasks other than the photocopying. In a meeting that lasted only a few minutes, B. again told Ninedorf he could not do any of the listed tasks because of his work restrictions. Within a few moments, B. then returned to see Taylor, complaining that he was unable to do the work Ninedorf had assigned.

B. believed that Taylor had an outdated version of his work restrictions, and that Taylor's policy was that he should work until he was in pain. B. told Taylor he was already in pain. B. believed that Taylor was uninterested in his actual condition and appropriate restrictions. At B.'s request, Taylor then called Warnecke, who said she had no restrictions on file other than the ones which Dr. Schmelzer issued on November 10. Neither Taylor nor Ninedorf had Dr. Schmelzer's December 1 restrictions.

In an increasingly agitated state, B. several times asked Taylor for authorization to leave, which she continually told him she had no authority to do. B. finally told her he was going home sick; Taylor's reply indicated she understood that he was going to do so.

After conversations with other employes, and a failed attempt at contacting his physician, B. left the worksite. As he left, he told Ninedorf, a bargaining unit employe, that he was leaving. She replied, "okay". He neither contacted a supervisor nor reported to work until February 26, 1996, when he again reported for work.

On February 21, 1996, B. saw Dr. Oreck, who noted in the section on "Comment &/or Restrictions," the following:

4 hr/day, no typing, 50 min on/10 min off - until next office visit with me 2-28-96



Oreck made no notation in the "may return to work on" box. On February 26, B. returned to Oreck's office, and had Oreck's assistant check the box and insert that day's date.

On February 23, 1996, Transit Service Manager Ryan Larsen wrote B. as follows:

RE: Letter of Investigation - 5 consecutive no-shows for work

Notice of Hearing

You are hereby placed under investigation for failing to arrive or show up for your assigned duties as outlined under article 14.66(D) of the labor agreement.

You failed to report for work or notify your immediate supervisor or appropriate designee of your absence on: Friday, February 16, 1996; Monday, February 19, 1996; Tuesday, February 20, 1996; Wednesday, February 21, 1996; Thursday, February 22, 1996; and Friday, February 23, 1996.

You are invited to a pre-determination hearing on Friday, March 1, 1996 at 9:00 AM, in the Madison Metro conference room. If you are interested in being represented by an official of the Teamsters Union, it is your responsibility to inform the steward of your choice so they make may arrangements to attend.

You will be advised of the outcome of this hearing.

On February 27, Warnecke wrote to B. on behalf of Crawford & Company, notifying him that the Company could not authorize worker's compensation benefits for the period February 12-20 due to there being no medical authorization submitted to support his time loss prior to February 21.

On March 1, 1996, Warnecke made a memo for her files, as follows:

Bruce B.
3/1/96
Employe came in our(?) office toady.
Handed me medical note to cover him for dates I c(ou)ld not authorize him on time

sheet (no Drs. Slip). Dr's note says he cannot do repetitive duties (involving hands + wrists). Then he gave me a list of lite duty assignments that J. Ninedorf wrote down for him - I guess to show that work was repetitive.

I brought up issue regarding when he left his light duty assignment + remained off with no med. Slips. Asked me if I called Fran to tell her why he had left that day as he "instructed" me to do. Yes, I told him, I did call Fran after our conversation (-- however, the medical restrictions given him for that day were different than those issued recently). He said his dept. mentioned that he could be terminated for not calling in each day he was out + could I write down that I did contact Fran to advise he went home after called me while (?) being lite duty in Metro Plus. I told him i will not write that for him - it's more involved than that. (He called me after Fran went home that day + I told him that if he's in too much pain that he had to get a doctor's OK for each day he's out). Asked me "do you have everything you need to authorize my time back?" I said I had to get his file + review the documents as well as contact his dept. He repeated it "do you have everything you need. . .?" I found myself repeating everything I had said. When he would repeat back something I had told him five minutes previously - he would not be accurate in what I had said earlier. He left. . . I pulled file - our original restrictions were to take 10 minute breaks between repetitive duties. He brought in today new restrictions. These will not replace his earlier ones, however, for the dates in questions.

