

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PDM BRIDGE CO.

and

**UNITED STEELWORKERS OF AMERICA
INTERNATIONAL UNION, LOCAL 2138, AFL-CIO, CLC**

Case 4

No. 66651

A-6270

Appearances:

Mr. Marvin J. Finendale, International Rep., 3108 Cumming Avenue, Superior, WI 54880, on behalf of Local 2138.

Mr. Christopher J. Murphy, Esq., Saul Ewing, LLP, Centre Square West, 1500 Market Street, 38th Floor, Philadelphia, PA 19102-2186, on behalf of the Company.

ARBITRATION AWARD REGARDING PROCEDURAL ISSUES

The captioned parties requested a panel of seven Wisconsin Employment Relations Commission Staff Arbitrators from which to select an arbitrator to hear and resolve a dispute between them regarding when, if ever, the Company is obliged under the contract to pay for lunch breaks. Staff Arbitrator Sharon A. Gallagher was selected by the parties to hear and resolve the dispute. At the hearing, held on March 6, 2007 at Eau Claire, Wisconsin, the Company raised procedural issues including whether the instant grievance had been timely filed. The parties agreed that the Arbitrator should hear both the procedural and the substantive issues but that they would brief the procedural issues first, those briefs to be received on or before March 30, 2007; that the Arbitrator would then issue her decision regarding the procedural issues and only if she found the matter properly before her, would the parties then submit briefs on the merits in an agreed-upon fashion. The Arbitrator received the parties' briefs on the procedural issues by March 30, 2007.

PROCEDURAL ISSUES:

1. Is the grievance properly before the Arbitrator:
 - a) Was the instant grievance timely filed?
 - b) Does the Union's failure to process two prior grievances to arbitration mean that the Union "lost" those grievances?
 - c) Did two prior grievances effectively resolve/settle this case?

RELEVANT CONTRACT PROVISIONS

ARTICLE XI
GRIEVANCES

Differences of opinion or disputes concerning the interpretation of or adherence to the terms and provisions of this Agreement shall be handled in the following manner:

The employee originating the grievance shall immediately discuss the matter with the foreman in charge as to his/her grievance. If the grievance is not immediately resolved, the employee shall then initiate the FIRST STEP of the grievance procedure under Article XI of the labor Agreement. All grievance claims shall be presented within five (5) working days, except in wage claims. When an employee is absent from work, he/she shall have five (5) days after returning to work to present his/her claim.

FIRST STEP: The employee or employee's (sic) having the grievance shall notify their steward and/or one committee person and the matter shall then be taken up by the employee and/or steward or committee person on behalf of the employee with their immediate supervisor or foreman.

SECOND STEP: If the grievance is not settled within twenty-four (24) hours after being presented to the immediate plant supervisor (or foreman), it shall be reduced in (sic) writing by the grieving party and/or steward or committee person on grievance blanks furnished by the Union, and filed with the Plant Superintendent. All three (3) copies of grievance (sic) form go to the Company for response. The Union shall then make arrangements for a meeting of two (2)

committee persons, the grieving party, the Plant Superintendent, and up to two (2) additional Company representatives. If possible, this meeting shall be scheduled to take place within twenty-four (24) hours of the filing of the grievance. In the event the Company elects to include more than three (3) people in this meeting, the Union will have an equal number of committee representatives present. The Company shall write its response on the back of the grievance form within five (5) working days after this meeting is held. The Company retains the pink copy and returns the yellow and white copies to the Union.

THIRD STEP: If the grievance has not been settled at the SECOND STEP, the Union shall have ten (10) working days from the receipt of the SECOND STEP answer to move the grievance to the THIRD STEP. The representative of the National Organization of the Union, along with the local grievance committee and the Company representative(s), which may include the following: General Manager, Production Manager, Plant Superintendent, and/or Supervisor, shall meet to settle the grievance. The Company shall give its answer in writing to the representative of the National Organization through the local committee within ten (10) working days.

FOURTH STEP: If the matter cannot be settled by agreement, it shall be referred to arbitration within twenty (20) days after the Company answers the THIRD STEP, for final decision as follows:

. . .

2. If any of the preceding time limits are not met, the party not in compliance shall be deemed to “have lost the grievance.” Time limits may be extended by mutual agreement. The arbitrator shall have no right to amend, modify, nullify, ignore or add to or subtract from the provisions of this Agreement, or extend its duration, and any grievance not involving a provision of this Agreement or its interpretation shall be denied. He/she shall consider and decide only the particular issue(s) presented to him/her in writing by the Company and the Union, and his/her decision and award shall be based solely upon his/her interpretation of the meaning or application of the terms of this Agreement to the facts of the grievance presented.¹

¹ This provision has appeared in the parties’ agreements since at least 1996.

