

**IN THE MATTER OF ARBITRATION BETWEEN**

<b>ASSOCIATED MILK PRODUCERS, INC.,</b>	)	
	)	
<b>Employer,</b>	)	
	)	
<b>and</b>	)	<b>MALECEK DISCHARGE GRIEVANCE</b>
	)	
<b>TEAMSTERS, LOCAL NO. 120,</b>	)	<b>ARBITRABILITY ISSUE</b>
	)	
<b>Union.</b>	)	
	)	<b>FMCS CASE NO: 101223-52514-3</b>
	)	

Arbitrator: Stephen F. Befort

Hearing Date: August 11, 2010

Post-hearing briefs received: August 30, 2010

Date of Decision: September 21, 2010

**APPEARANCES**

For the Union: Martin J. Costello

For the Employer: Susan K. Hansen

**INTRODUCTION**

Teamsters, Local No. 120 (Union), as exclusive representative, brings this grievance claiming that Associated Milk Producers, Inc. (AMPI or Employer) violated the parties' collective bargaining agreement by discharging Lauren Malecek without just cause. The Employer maintains that the grievance is not procedurally arbitrable and that it properly discharged the grievant for cause. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through

the testimony of witnesses and the introduction of exhibits. At the hearing, the parties stipulated to bifurcate the proceedings so as to present only the issue of procedural arbitrability at this time. The parties further stipulated that if the grievance is found to be timely, the parties will proceed to consider the matter under the appropriate steps of the grievance procedure set out in the parties' collective bargaining agreement with arbitral jurisdiction reserved by the undersigned.

### **ISSUE**

Is the grievance filed by the Union on behalf of Loren Malecek procedurally arbitrable?

### **RELEVANT CONTRACT LANGUAGE**

#### **ARTICLE 3. GRIEVANCE PROCEDURE**

**B. Resolution:** The employee shall first attempt to resolve the matter with the supervisor within five calendar days of the alleged violation and the supervisor has five calendar days to respond. The Union and Company will attempt to resolve the grievance at Section B. Failing agreement, the employee may then advise a steward on his or her own time who will discuss the matter with the supervisor and the employee. Failing resolution, the matter must be submitted in writing to the Company and the Union. At the request of the employee the steward can be present if the matter involves discipline. The five calendar day time limit should be complied with if at all possible, but failure will not make the alleged violation complaint null and void.

**C. Written Grievance:** All grievances that are not resolved with the supervisor must be submitted in writing to the supervisor signed by the employee and the Union (except a grievance filed by the Union office which should be submitted directly to the division manager) within fourteen (14) calendar days of the alleged contract violation or knowledge thereof, or said grievance will be considered null and void and it will not be subject to further review. The Union and Company will attempt to resolve the grievance at Section C. In the case of discipline or discharge, the matter must be submitted, in writing, within seven (7) calendar days of the receipt of notice of the discipline or discharge or it will likewise be null and void and not subject to further consideration.

\* \* \*

**E. Arbitration Procedure:** If the grievance is not settled and been filed on time, the Employer and the Union shall agree upon a neutral arbitrator. Failing agreement on a neutral arbitrator, either party may request a panel of arbitrators from the Federal Mediation and Conciliation Service. The parties shall select an Arbitrator within fourteen (14) calendar days following receipt of the arbitration list from FMCS. The arbitration hearing will be scheduled within sixty (60) days following the selection of an arbitrator. The Arbitrator will render a written decision and forward the decision to the parties within thirty (30) days from the conclusion of the arbitration hearing or from the date of submission of post-hearing briefs, whichever is later.

\* \* \*

**G. Authority of the Arbitrator:** The decision of the arbitrator shall be based upon the terms and conditions of this Agreement and the arbitrator's function is to interpret and apply this Agreement. The arbitrator will have no authority to alter, in any way, the terms and provisions of this Agreement and shall confine his or her decision to a determination of the facts and to the interpretation and application of the contract. The decision of the arbitrator shall be final and binding unless one or the other of the parties appeals the matter in an appropriate timely manner. In no event shall the arbitrator's award be retroactive to more than thirty days prior to the filing of the grievance.

### **FACUAL BACKGROUND**

AMPI is a dairy marketing cooperative that collects milk and processes dairy products. The grievance at issue concerns a facility located in Dawson, Minnesota. The Union represents a unit of production and maintenance employees working at the Dawson facility.