Also on March 1, 1996, Dr. Schmelzer wrote to Warnecke as follows:

I am writing this letter to confirm that Bruce B. has persistent problems with bilateral wrist and elbow pain, numbness, which seemed to start on approximately November 6, 1995. The symptoms were worsened with his typing and filing duties at work. The patient carries the diagnosis of epicondylitis as well as bilateral flexor tendonitis and carpal tunnel syndrome. The patient has been directed to be on limited work activities. The patient was sent through a physical therapy program and then, because of persistent symptoms, to Dr. Oreck a hand specialist surgeon for evaluation and more definitive treatment. As in my work restrictions note of December 1, 1995, the patient is advised to have work limitations and not to work with anything requiring repetitive use of forearms, wrists or hands.

The patient was also directed that he may need a more appropriate work stations, which was adjusted, appropriately, to his height and to his primary tasks, to relieve his symptoms. The patient did not have restrictions on standing, walking, sitting, driving or use of his feet. Limitations were basically for the use of his hands, forearms, and wrists. These limitations continue at this time.

Please consider this in your evaluation of both his work situation and his disability claims. Dr. Oreck is primarily following Mr. B. at this time.

Following his predetermination hearing, B. was given the opportunity to supply a physician's note explaining his absences, and stating that they had prevented him from calling in to notify the employer. On March 15, 1996, B. submitted a letter from Dr. Steven L. Oreck, dated March 7, 1996, which read as follows:

> Enclosed are copies of work-restriction forms I issued on January 17 and February 21, 1996, which as I understand it basically continued the restrictions initially imposed by Dr. Schmelzer.
>
> The work provided to the patient on February 15, 1996, was not within the restrictions listed by us.
>
> Please contact my office should there be future questions.

Oreck's comments that the work provided to B. on February 15 was outside the proper restrictions was based exclusively on representations made by B.

The then-assistant General Manager of Madison Metro, who made the termination recommendation felt the letter was insufficient to excuse or explain B's absences on the dates in question. On March 15, Transit General Manager Paul Larrouse wrote B. as follows:

> On March 1, 1996, a predetermination hearing was held at Madison Metro in the matter of your unexcused absences from work for the dates, February 16, 19, 20, 21, 22 and 23, 1996.
>
> Madison Metro can longer continue (sic) to maintain your employment status due to the fact that these absences were unexcused and there is no documentation to support these absences.
>
> Your employment with Madison Metro is terminated, effective Friday, March 15, 1996.
>
> Questions or comments pertaining to this action can be directed to my attention at your convenience.

B. had previously been disciplined at least three times for unexcused absences. On January 18, 1995, Transit Grants and Program Manager Elizabeth Boehringer issued two Written Warnings, for B's failure to report to work in a timely manner on January 9 and 10, 1995. Each letter included

the following:



> According to Section 14.66(D) of the current labor agreement, an unexcused absence is when an office employee has not been granted an excuse by a supervisor by personal contact and does not show up for work. The penalty for an employe's second unexcused absence within a given nine (9) month period is a written warning. Office employees are cautioned that two (2) consecutive days of unexcused absence may result in discharge.

On March 13, 1995, Boehringer imposed a one-day suspension on B. for an unexcused absence on December 30, 1994, which had been the subject of a previous letter from her on January 6, 1995, and a pre-disciplinary hearing on the date of the suspension. The March 13, 1995 letter read, in part, as follows:

> According to Section 14.66(D) of the labor agreement, an unexcused absence is when an office employee has not been granted an excuse by a supervisor by personal contact and does not show up for work. Therefore, the finding of this hearing is that you violated said section of the labor agreement.
>
> You were previously found to have unexcused absences on July 12, 1994, January 9, 1995 and January 10, 1995. The penalty for an employee's fourth unexcused absence within a given nine (9) month period is a one-day suspension. This suspension will take place March 28, 1995.
>
> Further failure to observe the contract may result in disciplinary action up to, and including, discharge.

