

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL NO. 392

and

WAUKESHA BLOCK CO., INC.

Case 1
No. 54547
A-5530

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, Attorneys at Law, by
Mr. Matthew R. Robbins, appearing for the Union.

Gill & Gill, S.C., Attorneys at Law, by Mr. Bruce N. Evers, appearing for the Company.

ARBITRATION AWARD

Laborers' International Union of North America, Local No. 392, herein the Union, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and to decide a dispute between the parties. Waukesha Block Co., Inc., herein the Company, concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Waukesha, Wisconsin, on January 13, 1997. There was no stenographic transcript of the hearing made. The parties completed the filing of post-hearing briefs on February 25, 1997.

ISSUES:

The parties stipulated to the following issues:

Was there just cause for the discharge of Michael Brook? If not,
what is the remedy?

BACKGROUND:

The Company manufactures approximately 200 different types of concrete masonry blocks for use in the construction of both residential basements and commercial building walls. These blocks are produced by two machines, one at Plant 1 and one at Plant 2. The machines produce

different types of blocks based on the different mixtures of sand, gravel and cement, which mixtures are then poured into different types of forms. The blocks then come out of the end of the machines, at which time an employee referred to as the "cuber" puts the blocks on pallets and moves them to storage. While a machine is operating, the machine operator can, if desired, leave the machine and attend to other matters, such as either relieving the employee working as the cuber so the cuber can go to lunch or going down in the pit to make certain that the material feeding into the block machine is running smoothly. The machine operator normally can be absent from the block machine for a period of at least 15 to 20 minutes without any problem. If some problem does develop, the machine can be shut down temporarily and then restarted. The block machine must be cleaned on a daily basis. It takes approximately an hour to an hour and one-half to do the daily cleaning of a block machine. The cleaning process is started by the machine operator placing the controls on the last batch setting. Once the cleaning process begins, the operator cannot reverse the process.

On September 27, 1996, 1/ Brook was scheduled to work from 5:00 a.m. to 4:00 p.m. as a machine operator on the block machine in Plant 1. Shawn Lyons was working with Brook as the cuber. At approximately 12:15 p.m. on September 27, Brook put the machine on the last batch setting, which setting begins the procedure for shutting down the machine. Shortly thereafter, Brook went to Phil Arena, his supervisor, and told Arena that he was shutting down the machine and going home because he had not been able to take any breaks and because he had been having production problems all day. Arena went to Plant 1 and saw that the block machine was on the last batch setting. Arena contacted his supervisor, William Schaab, who is the Company's Vice-President of Block Operations. Schaab and Arena decided to terminate Brook's employment. Arena arranged for an employee to replace Brook. Arena then went to Plant 1 and informed Brook that his employment was terminated immediately.

At the time of his termination, Brook had been employed by the Company for approximately eleven years. Until January of 1995, Brook had not been disciplined by the Company. In January of 1995, Brook was given a verbal warning for substandard productivity and for uncooperativeness. In August of 1995, Brook was given a written warning for the same reasons. In April of 1996, Brook was given a three-day suspension without pay for basically the same reasons as in his prior warnings. Brook did not grieve any of the aforementioned disciplinary actions. Subsequent to Brook's suspension in April of 1996, a Union Business Representative, Aaron Couillard, met with Brook to discuss the situation. Couillard also met with Brook's fellow employees in an attempt to improve the relationship between them and Brook. When Brook returned to work on May 2 following his suspension, Arena met with him to review his duties and responsibilities.

In October of 1993, Brook suffered a brain injury and a broken arm in a motorcycle accident. He returned to work in April of 1994. Brook testified that, since the accident, he gets upset more easily and is bothered more by stress. Brook testified as follows about the events on September 27. There were more production problems than usual, e.g., the blocks were cracking, the returns were not coming back right, there were problems with the cuber, and, one of the

1/ Unless otherwise specified, all other dates herein refer to 1996.

machines ran out of material. As a result of those problems, Brook had to frequently stop what he was doing either to correct the problem or to help Lyons, who was working as the cuber. Lyons had been working for the Company for only about two weeks and was not very experienced. Further, the operation was short-handed, so there was no one either to help Brook with the problems, or, to relieve him for his breaks. Brook said that by noon he was so upset and frustrated, because he was afraid he would be disciplined again for low productivity, that he decided to shut down the machine.

POSITION OF THE UNION:

Brook had not been disciplined prior to 1995. All of his disciplinary actions were received following a grievance filed by the Union which forced the Company to return Brook to work after he sustained a serious head injury in an accident. It is obvious that the Company jumped at the perceived chance to discharge Brook. Arena did not tell Brook that he would be fired if he left work. Rather, Arena simply told him that, if he was leaving, then he should just punch out instead of cleaning his machine. Thus, Brook was not insubordinate. Rather, he was frustrated. At no time was Brook loud, disrespectful or hostile to Arena. When Brook asked to talk to his Union steward, Arena told him he could, but only after he punched out. Brook complied with that requirement.

Prior to September 27, Lyons had another employee assisting him on the cuber. On September 27, Lyons was working alone. When Couillard visited the plant two days after the discharge, another employee was again assisting Lyons. The area in which Brook was working on September 27 was severely understaffed. The Company had allowed two employees to be gone from work on that day. A third employee, a lead employee, had left the area and had gone to the Company offices. The Company knew that Brook had a tendency to become flustered or frustrated when things did not go smoothly in his work area. As the problems mounted on September 27, Brook became frustrated and began shutting down the block machine about one hour early. Given the length of time it takes to clean the machine at the end of the shift and the problems which were occurring with the machine, there was a minimal amount of production actually lost on that day. Further, if another employee had been helping Lyons on September 27, then it would have been much easier for Brook to deal with the production problems and it is likely that he would not have left work early.