Loren Malecek is a production worker employed at the Dawson plant. On October 3, 2009, Mr. Malecek underwent reasonable cause testing pursuant to AMPI's Alcohol and Drug Testing Policy. Following the test, the Employer directed Mr. Malecek to contact its Employee Assistance Program for evaluation. On October 26, the Employer presented Mr. Malecek with a notice of discharge stating as follows:

You had a chemical dependency evaluation set up for Friday, October 23, 2009. You chose not to complete this evaluation. As of today, your employment with Associated Milk Producers, Inc. is terminated for failure to follow the AMPI alcohol and drug policy.

Mr. Malecek spoke with AMPI Dawson Division Manager Mark Tastad by telephone on October 30 and asked to be reinstated. Mr. Tastad denied the request and told Mr. Malecek that he could contact a Union steward to exercise his rights under the parties' collective bargaining agreement.

On Monday, November 2, Union Steward Blaine Hustad met with Mr. Tastad to discuss the termination. Mr. Tastad again held firm and indicated that the termination decision would stand. Mr. Hustad verbally informed Mr. Tastad that the Union would be filing a grievance challenging the termination.

On that same day, Mr. Hustad gave a grievance form to Vickie Malecek, the grievant's wife and another AMPI employee, to give to Mr. Malecek. Mr. Hustad delivered the signed grievance to the Employer on November 4. On the following day, Mr. Hustad substituted an amended grievance which specified the agreement provisions allegedly violated.

On November 5, Mr. Tastad sent an email to Union Business Agent Mike Klootwyk indicating that the grievance was not timely filed under the terms of the parties' contract. A letter sent to Mr. Malecek on November 9 similarly stated that the Employer considered the grievance to be null and void and not subject to further consideration under Article 3, Section C of the contract. The Employer reiterated this position during a grievance step meeting held on November 24.

The grievance proceeded to an arbitration hearing on August 11, 2010. At the hearing, Mr. Klootwyk testified concerning the parties' resolution of a grievance on

December 8, 2005. Mr. Klootwyk stated that previous Divisional Manager Joe Vaske expressed the desire to reduce the number of formal grievances by having the Union and the Company attempt to first settle disputes through the Article 3, Section B informal discussion procedure. Mr. Klootwyk testified that he responded by expressing the concern that the informal process might “time out” the Union’s ability to file a formal written grievance within the specified 7-day timeline. According to Mr. Klootwyk, Mr. Vaske responded by stating that the Employer would not count the Section B discussion time against the 7-day formal grievance deadline. The Union also introduced Mr. Klootwyk’s notes from this meeting which stated as follows:

Discussed the grievance procedure and came to resolution on the 72 hour language. The grievance should first go to the supervisor. The 72 hour and 72 hour response will not count towards the grievance time limits of 7 days discharge and 14 days others.

The Employer called Plant Superintendent Rick Johnson in rebuttal, who testified that he was present at this meeting and does not recollect any agreement to extend the contract’s timelines.

The parties stipulated at the hearing to bifurcate the grievance proceeding so as to present initially only the issue of procedural arbitrability. The parties further stipulated that if the grievance is found to be timely, the parties then will proceed to consider the matter under the appropriate steps of the agreement’s grievance procedure.

## **POSITIONS OF THE PARTIES**

### **Employer:**

The Employer contends that this matter is not procedurally arbitrable because the Union did not submit its request for arbitration within the timelines specified in the

parties' collective bargaining agreement. Pursuant to Article 3, Section C, a grievance "must be submitted, in writing, within seven (7) calendar days of the receipt of notice of the discipline or discharge." In this instance, sine the union's grievance was not filed until nine calendar days following receipt of such notice, the Employer argues that the grievance is not arbitrable. The Employer further maintains that the parties did not verbally agree to extend this timeline pending completion of the informal process set out in Article 3, Section B.

**Union:**

The Union claims that the grievance is arbitrable because the parties agreed to a modified grievance review procedure in 2005. The parties' agreement provides for a two-tier review of contract disputes: an informal Section B discussion step and a more formal Section C written grievance step. The Union contends that the parties agreed in 2005 that the time spent in Step B discussions would not count against the time lines specified in Section C for filing a written grievance. When that understanding is applied to the facts of this case, the Union claims that its written grievance is timely and arbitrable.