If the Company initiates the discussion of a grievance or requests a meeting during normal working hours with a Union official, this individual will not lose pay for said meeting.

In the event a grievance shall arise which cannot be reasonably delayed, either party may call a special meeting of the Company and Grievance Committee to settle the dispute, at which time the National Representative of the Union may be present.

LETTERS OF UNDERSTANDING

. . .

E. Lean Culture Utilizeing(sic) Lean Principles

It is the intent of labor and management to promote a culture of continuous improvement. To this end, all product new and existing will be produced in keeping with lean manufacturing principles. At the time of production, the manpower and skills requirements will be identified and assigned to meet the planned production hours, recognizing that quality (getting it right the first time) and good safe operating practices will be utilized to manufacture the product. The employees assigned to the teams will perform tasks required to support, manufacture and ship the product.

To support and continue the progress already made in the endeavor, the parties agree to the following principles:

- Create a sense of ownership among workers
- Make continuous improvement an expectation of workers
- Create a structure of teams to utilize workers' ideas (ie., kaizen event participation)
- Be open to new ideas from teams
- Provide workers with training required to enable a variety of work assignments (flexible workforce)
- The parties affirm that profitability and job security are mutually dependent. Further, the parties recognize that in order for the parties to maintain their strategic value, the focus needs to be on business growth – from which both profitability and job security emerge.

RELEVANT QUOTATIONS FROM PRIOR GRIEVANCES

UNION EXHIBIT 1:

. . . important Grievance information

Cell/Team Fabrication is (2) shifts working a particular job, with the job sitting idle for (1) shift. The thinking is – better communication and fewer mistakes

Nature of Grievance

The Company negotiated and got cell/Team fabrication language with this last contract – Now That they've taken our paid lunch break, They consistently run several operations just like They used to – 3 shifts around The clock. This is contrary to the language They put in the contract

Settlement requested in Grievance Either run the shifts as (2) cell shifts with unpaid lunch or (3) shifts around the clock with paid lunch, Don't pervert it. Also to be made whole

Agreement Violation Art. VI (Hours of employment)
Cell/Team language²

Answer of Company Representative Date: 2/2/06
Grievance resolved as per discussions today.

UNION EXHIBITS 2:

. . . important Grievance information

We have new cell/Team language which the company put into the new contract – which They now are not honoring

Nature of Grievances

The Company has scheduled & implemented new hours for the paint & blast areas – 3 shifts around The clock doing the same normal work as always except they're calling these shifts cells now (when They are not) - & they have taken the paid lunch break away, This is contrary to the contract

Settlement requested in Grievance Either run 2 shift as cells & let 1 shift be idle as per contract or runs shifts around the clock & pay lunch break, Also want backpay for lost breaks & to be made whole

Agreement violation
Art VI Cell/Team language³

Answer of company Representative Date 2/20/06

Grievance settled Explained the intent of the language, the spirit of the negotiation process, and parties agreed that issue is resolved

² Terry Eisold signed this form as “aggrieved” and as “Union Representative.”

³ Terry Eisold signed this form as “Union Representative.” The Grievants (“aggrieved”) were Quigley and Horel.

BACKGROUND:

The parties have had a collective bargaining relationship for many years. On September 1, 2005, the 2005 agreement went into effect which included the parties' agreed-upon new language describing cells and teams. All witnesses who testified herein stated that after September 1, 2005 only those employees who worked "straight 8" hour shifts were paid for lunch breaks.

FACTS:

The Union never processed the two prior grievances, quoted above (U. Exhs 1 & 2) to arbitration. Nor did it attempt to reopen either of these cases, before filing the grievance before me (Jt. Exh. 2). The Union offered the following facts regarding the processing of the first and second grievances. For purposes of this Procedure Award, I have credited all evidence proffered by the Union.

Terry Eisold stated herein that he has been employed by the Company or its predecessor for 37 years, and that for about 25 of his years with the Company, he has held a Union office, processing grievances and participating in contract negotiations on the Union side. Eisold stated that he was both a Grievant and the Union representative (having signed in both capacities) on the first grievance (U. Exh. 1), filed on January 20, 2006. Eisold stated that he filed that grievance because the Company was then running 3 shifts around the clock and Eisold believed the employees were entitled to paid lunches and he asked for that relief in the grievance if the Company continued to work three shift, not two cell shifts.

