

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
LABORERS' UNION, LOCAL NO. 1086 : Case 5
and : No. 47680
ADVANCE CAST STONE COMPANY : A-4946
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Appearances:

Mr. Thomas Klein, Business Manager, Laborers' Union, Local No. 1086,
appearing on behalf of the Union.
Mr. Matthew Garni, Vice President, Advance Cast Stone Company, appearing
on behalf of the Company.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and Company or Employer respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on September 11, 1992, in Random Lake, Wisconsin. The hearing was not transcribed and the parties did not file briefs. Based upon the entire record, the undersigned issues the following Award.

ISSUES

The undersigned frames the issues as follows:

1. Is the grievance procedurally arbitrable?
2. If so, did the Company violate the just cause provision of the parties' collective bargaining agreement by discharging the grievant? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1991-93 collective bargaining agreement contains the following pertinent provisions:

ARTICLE VII

GRIEVANCE PROCEDURE

. . .

Section 7.2. A grievance shall be presented within ten (10) working days (a) from the time of occurrence upon which the same is based or (b) from the time such occurrence becomes known to the employee and/or the Union, but in any event not more than ten (10) working days after such occurrence. Failure to submit a grievance within such period shall constitute a bar to further action thereon.

Section 7.3. Adjustment of Grievances.
All grievances shall be handled and adjusted in the following manner:

(a) Step 1. the aggrieved employee or employees, or the Union, shall present the grievance in writing to the immediate supervisor, at which time the Steward may be present. If the grievance is not satisfactorily settled or adjusted within three (3) working days, it shall be referred to Step 2.

(b) Step 2. Upon referral from Step 1, the grievance shall be taken up between the plant superintendent or other management designee and the Steward, with or without the aggrieved employee and the Union's Business Manager or field representative.

(c) Step 3. If no satisfactory settlement or adjustment of the grievance is had in Step 2 within five (5) working days after having been taken up in such Step 2, the grievance shall be referred to a conference or conferences between the plant manager and/or other representatives of the Company and the Business Manger and/or other representatives of the Union who shall endeavor to settle and adjust the grievance.

. . .

ARTICLE XII

DISCHARGE OR SUSPENSION

Section 12.1. The Employer shall not discharge an employee having seniority without just cause, and shall give at least one (1) written notice of complaint or warning against such employee. A copy of such notice shall be delivered or mailed to the Steward as well as to the Business Representative of the Union. No such warning notice need be given to an employee before he is discharged if the cause of such discharge is dishonesty, drunkenness, possession or use of controlled substances on Company property or while on duty or reckless while on duty, or the carrying of unauthorized passengers. The warning notice as herein provided shall not remain in effect for more than six (6) months.

FACTS

The Company manufactures and installs precast concrete. The production workers in the plant are represented by Laborers' Local 1086. The grievant, Mike Miracola, worked for the Company for nine years as a production worker until his discharge.

From time to time, the Company has production workers on layoff status due to slow-downs in work orders. When this happens and there are employees on layoff status, the Company reviews the unemployment compensation reports it receives from the state as part of its standard operating procedure. It reviews these forms to see if any of its laid off employees are working, and if so, where they are working. Additionally, the Company tries to ensure that if a laid off employee from Advance Cast Stone works for another employer while on lay off status, that the employee reports whatever income is earned to the Wisconsin Department of Industry, Labor and Human Relations (DILHR) Unemployment Compensation Division. The reason for doing so is that the Company does not want to pay more than its proportionate share into the state's unemployment compensation fund.

In the fall of 1991, the Company laid off about a dozen employees due to lack of work. One of those employees was Robert Tise. While Tise was laid off and receiving unemployment compensation benefits, the Company learned that he was working for another employer and not reporting his wages from that job to the Unemployment Compensation Division. After learning this, the Company advised Tise that unless he reported his income from the other job to the Unemployment Compensation Division, he would be fired. Tise thereafter reported his wages from the other job to the Unemployment Compensation Division. Afterwards, this incident was widely reported throughout the plant. As a result, all employees were put on notice that in the event they were laid off from Advance Cast Stone and drawing unemployment compensation benefits, and they worked for another employer, they were to report the income from that job to the Unemployment Compensation Division.

On March 4, 1992, the Company laid off four employees due to lack of work. The four were Mike Miracola, Jeff Panzer, Rick Tise and Mike Tappa. After these employees were laid off, they all filed for, and subsequently received, unemployment compensation benefits.

Sometime thereafter, Company Vice President Matt Garni reviewed the Unemployment Compensation Division's "Initial Determination" form that related to Miracola. This form contained a finding that Miracola had "performed no wage earning services and was totally unemployed" during the pertinent time

period (i.e. after he was laid off from Advance Cast Stone). Insofar as the record shows, this finding was based on Miracola's representation to the Unemployment Compensation Division that he had not earned any income while on layoff status from Advance Cast Stone. Garni questioned the accuracy of this finding by the Unemployment Compensation Division. Specifically, Garni believed that Miracola was working for another company (namely Modern Metals, a paint shop in Fredonia, Wisconsin) and was being paid "under the table" by that company. What caused Garni to suspect this was that before Miracola had been laid off, Garni had heard Miracola tell a foreman at Advance Cast Stone that he was working part-time at Modern Metals and that the owner (of Modern Metals) "treated him real well."

On May 5, 1992, 1/ Garni had his secretary call Modern Metals and ask to speak to Miracola. The person answering the phone at Modern Metals said Miracola was not available at the moment. Garni interpreted this reply to mean that Miracola was working at Modern Metals, but he was not there at the time of the phone call.

Garni then contacted the Unemployment Compensation Division and advised them of his belief that Miracola was working at Modern Metals while collecting full unemployment compensation benefits and was being paid "under the table" by that company. 2/ The Unemployment Compensation Division subsequently investigated Garni's allegation. Insofar as the record shows, their investigation consisted solely of asking Miracola on two occasions if he had been, or was presently employed at, Modern Metals. Miracola replied both times that he was not currently working for Modern Metals nor had he ever worked for that company. Insofar as the record shows, the Unemployment Compensation Division accepted Miracola's reply at face value and did not investigate Garni's complaint against Modern Metals further. Garni, however, did not believe Miracola's statement to the Unemployment Compensation Division that he was not working for Modern Metals while he collected unemployment compensation benefits.

Around June 24, Garni spoke with Mike Tappa, one of the employees who was laid off in March and who had subsequently been recalled to work. Garni knew Tappa had worked at Modern Metals while he was laid off from Advance Cast Stone. Garni asked Tappa if Miracola had also worked at Modern Metals while he was laid off and Tappa replied that he saw Miracola working there (i.e. at Modern Metals) quite a bit. Tappa also told Garni that Miracola told him the arrangement he had with Modern Metals was that his earnings were included in his wife's paycheck. Tappa also told Garni that when he worked at Modern Metals, a supervisor there asked him if he was reporting the money he was earning to the Unemployment Compensation Division, to which Tappa replied that he was, whereupon the unnamed supervisor then replied: "Why? Nobody else does." Tappa also told Garni that the supervisor then told him (Tappa) that if he desired, some type of arrangement could be worked out to keep his wages from Modern Metals "off the books" so that it (i.e. his salary from Modern Metals) would not have to be reported to the Unemployment Compensation Division. Insofar as the record shows, Tappa did not avail himself of the supervisor's offer, but instead reported the income he earned at Modern Metals to the Unemployment Compensation Division.

Garni fired Miracola on June 24. His discharge letter stated as follows:

1/ All dates hereinafter refer to 1992.

2/ Modern Metals and Advance Cast Stone are not business competitors; they are in entirely different businesses.

Mr. Michael Miracola
RR No. 1
Adell, WI 53001

Dear Sir:

This is to formally advise you that you are discharged from your employment with our Company because of your dishonesty in collecting unemployment benefits while employed at the Modern Metals Company in Fredonia.

Under Article XII, Section 12.1, of the Local 1086 Labor Contract, because of your dishonesty, we are discharging you without a previous written warning.

Further, you will refrain from entering the premises of the Advance Cast Stone Company without specific permission from Matt Garni.