**DISCUSSION AND OPINION**

**Procedural Arbitrability**

The issue of arbitrability is a matter governed by the parties' contractual agreement. While the Supreme Court has counseled that a finding of arbitrability generally is favored, United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), the parties are free to withhold matters from arbitration by the terms of their contractual arrangement.

In this instance, the Employer contends that this dispute is not arbitrable because the Union's request for arbitration was untimely. In support of this position, the Employer points to Article 3, Section C of the parties' collective bargaining agreement which states that a grievance "must be submitted, in writing, within seven (7) calendar days of the receipt of notice of the discipline or discharge." Since it is undisputed that the Union's grievance was not filed until nine calendar days following receipt of such notice, the Employer argues that this dispute is not arbitrable.

As the leading treatise on labor arbitration states, "if the agreement does contain clear time limits for filing and prosecuting grievances, failure to observe them generally will result in dismissal of the grievance if the failure is protested." ELKOURI & ELKOURI, HOW ARBITRATION WORKS 220 (6<sup>th</sup> ed. 2003). Numerous decisions issued by Minnesota arbitrators similarly have held that a union's failure to comply with the explicit time limits set out in a collective bargaining agreement for the processing of grievances may deprive an arbitrator of jurisdiction. *See, e.g., Benton County and Law Enforcement Labor Services, Inc.*, BMS Case No. 09-PA-0415 (Befort, 2009); *Goodhue County and Law Enforcement Labor Services, Inc.*, BMS Case No. 04-PA418 (Miller, 2005); *Teamsters local No. 320 and County of Washington*, BMS Case No. 93-PP-18-B (Rutzick, 1993).

While the Union does not dispute that it did not file its written grievance in this matter within seven calendar days, it argues that the parties agreed to modify that requirement in conjunction with the resolution of another grievance in 2005. As noted above, Union Business Agent Klootwyk testified that the parties verbally agreed, as a basis for encouraging the resolution of disputes through the agreement's informal Article

3, Section B discussion procedures, that the Employer would not count the Section B discussion time against the 7-day formal grievance deadline. Thus, according to Mr. Klootwyk's understanding, the five days afforded in Section B for the employee's informal presentation may extend Section C's seven day formal filing period to a potential twelve day limitations period.

The Union argues that its grievance filing was timely per this understanding. The Employer provided notice of termination on October 26 which was followed by an informal discussion between Mr. Hustad and Mr. Tastad on November 2. The Union then filed its formal written grievance two days later. If Mr. Klootwyk's understanding is controlling, the seven-day filing clock began to run on November 2 and the grievance is timely.

The ultimate question is whether there is sufficient evidence to show that the parties reached a mutual agreement that modified the terms of the written collective bargaining agreement. While Mr. Klootwyk testified in the affirmative, Mr. Johnson's testimony denied any recollection of such an agreement.

Mr. Klootwyk's testimony, however, is credibly supported by his contemporaneous written notes. These notes state:

Discussed the grievance procedure and came to resolution on the 72 hour language. The grievance should first go to the supervisor. The 72 hour and 72 hour response will not count towards the grievance time limits of 7 days discharge and 14 days others.

The "72 hour language" refers to the Article 3, Section B informal discussion process that precedes the filing of a formal grievance. At the time of the 2005 grievance, the Union had 72 hours to attempt the resolution of a dispute and the supervisor had a similar 72 hour period to respond. This time frame was expanded to five days each under the

current 2007-2010 collective bargaining agreement. The obvious meaning of Mr. Klootwyck's note is to memorialize an understanding that the time limit for filing a formal grievance under Section C will not start to run until after the Section B informal process has run its course.

Since Mr. Klootwyck's testimony is supported by tangible corroborating evidence, I find it more credible than Mr. Johnson's lack of any recollection concerning the existence of such an agreement. Accordingly, the Union's November 4 grievance is timely and this dispute is procedurally arbitrable.

#### **AWARD**

The Grievance is procedurally arbitrable. Jurisdiction is reserved over the merits of the grievance should resort to arbitration be necessary following exhaustion of the contract grievance procedure.

Dated: September 21, 2010

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Stephen F. Befort  
Arbitrator