All three letters also noted the availability of the City's Employee Assistance Program, which Boehringer noted was free, confidential, helpful and voluntary. "Whether or not you contact EAP," each letter added, "you are responsible for meeting job performance expectations."

B. grieved this discipline. At the time of the hearing in the instant proceeding, the March 13 discipline had not been resolved, and B. had not served the one-day suspension.

## ISSUE

The parties stipulated to the issue as:

"Did the City have just cause to terminate B.B.? If not, what is the appropriate remedy?

## RELEVANT CONTRACTUAL PROVISIONS

## ARTICLE 14 - WAGES AND WORKING CONDITIONS

. . .

## OFFICE EMPLOYEES

**14.66 Absences from Work**

. . .

D. An unexcused absence is when an office employee has not been granted an excuse by a supervisor by personal contact and does not show up for work. Penalties for unexcused absences are as follows in a nine (9) month period:

| | |
|---|---|
| One (1) unexcused absence | verbal warning |
| Two (2) unexcused absences | warning letter |
| Three (3) unexcused absences | one (1) day off discipline |
| Four (4) unexcused absences | Two (2) days off discipline |
| Five (5) unexcused absences | discharge |

(Office employees are cautioned that two (2) consecutive days of unexcused absence may result in discharge.)

. . .

## ARTICLE 22 - DISCIPLINE

22.1 The Employer shall not discipline any employee without just cause.

22.2 Discharge shall be only after written warning notices to the employee with a copy to the Union except for the following serious offenses:

. . .

G. No show for work for two (2) consecutive days or more without notice to the Employer except where the notice cannot reasonably be given.

## POSITIONS OF THE PARTIES

The Employer restates its understanding of the facts and concludes that it is clear the discharge of the grievant was with just cause. The Union disagrees.

The City applies the facts to the "seven factors test" which Arbitrator Daugherty devised to evaluate discipline. The grievant had ample notice that two consecutive days of unexcused absence could result in termination, the City says, because that condition is explicit in the collective bargaining agreement, and the grievant personally had three prior warnings of these consequences. That an employe who is absent without authorization must call in, the City says, cannot be seriously argued.

The City conducted a thorough, fair and objective investigation, giving two opportunities to the Grievant to provide either clarification of his actions or the express medical authorization for his absences which he knew he had to give. Nothing the Grievant offered before his termination, including the memo with the return-to-work date, gave either explanation or authorization.

The City notes that the Grievant acknowledges that he did not call in, and says that neither his proffered justification nor his bogus attempts to establish that he was covered by workers' compensation have any merit at all, and that his testimony showed his reasons and excuses to be non-existent.

No other employes in similar circumstances have been treated differently, the City says, noting there was no testimony alleging such a situation.

Finally, the City concludes, given the Grievant's prior warnings and the totality of the evidence, termination was the only available option. Furthermore, the City argues, given the Grievant's own testimony on the creation and intentional submission of the Oreck note with the return-to-work date, coupled with the evidence about the complete lack of meaningful distinctions in the restrictions to be followed, the City is due attorney's fees.

The Union states that the Employer unjustly terminated B. after he objected to work assignments that were outside his medical restrictions. Rather than attempt to determine the Grievant's correct medical restrictions, the Union says, the Employer placed the entire burden on the Grievant to resolve the confusion, and then discharged him for missing work while he obtained the correct medical record from his doctor. The Employer has the burden of proving it discharged the Grievant with just cause, but has behaved throughout as though the burden were the Grievant's, and has been uncooperative in determining actual work restrictions, allowing him to obtain work

restrictions, and in advising him of his rights and responsibilities.