Sincerely,

ADVANCE CAST STONE COMPANY

Matt Garni, Vice President

Garni also sent the following letter to Union Business Manager Tom Klein that same day:

Laborers Local No. 1086
50 East Bank Street
Fond du Lac, WI 54935

ATTENTION: Mr. Tom Klein

Dear Tom:

Re: Michael Miracola

The above mentioned employee was laid off from his employment here on March 4th, 1992. He received a check from the Unemployment Service in the amount of \$78.00 for the week ending March 7th, 1992. Since that date, he has collected every week a check in the amount of \$230.00 including the week of June 13th, 1992, the last employment report we received from Madison.

Another of our employees, Michael Tappa, was also laid off on March 4th. This employee collected \$77.00 for the week ending March 14th, and \$76.00 for the week ending March 21, 1992. This employee, also worked part time at the same Modern Metals Company, 275 Industrial Drive, Fredonia, Wisconsin as Michael Miracola did and will testify to that effect if needed. In fact, Tappa has explained the elaborate means that were used to hide the wage payments made by that Company to Miracola so he could collect Unemployment Benefits.

On May 5th, 1992, we wrote to the Unemployment Compensation Division in Madison that we suspected that Miracola was earning wages on a cash basis from Modern Metals Company. On that same day, our office called Modern Metals Company and asked to speak to Michael Miracola. They said without hesitation that he was not available to answer the phone at the moment. So, there was no question in our minds that Miracola was in their employ.

On May 15th, The Sheboygan Unemployment Service called to advise that they had contacted Miracola who reiterated that he was not employed.

After more prodding from this office, on June 12th, 1992, Miracola was called to the Job Service office in Sheboygan and unequivocally stated that he was not employed and had never been employed at the Modern Metals Company.

With all of the above facts, in mind, we feel obligated to formally discharge Michael Miracola. Under Article XII, Section 12.1, of the Labor Contract, we are permitted to discharge employees without a previous written warning because of dishonesty.

As you can well understand, our Company cannot tolerate this type of dishonesty from our employees. It is not good for the morale of our other employees to see this type of cheating go unpunished.

Sincerely

COMPANY

President Matt Garni, Vice

Donald responded to Garni's letter with the following letter:

September 3, 1992

Advance Cast Stone Co.
Route 1, Box 347
Random Lake, WI 53075

Attn: Matt Garni

RE: Letter of September 1, 1992

Your letter is a complete misrepresentation of any conversation between you, me and Mr. Klein. At no time did I say Michael Miracola worked for us or had been an employee or on our payroll. I did not call Mr. Klein but you did and I spoke to him. I told him that Michael Miracola had worked on his car with permission from our superintendent. He may have helped his wife (who was and is on our payroll when work is available) but he was not working for us.

Sincerely,

Charles H. Donald
cc: Michael Miracola
Tom Klein

Several days after Miracola was discharged, the Company fired another employe for the same reason (i.e. collecting unemployment compensation benefits from Advance Cast Stone's account while working for another company and not reporting wages from the company to the Unemployment Compensation Division.) The discharged employe was Mike Panzer, one of the four employes who was laid off in March, 1992. In that case the owner of Parr Construction Company verified that Panzer worked for his company while he was drawing unemployment compensation benefits from Advance Cast Stone.

Miracola admitted that after he was laid off from Advance Cast Stone in March, he was at Modern Metals on occasion. He testified that all he did at Modern Metals when he was there was work on his own car parts. Tappa testified that when he was working at Modern Metals, he saw Miracola working there. Tappa also testified that he never saw Miracola working on car parts at Modern Metals.

Miracola testified that shortly before he was laid off in March, he and Garni exchanged words. The record does not indicate what prompted this exchange. Shortly afterwards, Garni offered to pay Miracola \$1,000 and not contest his receiving unemployment compensation if he would quit Advance Cast Stone. Miracola did not accept Garni's offer.