In September of 1996, another employee, Bob Gardener, walked off the job because of personal concerns, but he was not disciplined for that conduct. While Gardener did not have the same disciplinary history as Brook, the absence of any discipline for Gardener would suggest that a less severe form of discipline, rather than discharge, would have been appropriate in Brook's case.

Under the facts, Brook's discharge was without just cause. The discharge should be reduced to a written reprimand and Brook should be reinstated and made whole for all losses.

POSITION OF THE COMPANY:

The Company lost an afternoon of production as a result of Brook's decision to shut down the machine at noon without any prior notice to management. Arena interpreted Brook's action to demonstrate that he again was not going to cooperate with management, but rather, was going to do things his way. Substandard work and uncooperativeness were the reasons for each of Brook's prior disciplinary actions.

Brook never informed Arena of any problems in Plant 1. If there had been so many problems, Brook could have shut down his machine temporarily and gone to Arena for help. Arena testified that the problems which Brook allegedly experienced on September 27, were not out of the ordinary. Brook had operated Plant 1 for over ten years and was accustomed to those types of problems.

The instant situation is different from the previous situation involving Robert Gardener. Gardener left work early after he had complained about a safety issue which had existed for over one and a half weeks without being corrected. When Arena investigated the situation, he found that the safety issue did exist and was a legitimate concern for Gardener. Further, no production time was lost when Gardener walked off the job. In addition, Gardener had not been disciplined prior to that incident. Thus, the two situations were not the same.

The Company had disciplined Brook in a progressive procedure. There was just cause to terminate Brook's employment in view of the circumstances.

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE X

SENIORITY

. . .

Section 5. Seniority shall be lost by (a) voluntary quit; (b) discharge for cause; (c) withdrawal or transfer from the Bargaining Unit; (d) absence from work for two (2) consecutive days without notifying the Employer or without reasonable cause, in which case the employee will be considered for the purpose of seniority to have quit voluntarily.

. . .

DISCUSSION:

The parties are in agreement with respect to much of the background leading up to Brook's termination. One of the few areas of disagreement is whether another employee had been helping Lyons with the cubing operation on both the days preceding and the days following September 27.

Arena testified that other employees had been helping Lyons prior to September 27, but that no employee was assigned to help Lyons on the Tuesday after Brook's termination as asserted by the Union's Business Representative. Brook did testify that he became upset and frustrated on September 27 due to the numerous problems which were interfering with production and he feared that, as a result, he would be disciplined again for low productivity. In spite of that concern, Brook did not talk to Arena about those problems. Rather, Brook decided to shut down the plant and to go home early. Therefore, the presence or absence of an employee to help Lyons on either September 27, or the following Tuesday, did not justify Brook's conduct.

The Union accurately asserts that, on September 27, Brook did not refuse a direct order from Arena. However, Brook was not terminated for insubordination. Arena testified that he believed Brook's act of initiating a shutdown of Plant 1 was a continuation of the conduct for which he had been disciplined on previous occasions, i.e., a problem of uncooperativeness. It was that continued conduct which provoked Brook's termination.

Arena testified he was not aware that Brook was having an unusual number or type of production-related problems on September 27. Brook was an experienced operator who had encountered various production problems in the past. Arena said he had been in Plant 1 at least four times during the morning of September 27. Even if Brook had not seen Arena on any of those occasions, he could have contacted Arena either by using a nearby telephone, by walking to Arena's nearby office, or, by sending Lyons to find Arena.

Apparently Brook set the block machine on the last batch setting at approximately 12:15 p.m., which means it would have been about 1:30 p.m. when the machine finished the last batch. Since Brook was scheduled to work until 4:00 p.m., it seems that there were about two and one-half hours during which the machine was out of production. Consequently, the undersigned does not agree with the Union's assertion that "there was a minimal amount of production actually lost on that day."

The Union contends that another employee, Robert Gardener, was not disciplined in the fall of 1996 when he walked off the job. Arena testified, without contradiction, that, for at least a week, Gardener had been expressing to the Company some safety concerns about his job. When the Company failed to address those concerns, Gardener turned his job over to another employee and left work. After investigating the matter, Arena concluded that the safety concern was justified. Accordingly, Gardener was not disciplined. The undersigned is persuaded that the situation involving Gardener is distinguishable from the instant matter and fails to support the allegation of disparate treatment.

Brook started the shutdown cycle of the block machine before he told Arena of his intent to shutdown the machine and to go home before the end of his scheduled shift. Standing alone, such an action would not appear to justify Brook's discharge. But, Brook's actions on September 27

must be viewed in relationship to the events leading up to the discharge. Brook had received increasingly severe disciplinary actions, beginning with a verbal warning on January 10, 1995, and followed by a written warning on August 10, 1995, and a three-day suspension on April 29, 1996.

All of those disciplinary actions were based on Brook's uncooperativeness and his unsatisfactory productivity. None of the disciplinary actions received by Brook, prior to September 27, were grieved. When Brook returned to work on May 2, 1996, following his three-day suspension, Arena met with him to review his duties and responsibilities. At that time, Arena told Brook to ask for help if he needed it and to tell someone when he noticed a problem. Such a background demonstrates that the Company had a continuing concern with Brook's behavior and performance.

The Company did utilize a progressive disciplinary procedure in an effort to correct that behavior and performance. Accordingly, the Company's decision to discharge Brook for his conduct on September 27 was a reasonable action.

Based on the foregoing, the undersigned enters the following

AWARD

That the Company did have just cause to discharge Michael Brook on September 27, 1996; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 8th day of May, 1997.

By Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator