

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MODERN BUILDING MATERIALS, INC.

and

TEAMSTERS UNION LOCAL NO. 43

Case 27
No. 55369
A-5594

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Mr. John Brennan** and **Ms. Jill M. Hartley**, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

Mr. Ted Mastos, Personnel Director, Modern Building Materials, Inc., 8011 Green Bay Road, Kenosha, Wisconsin 53142, appearing on behalf of the Company.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Teamsters Union Local No. 43 (hereinafter referred to as the Union) and Modern Building Materials, Inc. (hereinafter referred to as the Company) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen as arbitrator of a dispute over the assignment of Sunday overtime on June 1, 1997. A hearing was held on October 28, 1997, in Kenosha, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. The parties submitted post-hearing briefs, the last of which was received by the undersigned on December 30, 1997, whereupon the record was closed.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The parties agreed that the following issue should be determined herein:

Did the Company violate the collective bargaining agreement by working Ruben Castenuela, Jr. on June 1, 1997? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

Article 3. Management Rights

Employees covered by this agreement shall be governed by all company rules and regulations issued by proper authorities of the company which are not in conflict with the terms and conditions of this agreement which have been made available to the affected employees prior to becoming effective.

It is recognized by the contracting parties that the management of the business and direction of the working forces, including but not intended as an exclusive list of management prerogatives, the right to hire, promote, lay off, discharge, suspend, discipline and transfer employees, make or change reasonable rules and regulations for employee conduct and determine the methods of performing work and the quality of work, is vested in the company, except as the same has been specifically limited by the terms of this agreement, and provided that this Article does not impair the right of the union under Article 30 and 31 (Grievance and Arbitration Procedure).

. . .

Article 12. Seniority

For purposes of this Article, "Seniority" of an employee shall be defined as the employee's continuous service with the company from the first day worked until termination.

The company and the union agree that where qualification and ability to perform work are equal overall, seniority shall prevail. . . .

. . .

Whenever possible, seniority shall prevail for Saturday, Sunday and holiday work. . . .

. . .

In the absence of the lead person or machine operator who does not work on a weekend, the employer may choose a replacement. This is only for other than seasonal layoffs. . . .

. . .

FACTUAL BACKGROUND

The Company manufactures precast concrete products in Kenosha, Wisconsin. The Union is the exclusive bargaining representative for the Company's non-probationary employees, excluding supervisors, guards and office clericals. Among the Company's products are flattops, the upper portions of manholes onto which the cover is fitted. Flattops are produced in both of the Company's plants at Kenosha. At the newer plant, a Virtivibe hopper is in use, and a computer operated Turmac mixer was installed in the winter of 1996-97. Some employees, including Norman Mieloszyk, were trained in the operation of the Turmac mixer when it was installed. Mieloszyk never worked on the Turmac after it became operational, though he had operated all of the other flattop machines in the plant. After the Turmac was placed in operation, modifications were made to it, including changes in the hoist, the braking system, the moisture control sensor, and the controller contactor for the braking system. Faulty e-prom chips and valves were also replaced.

Ruben Castenuela, Jr. was one of the employees normally assigned to operate the Turmac mixer. On Saturday, May 31, 1997, Castenuela worked overtime producing flattops. He experienced problems with the Turmac mixer, including difficulty maintaining the proper mix of water and cement. These problems prevented him from meeting the production quota for Monday morning. As a result, Company President Mike O'Connor asked Castenuela to work overtime on Sunday to fill the orders for Monday. O'Connor did not seek any other employee for the work, because the operator would be working alone, without maintenance employees or supervisors available to deal with problems. O'Connor reasoned that Castenuela, as the normal operator for the mixer, would be best able to deal with problems.

The instant grievance was filed protesting the Company's failure to offer the Sunday work to other employees. 1/ Norman Mieloszyk was identified by the Union as the employee who was entitled to work in Castenuela's place. The grievance was not resolved in the lower steps of the grievance procedure and was referred to arbitration. A hearing was held on October 28, 1997, at which time, in addition to the facts recited above, the following testimony was taken.

1/ Other employes grieved the assignment of a junior employe to work on June 1st as the laborer assisting Castenuela. Those grievances were resolved at the arbitration hearing.

Norman Mieloszyk

Norman Mieloszyk testified that he is a Quality Control Inspector and a steward, and has worked in every job in the bargaining unit. He has often made flattops, although not with the Turmac mixer. He was trained on the Turmac mixer when it was installed, and to his knowledge there was no difference in the operation of the mixer from the time of his training through June 1st. While he had never worked on the Vertivibe hopper, he had watched others operate it and understood its workings. Mieloszyk conceded that he was not aware of the likely problems with the Turmac mixer, but expressed the opinion that maintenance employes should be on hand if it is in operation.

Mieloszyk stated that he had from time to time been asked to help arrange weekend overtime, and that in every case the senior employe was given preference, whether or not he normally worked the available machine. Mieloszyk opined that skills and ability do not enter into the decision to assign overtime, and that as a practical matter seniority controls.