Eisold stated that during the processing of this grievance Plant Manager Hoilien stated that the cell contract language was new and Hoilien asked the Union for more time and patience while the Company got more involved and tried to make the cells work. Eisold stated that the Union agreed to give the Company time, to be patient. Eisold stated that he agreed to drop the first grievance on behalf of the Union.⁴ Eisold stated that he dropped the first grievance, because he believed he had the Company's word, its promise, that the Company would resolve the cell problem. But Eisold admitted that he never asked that the first grievance he held in abeyance pending the Company's efforts to resolve it and that the parties put nothing in writing to memorialize the Company's promise to Eisold. Eisold also admitted that during his 25 years as a Union representative, the Company and the Union have strictly applied contractual time limits to grievances.⁵

After the Union dropped the first grievance, Eisold stated that nothing improved regarding cell operation - - that the Company continued to operate three shifts without paying for lunch time. It is undisputed that the Union received a copy of Hoilien's response indicating the first grievance had been resolved and that the Union took no action to keep the case open, to move it to arbitration or to object to Hoilien's characterization.

⁴ Union Representative Rybka stated herein that Eisold handled the first grievance on his own.

⁵ It is also undisputed that the Company and Union have only once mutually agreed to hold a grievance in abeyance, on December 21, 2006 (ER Exh. 14).

On February 2, 2006, Eisold filed a second grievance, Union Exhibit 2, in his capacity as Union Representative on behalf of two employees, Quigley and Horel. Union Exhibit 2 shows that the allegations and the request for relief written by Eisold on the second grievance were substantively the same as those Eisold wrote in Union Exhibit 1. It is undisputed that Quigley and Horel (the latter then a Union Steward) agreed to drop the second grievance after the Company explained to them that Article 6 stated that only when employees worked three shifts of eight hours each was the Company obliged to pay for employee lunch time (so that employees would receive 8 hours straight time pay per day).

When the grievants agreed to drop the second grievance, Eisold did not object or state any arguments to the contrary. It is undisputed that the Union received a copy of the Company's written response, indicating the grievance had been resolved, and that the Union did nothing to object thereto, to seek to keep the case open or to move it on to arbitration.

Thereafter, at regularly held Labor-Management (L-M) meetings between the Company and the Union held on August 1, October 3, and November 7, 2006 the parties discussed the employees' continuing complaints that the Company was not adhering to and/or implementing the cells properly and that it was working 3 overlapping shifts over eight hours each but not paying for lunch breaks. Union representatives, including Eisold, were present at all three of these L-M meetings. It is undisputed, that at each meeting, the Company representatives asked the Union to be patient/for time to get the cells working properly and that at each such meeting the Union agreed to be patient and grant the Company more time. All witnesses herein stated that although the Company promised to have a "just in time event" to educate/fix the problems with the cells at the October 3, 2006 L-M meeting, this "event" was never conducted and that after the November 7, 2006 L-M meeting, the cell problems became even worse because the Company continued to work three shifts around the clock and failed to pay for lunches.

On November 26, 2006 Union President Thompson (elected in June 2006) filed the instant grievance. Herein, Thompson explained that he filed the instant grievance because the cells were not working properly and his request for backpay was designed to get a monetary remedy for employees who had not received paid lunch breaks. Thompson also stated that on September 1, 2005 he was working on a cell in the Paint Department and the Company told him there would be no more paid lunches from that day forward. On September 1, 2005 Thompson was a Union Steward and had been one since the late 1990's. Thompson stated that he did not go to the Union Committee to seek to file a grievance regarding the loss of his own paid lunch breaks in September, 2005 although he had a problem with it.

Thompson stated that before he filed the instant grievance he reviewed the first and second grievances and the Company's responses thereto (U. Exhs 1 & 2); he looked at the 2005 proposals and ratification document and he asked the previous Union Committeemen and the prior Union President whether they believed they had given up the paid lunch breaks in bargaining. These Union officers responded in the negative.

After Thompson filed the instant grievance the Company filed the following answer thereto:

. . .

The grievance is denied for the following reasons - - (1) the grievance is untimely; (2) the grievance is barred by the resolution of grievances 06-01 and 06-02; (3) the union has not demonstrated the company has violated any provisions of the contract.

. . .

