

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**UNITED ELECTRICAL, RADIO AND
MACHINE WORKERS OF AMERICA, LOCAL 1112**

and

WISCONSIN DIE CASTING, LLC

Case 1

No. 63747

A-6120

(Kolterman Termination Grievance)

Appearances:

Timothy P. Curtin, International Representative, United Electrical, Radio and Machine Workers Union, on behalf of the Union.

Brigden & Petajan, S.C., Attorneys at Law, by **Marna M. Tess-Mattner**, on behalf of the Company.

ARBITRATION AWARD

United Electrical, Radio and Machine Workers of America, Local 1112, hereinafter the Union, and Wisconsin Die Casting, LLC, hereinafter the Company, requested that the Wisconsin Employment Relations Commission provide a panel of staff arbitrators from which the parties select an arbitrator to hear and decide the instant dispute between the parties, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The undersigned, David E. Shaw, of the Commission's staff, was selected and designated to arbitrate in the dispute.

By letter of May 19, 2004 and September 3, 2004, the Company objected to proceeding to a hearing on the merits of the grievance on the basis the grievance was not procedurally arbitrable. The Union submitted written argument in response on September 21, 2004, and the

Company submitted additional argument on September 22, 2004. The Union was given until September 30, 2004 to submit further response. Based upon the parties' labor agreement and their arguments, the undersigned makes and issues the following Award.

ISSUES

The issue raised by the Company may be stated as follows:

Is the grievance arbitrable?

CONTRACT PROVISIONS

As relates to the procedural issues, the relevant provision of the parties' labor agreement provides, in relevant part:

21. Grievance Procedure.

d. Definition of Working Days. For purposes of this section, the term "working days" shall refer to Monday through Friday.

...

f. Grievance Procedure. All grievances filed by an individual employee, group of employees or the Union shall follow the following steps:

...

STEP 3. If the grievant is not satisfied with the Human Resource Director's response to Step 2, within five (5) working days of the Step 2 response or lack of response the grievant or the Union shall present the grievance to the President. Failure to do so within five (5) working days shall constitute a waiver of any further action on the grievance. Within five (5) working days two Company representatives and two Union representatives shall meet to attempt to resolve the grievance. The Company's response shall be in writing, with one copy to the employee (if applicable), one to the Union and one to the Company. If the Company fails to respond within five (5) working days, the grievance shall be deemed denied as of the fifth (5th) working day after the grievance was presented to the Company.

STEP 4. If the grievant is not satisfied with the Company's response to Step 3, within five (5) working days the Union shall notify the Company in writing that the Union wishes to arbitrate the grievance. Failure to do so within five (5) working days shall constitute a waiver of any further action on the grievance. Within five (5) working days thereafter, the Union shall ask the Wisconsin Employment Relations Commission to provide a list of arbitrators from which the parties shall alternately strike arbitrators, with the Union having the first strike and the final remaining arbitrator being selected to arbitrate the grievance.

- g. Arbitration. Each party shall bear its own expenses related to the arbitration, and the parties shall equally bear the costs of the arbitrator. The arbitrator's authority shall be limited to matters concerning the interpretation and application of this Agreement, and appropriate remedies for any violation of the Agreement.
- h. Waiver of Steps. By mutual written consent between the parties, any step(s) in the grievance process may be waived.

POSITIONS OF THE PARTIES

Company

The Company takes the position that the grievance should be denied on procedural grounds without a hearing. The Union admits it did not provide written notice of its intent to arbitrate this grievance, let alone do so in a timely manner. Step 4 of the parties' contractual grievance procedure requires that the Union provide the Company with written notice of its intent to arbitrate a grievance within five working days of the Company's Step 3 response, and that failure to do so constitutes "a waiver of any further action on the grievance." The parties held a Step 3 meeting on the grievance on April 1, 2004, at the end of which the Company's President informed the Union's representatives that the grievance was denied. Therefore, written notice of intent to arbitrate should have been provided by April 8th. Even if the President's verbal response is deemed not sufficient to trigger the time limit, Step 3 provides, "If the Company fails to respond within five (5) working days, the grievance shall be deemed denied as of the fifth (5th) working day after the grievance was presented to the Company."

Further, Step 4 requires that the Union shall request a panel of arbitrators from the Wisconsin Employment Relations Commission within five working days of its written notice of intent to arbitrate. The Union did not mail its request to initiate grievance arbitration to the Commission until May 6, 2004, i.e., five weeks after the Company's Step 3 response. The Union's request was also defective in that it asked for the appointment of a single arbitrator, rather than a panel of arbitrators, as required by Step 4 of the grievance procedure.

While the Company disputes the Union's assertion that its representative gave the Company verbal notice of the Union's intent to arbitrate the grievance, it asserts that regardless of whether such verbal notice was given, the labor agreement requires that such notice be in writing, precisely to avoid confusion in this regard. The Company cites arbitral precedent that oral notice is not sufficient, where the agreement requires written notice. Further, the Union offered no reasons for its failure to give timely written notice of intent to arbitrate. Last, while the Company cooperated in the Union's request to the Commission, it did so while making it clear that it objected to proceeding based on its timeliness objections, and also insisted that the requirement of a request for a panel be followed.