POSITIONS OF THE PARTIES

The Union initially challenges the Company's assertion that the grievance is procedurally defective. In its view, it complied with the contractual grievance procedure even though all of the various steps (of that grievance procedure) were not followed to the letter. On this point, the Union

essentially asks the Arbitrator to overlook whatever procedural irregularities occurred in the processing of the instant grievance and to address the grievance on its merits. With regard to the merits, the Union's position is that the Company did not have just cause to discharge Miracola. According to the Union, the Company failed to satisfy its stringent burden of proof that the grievant actually committed the offense for which he was discharged (i.e. not reporting earnings from another company while drawing unemployment compensation benefits from the account of Advance Cast Stone). The Union acknowledges that while some employers sometimes pay employes "off the books," it notes that it is very difficult to prove same. It asserts the Company did not prove that that occurred here. In its view, there is no concrete proof that Miracola either worked for Modern Metals or drew income from that company while he was receiving unemployment compensation benefits from Advance Cast Stone's account. It relies on the following to support this proposition. First, it notes that Donald's letter states, in pertinent part, that Miracola "was not working for us." Second, it notes that the Initial Determination Statement of the Unemployment Compensation Division states that "the claimant performed no wage earning services and was totally unemployed in the weeks ending 03-14-92 through 06-27-92." The Union submits that the foregoing documents refute the Company's claim that the grievant was dishonest. It therefore asks that the grievance be granted, the discharge overturned and the grievant made whole for his losses.

The Company initially contends that the grievance was procedurally defective. It cites the following to support this proposition. First, it notes that Miracola did not present his grievance personally to his immediate supervisor. In its view, Miracola could have contacted his supervisor after working hours if he wanted to file a grievance. Second, the Company asserts that Step 2 of the grievance procedure was not followed because the Union steward did not discuss the grievance with management as it supposed to happen.

Finally, the Company submits that Step 3 of the grievance procedure was not followed either because the grievance was not referred to a labor-management conference. With regard to the merits, the Company's position is that it had just cause to discharge Miracola for the conduct in question. According to the Company, Miracola worked for Modern Metals while he was on lay off status from Advance Cast Stone and was paid "off the books" by Modern Metals. The Company further contends that Miracola did not report his earnings from Modern Metals to the Unemployment Compensation Division as he should have done. As the Company sees it, this conduct resulted in it paying more than its proportionate share into the unemployment compensation fund. In the Company's view, the aforementioned conduct was dishonest and warranted the grievant's discharge. The Company therefore requests that the grievance be denied and the discharge upheld.

DISCUSSION

Procedural Arbitrability

Since the Company contends that the grievance is procedurally defective, it follows that this is the threshold issue. Accordingly, attention is focused initially on the question of whether the grievance is procedurally arbitrable.

The first step of the grievance procedure provides that "the aggrieved employee or employees, or the union, shall present the grievance in writing to the immediate supervisor..." What happened here was that Union Business Manager Tom Klein filed the instant grievance. While the Company implies that Miracola, rather than Klein, should have filed the instant grievance, there was nothing improper about Klein filing it. This is because the language in Step 1 specifically allows the Union to file grievances in their own name, rather than the individual employe having to do it.

This step of the grievance procedure also provides that grievances are to be filed with the employe's "immediate supervisor." That did not happen here.

Specifically, Klein did not file the grievance with Miracola's "immediate supervisor," but instead filed it with Company Vice President Garni. Garni is above Miracola's "immediate supervisor" in the Employer's organizational structure. The record does not indicate who Miracola's "immediate supervisor" was.

The second step of the grievance procedure provides in part that "the grievance shall be taken up between the...management designee and the steward..." Insofar as the record shows, that never happened here. Specifically, the steward was not involved in processing the instant grievance in any way, shape or form.

The third step of the grievance procedure provides in pertinent part that "The grievance shall be referred to a conference or conferences between...representatives of the Company and the Business Manager...of the Union who shall endeavor to settle and adjust the grievance." Notwithstanding the

Employer's assertion to the contrary, this step was followed because Company representative Garni and Union Business Manager Klein did "endeavor to settle" the instant grievance.

The foregoing indicates that when the Union processed the instant grievance, it did not comply with several parts of the grievance procedure. First, it did not file the instant grievance with Miracola's immediate supervisor, but instead filed it with Garni. Second, after the grievance was filed, the Union steward was bypassed in the process and did not participate in processing it.