The Union states that the Grievant had no choice but to leave work on February 15, because, as the Employer concedes, it gave B. work that was outside his restrictions. The undisputed evidence confirms that B. could not safely do the assigned tasks on that date, and that the Employer alone is responsible for its agents' ignorance of his restrictions. The Employer's agents told B. to work until it hurt, made no attempt to locate the correct restrictions, refused to call his regular supervisor, failed to offer any alternative light duty work, and was aware that he would be leaving the work site. These responses gave the Grievant no choice but to absent himself from work until he could obtain the necessary medical documentation to prove the assignments were outside his restrictions. His only alternative was to remain at work and perform tasks that caused him pain and could cause permanent hand damage.

The Union states that it would have been presumptuous and rather bizarre for the Grievant to conclude for himself that he could stuff one envelope an hour and satisfactorily complete his assignment, as the Employer contends. Also, the Employer has no policy that an Employe who is unable to do light duty work must remain at work to do nothing; it is easy -- but incredible -- for the Employer to claim that the Grievant could have done virtually no work without discipline.

Sharp inconsistencies in the testimony of the Employer's witnesses further degrade the overall credibility of its version of events. None of its witnesses could agree on the time B. spent attempting the assigned tasks; the witnesses are hopelessly confused about the existence of the new set of restrictions; they disagree on the crucial fact of the availability of suitable work; they are at odds regarding the sequence of communication. At best, the testimony shows the employer's witnesses to be disorganized and poor communicators; at worst, it destroys their credibility.

The Union also states that the Employer's agents refused to take any position at all regarding B's leaving work on February 15. In particular, Taylor stubbornly refused to make any decision or give any instruction, would not tell him the repercussions for leaving work, dismissed him because she was tired of dealing with him, and condoned his absence. She told him he would be "okay" if the doctor would confirm he was unable to do the assigned tasks. Taylor told Ninedorf that B. could leave, and Ninedorf accordingly told B. it was okay for him to leave. It is an untenable trap for the Employer to disavow responsibility and defer to an employe's judgment and then discipline the employe for making the wrong decision.

Further, the Union states, the Employer did not put B. on notice that his conduct could result in discharge. Reduced to its essence, the Employer's position is that B. had a duty to work under faulty restrictions and do light duty work that could reinjure his hands. That position is patently

unreasonable.



The Employer relies on an absentee policy that it concedes is inapplicable to employes on workers' compensation; the labor agreement specifically exempts employes off due to a major injury from the requirement to provide a doctor's certificate for absences over 48 hours. The employer never told B. he had to start calling in on February 16. The grievant was absent due to a major injury which was supported by a doctor's notice, but had not returned to his regular duties, had informed the Employer of his reason for leaving on February 15, and had no reason to believe that he was expected to call in and reiterate the reason for his absence on a daily basis.

Further, B's absences were excused, in that he notified two supervisors and a workers' compensation administrator in advance of his absence, and the reason why. By enforcing the no-call, no-show policy under these circumstances, the Employer is merely trying to direct attention away from its own botched attempt to safely return the grievant to work. The Employer made no investigation of B's absence, placing on him the entire burden of resolving its filing foible, rejecting his documentation, and refusing to reveal what documentation would be sufficient to excuse his absence.

B. subsequently did obtain from Dr. Oreck a return to work authorization for February 26, which necessarily implies he was not released from work prior to that date. Dr. Oreck's letter excused B. from any work exceeding the medical restrictions of December 1; given the Employer's expressed intent to assign the Grievant such work, this letter clearly excused B. from work on all days prior to the letter. Thereafter, the Employer arbitrarily decided this letter was insufficient, and did not even notify B. that it required additional information to excuse his absence.

Finally, the Employer discharged the Grievant only for an alleged no-call, no-show, and not for insubordination. B's demeanor on February 15 is irrelevant.

The Grievant should be reinstated and made whole.