Daniel Dorr

Daniel Dorr testified that he had twice filed a grievance over the assignment of overtime to junior employes, and in both cases his grievance was upheld. Dorr said that his understanding of the overtime system was that overtime was assigned by seniority, except that employes who normally worked on a machine were entitled to work any overtime on their machine.

Sam Fontilea

Sam Fontilea testified that he was the manager of the new plant at the time of this grievance. He expressed the opinion that the changes to the Turmac mixer after it was placed in service substantially changed the basic operation of the machine and would have made Mieloszyk's training obsolete. To his knowledge, the only persons qualified to operate the Turmac mixer on the first shift, aside from himself, are Ruben Castenuela, Sr., Ruben Castenuela, Jr., and Dennis Strasser.

Dennis Strasser

Dennis Strasser testified that he is a Machine Operator in the bargaining unit, and is very familiar with the operation of the Turmac mixer, which is a key machine in production. Strasser stated that even though the mixer is computer operated, the computer makes frequent mistakes, and the operator must carefully monitor the operation to catch and correct these errors. The operator must also be able to run the mixer manually in case problems develop with the computer. Cleaning the mixer properly is very important to its efficient operation, and in his experience having people who are not familiar with the Turmac attempt to clean it almost invariably leads to problems.

Ruben Castenuela, Jr.

Ruben Castenuela, Jr. testified that he had worked on the Turmac for six months. In June of 1997, he and another employe named Gino were the only employes who normally worked on the Turmac and knew how to both run it and clean it.

On Saturday, May 31st, he experienced problems with the water-cement mix and was not able to make the production goals. Late that afternoon, Mike O'Connor asked him to work overtime the next day to complete the production for Monday morning.

Mike O'Connor

Mike O'Connor testified that he is the President and half-owner of Modern Building Materials. At midday on Saturday, May 31st, he realized that they would be unable to fill Monday morning's orders unless there was additional production on Sunday. Since the old plant was already set up for production on Monday morning and would require a full crew to operate, he decided to do the Sunday production in the new plant, using the Turmac mixer and Vertivibe. He tried to find volunteers among the maintenance employes for the Sunday overtime, but no one was willing. O'Connor did not want to have an inexperienced operator work on the Turmac alone on Sunday, without supervision and without backup from maintenance employes, so decided that he would ask Castenuela and, if he was not willing to work, to cancel the production and disappoint his customers. Castenuela agreed to work the Sunday hours. O'Connor testified that his policy was to offer overtime to the senior qualified employe, except that employes are always given the right to work overtime on their own machines, without regard to seniority.

Additional facts, as necessary, will be set forth below.

THE POSITIONS OF THE PARTIES

The Position of the Union

The Union takes the position that Norman Mieloszyk was entitled to the overtime work on June 1st, and that the Company violated the contract by failing to assign it to him. The contract requires a general equality of qualifications between employees before seniority comes into play. The relative ability clause in the contract does not require exact equality, and arbitrators have held that the Company must prove that a junior employee must be head and shoulders above a senior employee before seniority may be disregarded. Such proof is lacking in this case. The Union notes that the Company has generally awarded overtime strictly by seniority in the past, and asserts that its deviation from this practice in this case is a clear contract violation.

The record shows that Mieloszyk is more senior than Castenuela, and has worked every job in the plant. He has often produced flattops, and is thoroughly familiar with the Virtivibe hopper. As for the Turmac mixer, Mieloszyk was trained on this machine when it was installed. While various parts have been replaced or modified since his training, the overall operation of the machine has not changed, and these modifications have no bearing on his ability to operate the mixer. Granting that Castenuela has more actual experience in running the mixer, the Union asserts that greater familiarity is not the same as greater ability.

The Union also disputes the Company's claim that it had to use Castenuela because there would be no maintenance employees or supervisors available on Sunday, and he would be better able to correct problems. Certainly the operator is not expected to make major repairs, and the Company's unilateral decision not to require maintenance employees to report on Sunday cannot be used to defeat the seniority provisions of the contract. Moreover there is simply no reason to believe that any unusual problems would have arisen on June 1st that could only be handled by Castenuela. The primary possible problem cited by the Company -- adjusting the mix of water and cement -- is a standard problem with any mixer, and is not unique to the Turmac.

Even if the arbitrator were to consider Castenuela's greater familiarity with the Turmac mixer as being relevant to ability, he must also weigh the fact that Castenuela was afforded greater training opportunities than Mieloszyk. The Company cannot use Mieloszyk's lack of updated training on the Turmac mixer against him, when it was the Company itself that intentionally failed to train him.

For all of these reasons, the Union asks that the grievance be granted, and that Mieloszyk be made whole.