POSITIONS OF THE PARTIES ON PROCEDURE

Union:

The Union argued that as the contract violation asserted herein is a continuous one, the Arbitrator must rule on the merits of the case but that she may limit the monetary award to backpay dating only from the filing of the grievance forward. Here, the Union asserted that it was trying to work with the Company, and that it would be wrong to dismiss the grievance on the basis of the Company's argument that the instant grievance was untimely filed and that prior grievances on the same issue were lost or that they essentially decided the instant case once and for all.

As the Company failed entirely to live up to its repeated promises to have "work schedules comply with the cell structure," although the Union granted the Company the requested patience and time to work on cells, the Union urged that the prior grievances were never actually "settled" or "resolved". In addition, the Union noted that the contract has broad language defining grievances as "differences of opinion or disputes" concerning the interpretation of or adherence to the contract; and that in any event, the instant case is different from the prior two grievances. Therefore, the Union argued that it was not barred from bringing the instant grievance to arbitration. The Union pointed to the fact that nothing changed after the first two grievances were dropped, (as evidenced by Union-Management discussions in 2006) and therefore the Arbitrator should not find the grievances were either settled or resolved as claimed by the Company. Where, as here, the Company is continuing to violate the contract and such a continuing violation should never be barred from arbitration and the Arbitrator should proceed to decide the merits of this case.

Company:

The Company argued that on September 1, 2005 it discontinued paying employees for lunch breaks who were not working regular 8 hour shifts and that all witnesses who testified herein confirmed that after September 1, 2005 only employees working "straight eights" received paid lunches. Thereafter, the Company observed, the Union failed to object to the

elimination of paid lunches for 5 months until it filed the first grievance; that the Union dropped that grievance and two weeks thereafter the Union filed the second grievance which the Union dropped again (Co Exh. 7 and 9) nine months later, the Union filed the instant grievance which raised the same issues as were raised in the first and second grievances. In these circumstances, the Arbitrator should conclude that the Union “lost the grievance” (under Article XI), by failing to take either the first or second grievance to arbitration or because the instant grievance is barred by the settlement/resolution of the first and second grievances.

The Company further noted that the language of Article XI at issue here was interpreted by WERC Arbitrator Bielarczyk in a prior case regarding the Company’s business predecessor (PHOENIX STEEL, INC. AND USWA LOCAL 2138, CASE 8, NO. 42943, A-4525 (5/90)) in the precise way the Company has argued it should be interpreted herein. In addition, the Company asserted that this Arbitrator has ruled in a prior, albeit different case, that contractual time lines should be honored and that other arbitrators have issued awards on the same basis.

The Company argued that Article XI mandates that the Union bring a case to arbitration or be considered to have “lost the grievance” and that Hoilien’s notes support such a conclusion. If, as the Union asserted herein, the first and second grievances were not resolved/settled, the Company queried why the Union failed to move either one of them to arbitration. The Company argued that the issues raised herein are identical to those raised in the first and second grievances and it noted that in its answer to the instant grievance the Company raised the untimeliness issue. Furthermore, the Company noted that in Company Exhibit 11, the Union’s response to the Company’s denial of the instant grievance, read as follows:

. . .

1. Grievances discussed with PDM Management on 6/1/06 and 6/2/06 regarding the cell issues were promised to be resolved.
2. The departments are working 3 shifts and are not receiving a 15 minutes paid lunch break.

. . .

3. Paid breaks do not get paid in cell team fabrication by contract.

ACTION REQUESTED: The Union Committee is disputing the company’s interpretation of 3 shifts terminology as past practice has been (sic) 3 shifts have included overlapping overtime with no change in breaks.

In the circumstances described above and considering the fact that the Union did not dispute or object to Hoilien’s characterization of the first and second grievances as settled/resolved and because the Union never asserted it did not receive a copy of grievances with Hoilien’s characterizations thereon, the Company urged that the Union had full knowledge of the Company’s position and it acquiesced thereto. Therefore, the Company asked the Arbitrator to dismiss the grievance on procedural grounds.