In its reply brief, the City asks the arbitrator to recall that there is nothing in the record other than the Grievant's own testimony to support his contentions of fact. On all material issues -- the meaning of the restrictions, the specificity of instructions, the definition of repetitive, the authority of anyone to release him from work -- giving credibility to the Grievant would require the discounting and discrediting of every other witness. That is simply too much to ask. There is no record evidence to support the premises upon which the Grievant builds his case. The Grievant's repeated assertions that the City was attempting to require him to work under the "wrong" restrictions do not make it so, in that there were no discernible substantive differences between the two sets of restrictions. It is

also simply untrue for the Union to state that the Grievant was assigned to stuff envelopes.



Consistent with his efforts to evade responsibility, the Grievant attempts to shift all burdens of duty to the City, despite his express contractual obligation to prove that his absences were legitimate. Since he knew that his absences were not covered by Worker's Compensation, he was required to call in.

The City says it was appalled to read of the Union's reliance on Dr. Oreck's March letter and the return-to-work date, given the lack of foundation and the Grievant's apparently clear attempt to mislead the arbitrator. Further, all the grievant's purported medical evidence is seriously in dispute, all to the Grievant's detriment. Also in dispute were the reasons for the absences and the sufficiency of the Grievant's explanations. Cases cited were not on point.

Had the Grievant called his supervisor or produced a doctor's statement blessing his days away from the job, he would have prevented the loss of his job. He did neither, and must now face the consequences of his own choices according to the provisions of the collective bargaining agreement.

In its response, the Union states that the City's brief constitutes conjecture and conspiracy theories which show its continuing disregard for its employes.

In that the Grievant was not fired for his demeanor, the Employer's lengthy discussion of his behavior is irrelevant. The Employer also conveniently ignores the fact that, once the Employer applied the correct work restrictions, the Grievant worked without protest until his discharge. It is an unacceptably hefty leap to rely on the Grievant's demeanor to prove an intent to deceive and avoid work.

According to the Union, the Employer continues to ignore the undisputed fact that it relied on the wrong work restrictions on February 15; all evidence establishes that the assigned work was outside the Grievant's work restrictions. The City simply tries to avoid its responsibility by minimizing the differences between the November and December work restrictions, but those restrictions are critical and speak for themselves. The Union claims that Ninedorf testified she would have assigned different tasks if she had had the correct restrictions.

The Union concludes that the Grievant should be returned to work and made whole, and the Employer's request for attorney's fees denied as frivolous and outside arbitral law.

## DISCUSSION

The collective bargaining agreement between the parties provides that five unexcused

absences within a nine-month period will result in discharge, and that two consecutive days of unexcused absence may also lead to termination. An unexcused absence is when an employe "has not been granted an excuse by a supervisor by personal contact and does not show up for work." The parties have thus quantified the nature of just cause for discharge in this context,



subject to the Employer meeting its burden to establish that the facts support the conclusion that the absences in question were indeed unexcused.

There is no dispute that the Grievant, Bruce B., was absent from work at Madison Metro for six consecutive days. The Employer asserts that the record further establishes that B. did not obtain authorization for such absences through personal contact with a supervisor, placing the Grievant squarely within the terms of the contractual language.

The Union advances argument as to why the discharge was contrary to the contract. It asserts that B. had no choice but to leave work on February 15; that the Employer permitted B. to leave work on that date; that the Employer did not put B. on notice that his conduct could result in discharge; that B's absences were excused, and that discussions of B's demeanor are irrelevant.

Clearly, the Employer did put B. on notice that unexcused absences could result in discharge. First, that language is clear and explicit in the collective bargaining agreement. Further, the Employer had three times in the previous 13 months disciplined the Grievant for unexcused absences or tardiness, each time noting in its letter the potential culmination of such discipline. That the discipline imposed might have been stayed pending a grievance process does nothing to eliminate the Grievant's actual knowledge of this aspect of the agreement.

The Union argues that the explicit terms of the agreement do not apply because the Employer acted wrongfully in compelling B. to perform work outside the restrictions issued by his physicians. It appears the Union is correct that the Employer failed to apply the most recent communication from Dr. Schmelzer regarding B's restrictions. However, I do not find that the November and December restrictions are as materially different as the Union alleges. The initial restriction speaks to "ten minute breaks per hour from repetitive hand activities"; the subsequent restriction advises B. to "limit work duties requiring repetitive use of forearms, wrists and hands", and implicitly -- but not explicitly -- continues the hourly break restriction.

The Employer argues, and its witnesses testified, that the later restrictions are not materially more restrictive than the initial version. While the Union argues to the contrary, the Grievant's explanation of the difference was more tied to a December 1 conversation with his physician (the text of which is set forth in footnote 1/) than in the text of the document. And while the Union's medical witness, Dr. Oreck, said the later version "amplifies" the earlier, he further testified that the

first time he had seen either version was the day of hearing.

Oreck's testimony also clarifies that part of the documentary wherein he states that the work provided to B. on February 15 was "not within the restrictions. . ." That clarification is that this conclusion was based solely on a description of the work which the Grievant provided and that Oreck did not verify such description with Metro personnel. In Oreck's words, "Doing



them (work tasks) as he described they were going to have to be done . . ." As noted above, I do not believe Mr. B. accurately recounted the instruction he was provided.

The Employer's failure to have the most current medical commentary available when an employe returns to work from workers' compensation raises legitimate concern about the overall administration of this important aspect of the workplace. But the facts of this particular instance are not such, on their own, to invalidate the discharge.

Nor does the discipline fall based on the particulars of the work assignments. The Employer's witness most directly involved in the specifics of light duty assignments, Ninedorf, testified credibly that the assignment did not involve forbidden repetitive work, and did allow for necessary break time. Certainly there could have been an assignment so beyond the Grievant's physical capabilities, and which posed such a serious threat to his continued health, that he would have been excused from its performance. But even if that were the case -- and the record does not support such a conclusion -- that neither explains nor justifies the Grievant's continued absence from the workplace.

The record supports a finding that B. was upset and anxious on February 15. I believe that he perceived that his return to work on any basis was a serious mistake or error. 1/ The Employer's reliance on a dated medical report no doubt confirmed his worst fears. I believe that the combination of high anxiety, drug therapy, a normal apprehension accompanying a disabled employe's return to the workplace explains B's unexcused exit from the workplace. Whether or not that is contractually tolerable is not a question I need address, in light of other conclusions reached.

Here is the Union's ultimate, insurmountable problem -- the absences on the second, third, fourth, fifth and sixth day. Even if the Grievant were justified on the grounds of health and safety or anxiety and stress from leaving work on February 15th, he then would have needed to take the necessary steps to validate his continuing absences.

He took no such steps. Although he attempted to contact his physicians to discuss the duty assignments, he failed to contact in a timely manner either the workers' compensation administrator, or his permanent supervisor, or Taylor or Ninedorf concerning his continuing absence.

I do not find the cases which the Union has cited to be persuasive. In MISSION INDUSTRIES, 98 LA 688 (Weiss, 1991), the arbitrator reinstated a grievant who the employer knew to have a valid medical excuse (hospitalization following a miscarriage in another state), and whose job was of such minor consequence that the employer left it open and unfilled for three weeks. Those facts distinguish the cases.



I also note the selective editing the Union does in quoting from the decision. Here is the section which the Union deletes through its ellipses:

> After a few days, the employer has the authority to make whatever changes in the work force are necessary to deal with this problem, without retaining a financial or legal obligation to the employe who has dropped out of sight.

In ELKEM METALS CO., 98 LA 1001 (Duda, 1992), the arbitrator held that the grievant was not required to "report off sick" repeatedly, but that a "satisfactory explanation need only to be made once." That of course, is the distinction between ELKEM METALS and this case -- here, the grievant did not properly establish status on sick leave or otherwise provide a satisfactory explanation for his absences.

There is some similarity between the facts of the instant grievance with those in SAFEWAY STORES, 96 LA 676 (Cohen, 1991), in that both cases involve a grievant who relied on a worker's compensation condition as an explanation for violating the no-call/no-show rule. However, the sequence of events in SAFEWAY STORES is not completely clear, but it appears from the narrative and the discussion that the employe saw a Company doctor who committed to informing the Company that the employe would not be returned to work.