The Position of the Company

The Company takes the position that the grievance is without merit and should be denied. The assignment of a junior employe is entirely consistent with the collective bargaining agreement. While the contract recognizes seniority, the precondition to seniority prevailing is that employe qualifications and abilities be "equal overall." The Employer grants that it has settled grievances over work assignments in the past, but argues that these cases were examples of senior employes with equal abilities being unintentionally by-passed. Thus the grievance settlement agreements do not stand for any proposition other than that the Company sometimes makes mistakes.

The Company stresses that its determination of qualifications is entitled to deference, and that the arbitrator should not substitute his judgment for O'Connor's unless it can be shown that O'Connor was arbitrary, or made his determination in bad faith. There is no evidence of this. Instead, the record demonstrates that O'Connor carefully considered the production needs, the equipment involved and the need to have someone who could work without backup, and determined that, in the absence of volunteers from the maintenance classification, Castenuela was the best qualified employe. The other possible choice -- Norman Mieloszyk -- was qualified to operate the flattop and the hopper. However, he was not current in the operation of the Turmac mixer. There had been many changes to the mixer since Mieloszyk was trained, and given that time was of the essence it was not practical to have him retrained on the machine. Thus he was not only not "equal overall" to Castenuela, he was not qualified at all.

For all of the foregoing reasons, the Company asks that the grievance be denied.

DISCUSSION

The collective bargaining agreement provides that "where qualification and ability to perform work are equal overall, seniority shall prevail." The issue before the arbitrator is whether the grievant was equal overall to Castenuela in his ability and qualifications to run the Turmac mixer on Sunday, June 1st. Complete equality is never to be expected, and the question is whether the grievant was roughly as capable as Castenuela to perform this work. For the following reasons, I conclude that he was not, and therefore deny the grievance.

The grievant was trained in the operation of the Turmac mixer when it was first installed, but has not worked on it since it has been operational. The Company cited a number of changes in the mixer since installation which it believes renders the grievant's training obsolete. Some of these changes involved replacing defective parts and chips. Presumably the grievant's training was premised on the mixer operating properly and the replacement of defective valves and computer chips should not have invalidated that training. Some of the other modifications, however, do represent actual changes in how the mixer operates. Of

greater significance to this decision is the fact that the mixer does not always operate as it is supposed to. From the testimony of Castenuela and Strasser, it appears that the computer controls frequently make mistakes, and the Turmac routinely requires operator intervention to maintain proper operation. Even with Castenuela, an experienced operator, at the controls, the mixer was not working properly on the weekend of May 31 - June 1st.

This is not a job posting case, in which the employee selected will normally be provided with a break-in period to familiarize himself with the job. This is instead an overtime assignment case, where the employee must be able to perform the work proficiently from the start. The determination of ability for overtime work must be made in the context of the actual work to be performed, and must factor in not only the machines to be employed but the circumstances under which the work will be done. Given this, it is possible that an employee may be qualified for some overtime assignments on a given machine, and not qualified for others on that same machine. In this case, the Company made a reasonable judgment that the Sunday work would be performed on the Turmac mixer, a sophisticated piece of machinery which, notwithstanding the computer controls, is subject to malfunctions and which had in fact been malfunctioning in the days before the overtime assignment was made. The production was needed for the next morning's orders, and the work was to be performed with no maintenance employees on duty and no supervisors available. Thus the Company could reasonably have concluded that one qualification for doing this particular overtime assignment was the operator's ability to identify and immediately respond to problems, without assistance. 2/

2/ The Union has argued that the Employer may not defend itself in this case by citing the lack of maintenance employees on Sunday, since it was the Company that decided not to schedule those employees. The Company and the Union both have a duty to deal with one another in good faith, and the Company cannot manipulate the circumstances of the job assignment to evade the contract. By the same token, the Company does not have an obligation to structure the work so as to maximize a senior employee's opportunity to claim overtime. The decision not to have maintenance employees on duty was not driven by a desire to frustrate the grievant's bid for the work. It was based on the unwillingness of the maintenance employees to work on Sunday.

It appears that the grievant possessed the minimum qualifications to operate the Turmac mixer, and may well have been able to effectively perform this work when help was available to deal with problems. However, the overtime assignment on June 1st required not only the ability to operate the mixer, but also the ability to spot and correct malfunctions. It is clear that the grievant was not roughly equal to Castenuela in familiarity with the quirks and problems of the mixer, and did not possess equal ability to respond to those problems. It follows that he was not "equal overall" to Castenuela in the ability to perform the available work, and was therefore not entitled to claim the overtime.

On the specific facts of this case, I conclude that the Company did not violate the contract by assigning the work to Castenuela. Accordingly, I have denied the grievance.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The Employer did not violate the collective bargaining agreement by working Ruben Castenuela, Jr. on June 1, 1997. The grievance is denied.

Dated at Racine, Wisconsin, this 25th day of June, 1998.

Daniel Nielsen /s/

Daniel Nielsen, Arbitrator