Having so found, the critical question becomes whether the Union's non-compliance with the literal language of Steps 1 and 2 of the grievance procedure bars a review of the grievance on the merits. I find it does not for the following reasons. First, the grievance procedure does not provide an express penalty for noncompliance with various steps of that procedure. Second, with regard to the Union's filing the grievance with Garni rather than Miracola's immediate supervisor, it is noted that it was Garni who actually fired Miracola. Insofar as the record shows, Miracola's immediate supervisor was not involved in making this decision. That being the case, it would have served no practical purpose for Klein to have filed a grievance challenging Miracola's discharge with a management person (i.e. Miracola's immediate supervisor) who did not make the decision and who is lower in the Company's organizational structure than the person who actually made the decision (i.e. Garni). Consequently, it is understandable why Klein filed the grievance directly with Garni. Given the foregoing, the undersigned finds that the Union's noncompliance with Steps 1 and 2 of the grievance procedure is not fatal. It is therefore held that the instant grievance is procedurally arbitrable and properly before the arbitrator.

Merits

Having thus disposed of the Company's procedural objections, attention is now turned to the substantive merits of the grievance. Section 12.1 (the just cause provision) governs this matter and requires that the Company have just cause to discharge the grievant. The elements to a just cause analysis have been variously stated. In my opinion, where the agreement does not specify the standards and where the parties have not otherwise stipulated to them, the just cause analysis must address two elements. The first is that the employer demonstrate the misconduct of the grievant and the second, assuming this showing is made, is that the employer establish that the penalty imposed was contractually appropriate.

At the time of his discharge, the grievant was laid off from Advance Cast Stone due to lack of work and was receiving unemployment compensation benefits. The Company alleges that what happened here is that the grievant worked for another employer while he received unemployment compensation benefits, earned income from that employer which was paid "under the table", and failed to report the fact that he had earned income to the Unemployment Compensation Division. The grievant was discharged for the foregoing reason.

My analysis begins with the premise that if an employe drawing unemployment compensation benefits earns wages but does not report it, such conduct amounts to stealing from the company that paid taxes into the unemployment compensation fund. A payroll tax paid by employers provides the funds to pay unemployment benefits. In this case, it was Advance Cast Stone that paid those taxes and the grievant's unemployment benefits were being drawn from Advance Cast Stone's account with the unemployment compensation fund. Employes are not entitled to receive both full unemployment compensation benefits plus whatever they can earn. Instead, if they have additional earnings, their unemployment compensation benefits are offset. The employes at Advance Cast Stone were put on notice by the Tise incident in the fall of 1991 that employes who are laid off and drawing unemployment compensation benefits are to report wages earned from other employment to the Unemployment Compensation Division, and if they fail to do so they are subject to discharge for same. Given the foregoing, the undersigned is satisfied that the Company has a legitimate and justifiable concern with, as well as a direct interest in, paying only its proportionate share into the unemployment compensation fund and insuring that employes who are laid off and drawing unemployment compensation benefits report wages earned from other employment. The issue here regarding the first element of the just cause determination turns, then, not on the Company's interest in insuring that employes drawing unemployment compensation benefits report wages earned from other employment, but instead on whether the grievant failed to do so as charged.

As noted above, the first component of a just cause analysis requires a demonstration of the grievant's misconduct. This call obviously turns on the facts involved. The grievant admits that after he was laid off from Advance Cast Stone, he was at Modern Metals on occasion. He asserts though that all he did when he was there was to work on his own car parts. The Company does not dispute the grievant's assertion that he worked on his own car parts at Modern Metals, but it believes the grievant did more than that, namely that he worked for that company and was paid "under the table" by them.

After weighing the circumstantial evidence present here, the undersigned has reached the same conclusion as the Company did, namely that the grievant worked at Modern Metals while he received unemployment compensation benefits, that he was paid "under the table" by that company, and that he failed to report earned income to the Unemployment Compensation Division. This conclusion is based on the following factors. To begin with, there is the statement Garni overheard the grievant make to a foreman at Advance Cast Stone that he was working part-time at Modern Metals and that the owner "treated him real well." Taking the grievant at his word, this statement establishes that he was working at Modern Metals before he was laid off from Advance Cast Stone. Second, there is the fact that Tappa saw the grievant working at Modern Metals when both were laid off from Advance Cast Stone. In my view, this establishes that Miracola continued to work at Modern Metals after he was laid off from Advance Cast Stone. Also, it is noteworthy that while Miracola claimed he only worked on his own car parts when he was at Modern Metals, Tappa never saw Miracola working on any car parts. Third, there is Tappa's un rebutted statement that Miracola told him he (Miracola) had an arrangement with Modern Metals whereby his earnings were included in his wife's paycheck. Taking the grievant again at his word, this statement establishes that Miracola was paid for his services at Modern Metals by the very means he mentioned, namely that his earnings were included in his wife's paycheck. Certainly that is not the way employes are supposed to be paid. That being so, the conclusion drawn by the undersigned is that the grievant was paid in this fashion so that his wages were paid "under the table." Fourth, there is the fact that a supervisor at Modern Metals, one Ramsey, told Garni that Miracola was an excellent worker and painter. As a practical matter, Ramsey's statements undercut Miracola's assertion that he did not work for Modern Metals because here was a supervisor (of Modern Metals) praising Miracola's work for that company. It was implicit in his praise of Miracola's work that he had either seen Miracola perform work

at Modern Metals or was familiar with it. Finally, there is the fact that Donald, the owner of Modern Metals, told Garni that Miracola had done some work (for Modern Metals) for which he was paid under his wife's paycheck. This statement conflicts though with what Donald wrote in his subsequent letter. As a result, the undersigned is presented with a choice of relying on Donald's original statement to Garni or his subsequent letter. Given this choice, I pick the former over the latter because the former (i.e. Donald's original statement to Garni) is consistent with the four previously noted factors while the latter (i.e. Donald's letter) is not. In my view, the foregoing factors conclusively establish that Miracola worked at Modern Metals while he received unemployment compensation benefits, that he was paid "under the table" by that company, and that he failed to report the fact that he had earned income to the Unemployment Compensation Division.

Having concluded that the grievant engaged in the conduct complained of, the undersigned turns to the question of whether this conduct warranted discipline. The Company has previously put employes on notice that they face discipline if they fail to report income earned while drawing unemployment compensation benefits. Inasmuch as that is exactly what happened here, it follows that the grievant's actions constitute misconduct warranting discipline.

The second component of a just cause analysis requires that the employer establish that the penalty imposed be contractually appropriate. Said another way, the punishment must fit the crime. The Employer argues that its discharge of the grievant was proper under the circumstances. I agree. First, some offenses are so serious they are grounds for summary discharge even if the employe has not been previously disciplined. Such is the case here because the parties have contractually agreed in Article 12, Section 12.1 that dishonesty is one of the so-called cardinal offenses that does not require a warning notice prior to discharge. The grievant's conduct herein can easily be categorized as dishonest. Next, there is nothing in the record which indicates that the grievant was treated in less than an even handed fashion. The Panzer situation is noteworthy on this point because Panzer committed the same offense as the grievant about the same time and was also fired. While the Union distinguishes that case from this one, I am not persuaded that the Panzer situation is distinguishable. In my view it is directly on point both in terms of the crime itself and the punishment imposed. Other than the Panzer incident and the Tise incident previously noted which the Company used to put all employes on notice that they had to report income earned while drawing unemployment compensation benefits or face discharge, there is nothing in the record indicating that the Employer ever knew, or had been advised of, other similar incidents. That being so, it does not appear that the grievant herein was subjected to any disparate treatment in terms of the punishment imposed. Finally, it is noted that even if Miracola correctly characterized Garni as gunning for him because of run-ins the two men had previously had, that does not alter the outcome here. Accordingly then, it is held that the severity of the discipline imposed here (i.e. discharge) was neither disproportionate to the offense nor an abuse of management discretion, but was reasonably related to the seriousness of the grievant's proven misconduct. The Company therefore had just cause for discharging the grievant.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

1. That the grievance is procedurally arbitrable; and
2. That the Company did not violate the just cause provision of the parties' collective bargaining agreement by discharging the grievant. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 3rd day of December, 1992.

By _____
Raleigh Jones, Arbitrator