The Union contends that B. "notified two supervisors and a workers' compensation administrator in advance of his absence and provided the reason for his absence." If this were true, it might well justify part or all of B.'s continued absence.

The record, however, does not support such a definitive statement as the Union makes in its brief. The Grievant testified that he told Taylor he was leaving "to go and get the clarification", and that there was "not much else to say at that point", to which she purportedly replied, "do what you got to do. Go." He testified that he called Warnecke, to say he had decided to go home, to which she replied that he would need to obtain medical documentation of the current restrictions. He also "popped in" on a "pretty busy" Ninedorf, and said, "Look. I want to let you know I'm leaving", to which she replied, "Okay".

When he left, B. knew that he had been returned to work. All medical documentation submitted calls for him to work. There is a dispute as to his restrictions. There is no claim that he was totally work-disabled. B. left work after requesting and being denied sick leave. He was not on workers' compensation status when he left and he had been advised, by Warnecke, that he needed to produce medical support for his claim that his restrictions were wrong or misunderstood. He did not have a supervisor excuse his absence. He had no contact with Boehringer, his regular supervisor. Taylor did not approve his leaving, or his absence. Her "do what you got to do" remark was the culmination of a series of frustrating conversations with B. Ninedorf is not a supervisor. At a minimum, he owed his employer a telephone call seeking to clarify his status.



Similarly, Taylor and Ninedorf were upset at the behavior B. directed toward them. Each testified to being concerned about their personal well-being. When B. left, it was the perception of the Employer that he was not on workers' compensation, but rather was released for light duty and refusing to perform that duty. It is in that context that B. made no contact with the Employer for six work days.

Nothing in that testimony establishes a valid request and authorization for sick leave or return to Worker's Compensation leave. The Grievant had been released for return to work; he was not empowered to put himself back on leave. His subsequent communication, whereby he got a doctor's assistant to establish a new return-to-work date of February 26 does not legitimately place the Grievant back onto Workers' Compensation status for the six work days prior. As of the hearing, B. had been denied Workers' Compensation status for the period.

I do not believe that Oreck's March 7, 1996 note or testimony establishes that B. was medically unable to perform the tasks assigned on February 15. As already noted, Oreck had only B's description of the tasks, which I do not believe was accurate. At this point in time, Oreck had not seen Schmelzer's restrictions. The only restrictions specifically ordered by Oreck related to typing.

The collective bargaining agreement clearly establishes the penalty for extensive unexcused absences. The Grievant was aware of this provision. The Grievant absented himself from the workplace for six days without proper prior authorization. While absent, he made no effort to communicate with supervisors to explain or otherwise confirm his absences. He thus had more than the required two days of consecutive days of unexcused absences, and was, within the parameters of the agreement, properly subject to discharge. This contract vests in the Employer the authority to discharge an employe who has two (2) consecutive days of unexcused absence. It is the Employer, and not the arbitrator, who has the discretion to forebear or exercise discretion.

Accordingly, on the basis of the agreement, the record evidence and the arguments of the

parties, it is my

## AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 7th day of January, 1998.

William C. Houlihan /s/
William C. Houlihan, Arbitrator



## ENDNOTES

1/ Evidence of that is his non-response to the first of Warnecke's letters, the attitude he displayed upon his return, and the following transcription of his December 1 conversation with Dr. Schmelzer:

> A. Yeah. Well, Dr. Schmelzer made it pretty clear on December 1st when I saw him I believe the second last time, that I should not be going back to work until the situation that caused the problem in the first place was rectified in terms of my work environment: Chair, desk, computer keyboard, etcetera.
>
> And he also said that I probably shouldn't be back working -- Well, he said, you know, "I'm going to send you to the Hand Clinic for therapy." He said, "I see no reason for you to go back," essentially.

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