As the Union has provided no valid explanation or excuse for its failure to provide timely written notice of its intent to arbitrate, the Company asks that the Union's grievance arbitration request be dismissed without further action.

Union

The Union objects to the Company's attempt to avoid a hearing on the merits of the discharge over procedural matters. The case should be heard on the merits and the Company can raise its procedural issues and present its evidence at that time.

According to the Union, there were no procedural problems raised through Step 3 of the grievance procedure. At the Step 3 meeting on April 1, 2004, the Union presented its case to the Company, after which the Company President told the Union that the Company was not changing its position on the termination. At that point, the Local's President informed the Company that if that was its position, the Union would arbitrate the grievance. The parties left the meeting knowing the Union was putting the Company on notice of its intent to arbitrate. While it is true that the Union did not follow up with a request to arbitrate with the Company, the Company joined the Union's request for a panel of arbitrators from the Commission.

The Union asserts that the purpose of the notice requirement in Step 4 is to put the Company on notice that the Union intends to arbitrate the grievance. As a practical matter, after the President verbally denied the grievance, the Union provided verbal notice of its intent to arbitrate. The Union cites arbitral precedent in which arbitrators refused to dismiss grievances based upon procedural errors, indicating that most arbitrators are reluctant to decide a case on the basis of a forfeiture and thereby deprive a party of the right to have the case heard on its merits. Here, the Company is attempting to bar the grievant from presenting the merits of his case to the Arbitrator. This is a harsh penalty for a procedural defect that did not prejudice the Company in any way.

The Union requests that the Company's request be denied and the grievant be afforded the opportunity to "have his day in court."

DISCUSSION

Matters of procedural arbitrability, such as those raised by the Company, are for an arbitrator to decide. *JOHN WILEY AND SONS V. LIVINGSTON*, 376 U.S. 543 (1964).

As the Union notes, arbitrators are generally reluctant to decide a case on procedural grounds and thereby deny the parties a hearing on the merits of their dispute. Nevertheless, arbitrators are not free to ignore the wording and intent of the parties' agreement in order to satisfy their view of what would be a fair and equitable result. The parties negotiated specific wording into their agreement and those words must be given meaning. As are the parties, the Arbitrator is bound by those words in interpreting their agreement. This is as much true of the procedural requirements in the parties' contractual grievance procedure, as it is of any other provision in their agreement. (See, Elkouri and Elkouri, *How Arbitration Works*, (Sixth Edition) at pp. 273-276).

In this case, the parties have negotiated language in Step 4 of their contractual grievance procedure that specifically requires that "If the grievant is not satisfied with the Company's response to Step 3, within five (5) working days, the Union shall notify the Company in writing that the Union wishes to arbitrate the grievance. Failure to do so within five (5) working days shall constitute a waiver of any further action on the grievance." The wording as to the requirements is explicit, as is the wording as to the consequences of a failure to meet those requirements.

The parties held a Step 3 meeting on April 1, 2004, at which time the Company gave a verbal response denying the grievance. Step 3 of the grievance procedure requires that the Company's response be in writing, and that written response would then trigger the time limit for the notice of intent to arbitrate. However, Step 3 provides that in the circumstance where the Company fails to provide such a response within five working days, as here, "the grievance shall be deemed denied as of the fifth (5th) working day after the grievance was presented to the Company." Therefore, the time for providing written notification of the Union's intent to arbitrate began to run five working days from April 1st, i.e., on April 8th. However, the Union failed to provide such written notice at any time after April 1st.

The Union has offered no explanation as to why it did not provide the required written notice of intent to arbitrate, beyond arguing that since verbal notice had been given, it was not necessary. The Union argues that the Union President's verbal notice to the Company of the Union's intent to arbitrate the grievance satisfied the purpose and intent of the requirements set forth in Step 4, and therefore should be deemed sufficient to satisfy those requirements. The Arbitrator disagrees. While such verbal notice served the purpose of timely putting the Company on notice of the Union's intent to arbitrate, that is only half of the purpose of the requirements in Step 4. Verbal notice could be misunderstood, and the parties could dispute

what was, or was not, said. As the Company points out, the purpose of requiring that the notice be in writing is to avoid such disputes as to whether notice was, in fact, given.

The Union also seems to argue that the Company's joining in the request for a panel of arbitrators from the Commission should be deemed to constitute a sort of waiver of its objections to proceeding with the arbitration. As noted previously, however, such procedural objections as the Company's are generally to be decided by an arbitrator. Therefore, the company had no real choice but to proceed in that regard.

In accord with Step 4 of the parties' grievance procedure, the Union having failed to provide the Company with timely written notice of its intent to arbitrate this grievance, it is deemed to have waived its right to take further action on the grievance.

Based upon the foregoing, the Arbitrator issues the following

AWARD

The grievance is not arbitrable.

Dated at Madison, Wisconsin, this 6th day of October, 2004.

David E. Shaw /s/

David E. Shaw, Arbitrator