DISCUSSION OF PROCEDURAL ISSUES:

Article XI defines grievances broadly, as “(d)ifferences of opinion or disputes concerning the interpretation of or adherence to the terms and provisions of this Agreement...” However, Step 4(2) of the Agreement contains very restrictive language that “(i)f any of the preceding time limits are not met, the party not in compliance shall be deemed to “have lost the grievance.” This language is clear and it leaves no doubt that the parties intended that serious consequences would flow from the failure to proceed timely with a grievance, that such a failure to proceed further would be the same as losing the grievance, presumably in arbitration or at some other point during the processing thereof. It is also significant that Step 4 states that time limits “may be extended by mutual agreement” which makes it possible for the parties to avoid timeliness issues entirely by mutual agreement to extend time limits. Clearly, the parties were aware of this means of preserving their rights as they agreed to extend the time limits on a grievance in December, 2006. And it was undisputed herein that the parties have taken grievance time limits seriously over the years.

It is in the context that this case must be analyzed. The Union has argued herein that because the instant case involves a continuous violation of the labor agreement – - that is, the Company’s failure to pay employees’ paid lunch breaks violates the labor agreement on a daily basis - - that the Company’s timeliness/procedural issues cannot succeed. In addition, the Union has also contended that in the first two grievances which refer to paid lunch breaks, the Union was attempting to work with the Company, granting managers time and patience to get cells and teams working properly so that breaks would no longer be an issue; and that it would be unfair to dismiss the instant grievance on procedural grounds as having been “lost.” Because the Company never lived up to its repeated promises to fix the cells (which was the basis for the Union’s agreement to drop these grievances) and, the Union asserted, because nothing changed after it filed and dropped the first two grievances, these facts the Union’s contention that the first two grievances were never settled or resolved as the Company has claimed.

Here, it is undisputed according to both Union and Company witnesses that in September, 2005 after ratification of the effective labor agreement, the Company stopped paying for paid lunch breaks unless employees were working “straight eights.” Union officers admitted herein they were fully aware of this change and yet no grievance on the issue was filed until four months later, on January 20, 2006. It is important that that first grievance stated “. . .they’ve (the Company) taken away our paid lunch break . . . (t)his is contrary to the language They put in the contract . . .” and sought as a remedy, “Either run the shifts as (2) cell shifts with unpaid lunch or (3) shifts around the clock with paid lunch. . . Also to be made whole.” This is precisely what the second grievance, filed in February, 2006 contended and sought. The second grievance stated “. . . they have taken the paid lunch away, This is contrary to the contract . . .” and sought as a remedy, “Either run 2 shifts as cells . . .or run 3 shifts around the clock and pay lunch break, Also want backpay. . . and To be made whole.” Also, it is significant that Hoilien’s answer to the second grievance stated that he “...

Explained the intent of the language, the spirit of the negotiation process, and parties agreed that issue is resolved.” A comparison to the grievance before me, as explained by Mr. Thompson and the record evidence, shows the issue raised here is the same as the issues raised in the first and second grievances.

In my view, the fact that the cells never worked properly and lunches were not paid, as the Union thought they should be, from September, 2005 to November, 2006 actually supports an argument that the Union knew of the problems and acquiesced in or failed to take clear actions to preserve its future right to complain about unpaid lunches. In this regard, I note that the Union did not seek to get the Company to agree to hold the first or second grievances open or in abeyance while the Company tried to fix the cells; nor did the Union and the Company mutually agree to waive the time limits on either grievance. Given Arbitrator Bielarczyk’s prior award indicating that a grievance not pursued further is “lost” on the merits, it was important for the Union to get an extension of time or an agreement to hold either the first or second grievance pending the Company’s efforts to successfully fix the cells. Indeed, the Union failed to get any written confirmation of its understanding how the Company should fix the cells, how much time and patience would be agreeable and what would occur if the problems did not abate.

In these particular circumstances, and given the existence in the labor agreement of Step 4(2) and the long time period from the first denial of paid lunches through the dropping of the second grievance, Union’s argument that the failure to pay for lunch breaks was a continuing contract violation simply cannot succeed. In addition, I note that the Union undisputedly received a copy of Hoilien’s responses to the prior grievances and yet it failed to object to Hoilien’s characterizations that the first and second grievances had been resolved or settled. At the very least, the Union should have taken issue with the phrasing of Hoilien’s written responses (especially that printed on the second grievance, which strongly implied Union agreement to the Company’s interpretation of the contract language) in order to preserve its rights on the subject. It failed to do so. Based upon the above analysis I issue the following

AWARD

The instant grievance was not timely filed. The Union’s failure to process the two prior grievances to arbitration (concerning the same subject matter) means that those grievances stood resolved or settled and that the Union “lost” those grievances. The Union was therefore precluded from pursuing the instant grievance on the merits and it is hereby denied and dismissed on procedural grounds.

Dated this 25th day of May, 2007.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator