BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GENERAL TEAMSTERS UNION, LOCAL 662

and

AMERICAN MATERIALS CORPORATION

Case 9
No. 55397
A-5598

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Andrea F. Hoeschen**, appearing on behalf of the Union.

Reinhart, Boerner, Van Deuren, Norris & Rieselbach, S.C., by **Attorneys Christian A. Jenkins** and **Bryan Nowicki**, appearing on behalf of the Company.

ARBITRATION AWARD

General Teamsters Union, Local 662, hereinafter referred to as the Union, and American Materials Corporation, hereinafter referred to as the Company, are parties to a collective bargaining agreement which provides for the arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the Company, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a discharge. The undersigned was so designated. Hearing was held in Eau Claire, Wisconsin, on February 18, 1998. The hearing was transcribed and the parties submitted post-hearing briefs which were exchanged on April 20, 1998.

BACKGROUND

The grievant was a redi-mix driver for the Company for over 5 years until his discharge on May 14, 1997. The incident giving rise to the grievant's discharge occurred on May 12, 1997, when he delivered a load of concrete to Gordon Smith of Quality Masonry.

Smith was putting a foundation wall or basement wall under an existing house. In the past Smith used cement block for the basement walls but had just begun to use concrete forms for a short wall which he completed with two courses of cement block on the top. The concrete when it left the plant had a 4 inch slump according to the batch ticket. Slump is the amount of fall or drop that occurs when an amount of concrete is removed from a cone container. The wetter the concrete, the higher the slump. With greater slump, the concrete has less strength. Smith was pouring an L-shaped wall and there was only one location from which to unload the concrete. As Smith was relatively new at pouring concrete walls, he asked the grievant to help him out to get the right slump to flow into the forms yet retain its strength. Smith liked to pour a 5 – 5 ½ inch slump. Smith testified that the grievant added 5 gallons of water to the load of concrete. The grievant testified that with Smith's approval he added no more than 15 gallons initially and then added another 5 gallons to the load. The concrete appeared to be very loose; that is, had a very high slump. Smith questioned the grievant about the looseness of the concrete and the grievant said it would be all right and some guys pour it even looser.

The day after this pour, the wall had cracks running across it and had sank below the top of the forms. On May 14, 1997, Smith called the Company and spoke with Ron Brown, the Vice President of Redi-Mix Operations and complained that the wall had settlement cracks and the load was delivered too wet. Brown proceeded to the job site and examined the wall and concluded that the wall was not safe and estimated that the concrete was poured in excess of an 8 inch slump. Brown told Smith to remove the wall and the Company would pay for the removal and the repour of it with a resulting cost of about $2,000 ($1,600 for labor, $500 for concrete).

On May 14, 1997, at a meeting between the grievant and Company officials, the grievant was terminated. Ron Brown informed the grievant that the Company would not contest his Unemployment Compensation claim if he did not file a grievance over his discharge. The grievant did not respond to this offer and there is no written document memorializing an offer and acceptance. On May 20, 1997, the grievant filed the instant grievance alleging he was discharged without just cause. The matter was appealed to arbitration on July 17, 1998.

ISSUE

The parties were unable to agree on a statement of the issues. The Company stated the issues as follows:

1. Is the grievance barred by a mutual settlement of the grievance?

2. Did the Union timely request arbitration in accordance with the collective bargaining agreement, specifically Articles 29 and 30?

3. Did the Company have just cause to terminate Bruce Edington?

If not, what is the appropriate remedy?

The Union states the issues thusly:

1. Did the Company have just cause to terminate Bruce Edington?

If not, what is the appropriate remedy?

The undersigned adopts the issues as stated by the Company.

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 12

DISCHARGE OR SUSPENSION

The Employer shall not discharge, suspend, or otherwise discipline any employee without just cause. Appeal from discharge or suspension must be taken by written notice within five **(5) work days** from the date of discharge or suspension or notice thereof, whichever is earlier. The discharge and suspension grievance shall commence at Step 3 of the Grievance Procedure as set forth in Article 29 of this Agreement.

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ARTICLE 29

GRIEVANCE PROCEDURE

Any grievance must be presented **within five (5) days** of its occurrence or it shall be barred. A grievance shall be processed as follows:

1. The grievance shall be presented to and discussed with the employee's supervisor by the employee and steward, if requested.

2. If a satisfactory settlement does not result from such discussion within three (3) days, the grievance may be discussed with the steward and management.

3. If not settled satisfactory (sic) within five (5) days of Step 2, the grievance may be reduced to writing and referred to the management and the Business Representative of the Union.

4. If not settled satisfactorily in this discussion, either party may notify the other within five (5) days (excluding Sundays and holidays) after a deadlock in Step 3, of their desire to Arbitrate.

ARTICLE 30

ARBITRATION

The party desiring Arbitration shall notify the other party of its desire to arbitrate and within five **(5) days** the Employer and the Union shall each select one (1) member who shall act on the Arbitration Committee. Should the Committee be unable to arrive at a decision within five (5) days, exclusive of Sundays and holidays, it is agreed that an arbitrator appointed by the **Wisconsin Employment Relations Commission** will be accepted by both parties. It is understood that the Arbitration Committee shall not have the authority to change, alter or modify any of the terms or provisions of this Agreement.

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COMPANY'S POSITION

The Company contends that the grievance should be dismissed because the Union and the grievant settled the matter by entering into an agreement whereby the Company agreed not to contest the grievant's Unemployment Compensation and the grievant agreed not to grieve his discharge. It submits that the validity of the agreement is undisputed and the Company performed its part of the settlement agreement so the grievance should be dismissed and the grievant and the Union be required to perform their part of the bargain. The Company further argues that it is no defense to suggest that the Company could have breached this agreement because the Union and grievant did.

The Company insists that the grievance is not timely because the grievant and Union missed the five-day time limit for requesting arbitration in Article 29 of the agreement. It asserts that the Company made it amply clear to the Union on June 16, 1997, that the grievance would not be settled and thus deadlock was reached on that date. It points out that no request for arbitration was filed until mid-July, a month later. The Company states that it was not required to object to the timeliness of the arbitration appeal before the hearing in this matter. It argues that the grievance should be dismissed because it did not comply with the procedural requirements of the grievance procedure.

As to the merits, the Company submits that the grievant was discharged for just cause because he intentionally violated several of the Company's rules in order to quickly pour a load so he could make it to a Union meeting. It claims that it is undisputed that the thin, soupy concrete the grievant poured was severely defective and created a safety hazard to Smith's clients. It maintains that the evidence establishes that the grievant watered down the concrete. It submits that he added water before arriving at the job site and added more and then intentionally attempted to mislead Smith by telling him that others pour it thinner. It notes that a pour which should take an hour was done in 23 minutes and the grievant bragged to Union Steward Abley that he had "sluiced up" the load and shown Smith how to pour a wall. It suggests that the grievant was not able to explain why the wall was defective and testified he added 20 gallons or less to the load which could not have thinned the concrete to a slump of 8 or higher.

It argues that the grievant was responsible for assuring that the load of concrete did not leave the yard if it was above the ticketed slump of 4 inches. Additionally, according to the Company, the grievant admitted he knew the long-standing rule that water was not to be added to the load without the customer's authorization. It claims that the grievant's conduct was unreasonably dangerous because if it had not been discovered, the defective foundation would have posed a serious danger. It further observes that the Company incurred the cost of removing and repouring the wall. It claims that the grievant's version does not add up and he had noted on the delivery slip on other jobs as few as 10 gallons added but indicated nothing was added on the batch slip in this case. It observes that the grievant could not explain this.

The Company maintains that the grievant's account is totally unsupported and the Company's conclusion is supported by Vice President Brown as well as two independent witnesses, Smith and Abley. The Company insists that it had just cause to discharge the grievant. It concludes that for the three reasons set out above, the grievance must be denied.

UNION'S POSITION

The Union contends that there was no just cause for the grievant's discharge. It submits that the evidence fails to support the Company's speculation that the grievant added too much water to the concrete. It claims that the Company's own evidence shows that the grievant's pour was the same consistency as the repour. It notes that the repour batch should have left the plant at a 5 inch slump and 38 gallons of water was added at the job site which would bring it to a 9 inch slump, assuming the numbers are accurately recorded. The grievant's pour on May 12, 1997, according to the Union was in excess of an 8 inch slump, so if the repour batch was not too wet, neither was the grievant's. The Union notes that the grievant added about 30 gallons to an 8 yard load at a 4 inch slump on May 10, 1997, at the same site and got consistency that was perfectly acceptable. It claims that the Company's explanation is that its own evidence is wrong. It states that the repour slump is alleged to be in error but there is no evidence to support this theory.

It argues that the Company speculates that the concrete was too wet because the grievant's unloading time was too short. It insists that the Company's own evidence contradicts this and while Brown estimated about 10 minutes a yard to unload the pour on May 12, 1997, the 12 batch tickets put in evidence show an average of 5.18 minutes per yard to unload and the only 5 inch slump took 3.24 minutes per yard, whereas the grievant used 3.83 minutes to unload a 5 inch slump.

The Union claims that all water was added at the contractor's request. It submits that even if the wall failed because the concrete was too wet, any water added was at Smith's request as the grievant added 15 gallons and then 5 more as Smith desired. It argues that there is no evidence that the grievant added any water without Smith's approval. It points out that Smith, a contractor for 23 years, admitted he acquiesced in the grievant's adding 5 more gallons and Smith's story that he relied on the grievant makes no sense. It asserts that if Smith thought the load was too wet he could have rejected it. It claims the only reasonable explanation is that Smith poured a bad wall and seeks to shift the blame and save the cost of redoing the wall. It argues that the Company cannot meet its burden of proof by presenting a single interested witness to contradict the grievant. It states that there is no credible reason for an experienced redi-mix driver to add water to a load without the contractor's permission and the Company's suggestion that the grievant was in a hurry to attend a Union meeting is just speculation.

The Union contends that no major safety regulation was violated, the Company never identified the specific safety regulation in question, the Company's safety director knew of no safety regulation violated on the May 12 concrete pour and no safety regulation was mentioned at the grievant's discharge meeting.

The Union asserts that if the grievant did do something wrong, discharge is too severe a penalty. It submits that progressive discipline should be followed and the grievant's failure to record the water added on the batch ticket deserves only a written reprimand because the rule was new, was not followed by everyone, was not specifically told to the grievant and was not in writing. It alleges that the grievant was never put on notice or warned that failure to record water added was grounds for immediate discharge. It states that the grievant has had no prior discipline to justify any discipline beyond the first step.

Turning to the procedural defenses, the Union insists that the grievant did not waive his right to file a grievance over his discharge. It accepts that the Company told the grievant right after his discharge that it would not contest his Unemployment Compensation if he refrained from grieving it, but the grievant never said he wouldn't file a grievance. It points out that there was no written evidence of any settlement because there was none. The Union argues that any waiver requires that it must be knowing and intelligent and there was no evidence presented that the grievant made any waiver. It states that even if there was an agreement, the grievant repudiated it four days later and the Company suffered no prejudice as a result as it was free to contest his Unemployment Compensation claim.

The Union maintains the grievance is timely and arbitrable. It submits that the Company has the burden of proof that the appeal to arbitration was not timely. It observes that this defense was raised for the first time at the hearing on February 18, 1998, some seven months after the appeal was filed. It submits that the Company waived its defense by never raising a timeliness objection prior to the hearing. Besides, according to the Union, the appeal was timely filed as the contract states that an appeal must be filed within 5 days after a deadlock and deadlock did not occur until July 16, 1998, so the appeal was timely. The Union argues that the time limits are not mandatory because the contract does not specify the consequences of failing to meet the five-day requirement such as the grievance will be considered denied and not arbitrable. It insists that the language is directory and not mandatory and the grievance is arbitrable. It concludes that the Company cannot sustain its burden of proving just cause by inferences, speculation and contradictory evidence and the grievant should be reinstated and made whole.

DISCUSSION

The first issue is whether there was a mutual settlement at the time of the grievant's discharge. The evidence establishes that after the Company told the grievant that he was discharged that it would not oppose his Unemployment Compensation if the grievant would not file a grievance. Generally, a settlement of a discharge is a significant event and must be shown by clear evidence. The evidence in this case fails to show that the grievant agreed to the Company's offer. There is nothing in writing. No evidence was offered quoting the grievant as saying he accepted the offer or that it was okay with him or anything else to indicate assent. In order for a settlement, there has to be a bilateral contract, i.e. an offer and acceptance, a promise for a promise. Here, the evidence merely establishes a unilateral contract. The Company made an offer and the grievant's acceptance could be shown by action, i.e. he did not file a grievance. Here, however, the grievant did file a grievance four days later so there was no acceptance by action on his part. Furthermore, this occurred before any reliance or forbearance by the Company. The arbitration case cited by the Company, HEALTH CARE & RETIREMENT CORP., 99 LA 917 (HOCKENBERRY, 1/92, is not applicable to the instant case. The facts in HEALTH CARE indicated that the Company made an offer and there was a counter-offer, with the Company offering $2,000, then $6,000 and finally accepting the Union's counter-offer of $6,500. Here, there was no give and take, offer and counter-offer. It must be concluded that no agreement was reached. Even the follow-up letter sent to the grievant by Mr. Brown on May 16 does not state any quid pro quo for the Company's not contesting the grievant's Unemployment Compensation (Ex. 2). A discharge settlement should be clear and unambiguous and here the evidence fails to prove that a settlement occurred and the Company's defense is rejected.

Turning to the timeliness issue, the Company claims that the grievance was not appealed to arbitration in a timely fashion. Article 29, Section 4, states that either party may notify the other within five (5) days after a deadlock in Step 3, of their desire to arbitrate.

This language does not establish a clear time from which to appeal. The time starts from when the parties reach deadlock. "Deadlock" is somewhat fluid and comparable to an impasse in bargaining in that it is not always apparent when deadlock or impasse is reached. In TAFT BROADCASTING CO., 163 NLRB 175, 64 LRRM 1386 (1967), the Board enumerated a number of conditions in making a determination of impasse and stated that whether a bargaining impasse exists is a matter of judgment. The issue then is when did deadlock occur. The record indicates that Vice President Brown and Business Agent Dan Alexander met about the grievance around May 22, 1997 (Tr. 17). Alexander apparently requested information and sent a letter dated June 2, 1997, to Brown stating that he was still waiting for the information which was necessary to expedite the processing of the grievance (Ex. 4). On June 12, 1997, Brown called Alexander who was on vacation. Brown and Alexander next spoke on June 16, 1997, by phone and Brown said the Company was not going to take the grievant back (Tr. 19). The parties met on July 16, 1997, and Alexander asked if there was any kind of settlement of the grievance and Brown said no and that as far as he was concerned it was a closed case (Tr. 21). Alexander had also spoken to Paul Ayres, the Company's owner, after the June 16, 1997 conversation with Brown, and Ayres told him that if the Union had any offers, it should make them to Brown as Brown had the exclusive decision to decide the matter (Tr. 229). In my judgment, deadlock was not reached until July 16, 1997, because it was at this point that it was clear that there was no willingness to consider the matter further. The Union appealed the case to arbitration on July 17, 1997, so the appeal is deemed timely. Having found that the grievance is timely filed, there is no need to address the Union's waiver or the absence of consequences arguments.

As to the merits, the evidence clearly established that the concrete poured by the grievant on May 12, 1997, for contractor Smith's basement wall contained an excessive amount of water. The pictures, which are worth a thousand words, clearly show that the concrete was too wet (Ex. 16). Vice President Brown, with 25 years in the redi-mix business, was of the opinion that the concrete was poured in excess of an 8 inch slump and he tested the wall with rebound gun (Tr. 38, 87). This is a case of res ipsa loquitur, the wall speaks for itself. The question then is how did the excess water get into the concrete. Smith ordered 6 yards at a 4 inch slump (Ex. 14). The load master loaded the grievant's redi-mix truck. Once the concrete is in the truck, it is the driver's responsibility to make sure that it does not leave the Company plant at a greater slump than that specified (Tr. 133). If the slump is greater than that specified, then the driver, who has a slump meter and checks the load, must not leave the yard but report that the load is too wet and it is either dried or dumped (Tr. 137). In the instant case, the grievant never reported that the load was too wet at the plant and it was his responsibility not to leave the plant if it was. There was no evidence that the load master or the load itself was greater than a 4 inch slump when it was loaded and left the plant. The grievant testified that when he arrived at the site, he ran out a bit of the concrete (Tr. 180), and Smith told him he wanted it looser so the grievant added no more than 15 gallons (Tr. 181). The grievant testified that they started the pour but the concrete was not getting all the way to the backside so he asked if he should add 5 more gallons which he did for a total of

less than 20 gallons. Smith disputes everything but the 5 gallons. I don't find the grievant's testimony credible. The grievant had delivered a load two days before to the same job site and Smith told him he would appreciate the grievant's help because he had never poured into wall forms before. The grievant on that day had a 4 inch slump and added 10 to 12 gallons of water and then added an additional 5 and the pour was fine (Tr. 178-179). If the grievant on May 12, 1997, had added at most only 5 gallons more than on May 10, 1997, the slump would not be greater than 8 inches. If the addition of 15 to 17 gallons of water will bring a 4 inch slump load to a 5 or 5 ½ inch slump, then the addition of 20 gallons would bring the load to a 6 or 7 inch slump. The repour which apparently was fine required at least 30 gallons of additional water (Ex. 15) from a 5 inch slump. I conclude that the grievant intentionally added at least 40 to 50 gallons of water to the load without Smith's knowledge or permission. I base this on my calculation that it took 15 to 17 gallons to increase the slump to 5 or 5 ½ which translates to 10 to 12 gallons for each inch of slump for a 6 yard load. Thus, to go from a 4 inch to an 8 inch slump would require a minimum of 40 to 48 gallons, not the less than 20 gallons admitted by the grievant. When the grievant was discharged, he was told he was being terminated for intentionally pouring a bad wall by adding too much water, a charge the grievant did not deny at the time (Tr. 14, 132, 185). Furthermore, I credit Norm Abley's testimony that the grievant told him he sluiced up the load (Tr. 125). It was his opinion that meant the addition of 70 to 80 gallons of water. Abley had nothing to gain from his testimony whereas the grievant who denied making the statement (Tr. 196) has his job at stake.

The grievant knew it was an absolute rule that a driver was not supposed to add water without the contractor's approval as he testified so on cross examination (Tr. 190). The grievant was an experienced driver and could certainly tell the difference between a 5 to 5 ½ inch slump that Smith wanted and asked the grievant's help in getting and the over 8 inch slump that resulted in a bad wall. The Union argued that the time factor to unload the concrete was similar to other pours in evidence (Ex. 11). Yet the repour took one hour and five minutes compared to 23 minutes for the grievant's pour on May 12, 1997. It obviously takes longer to pour a basement form under a pre-existing house from a single spot than other types of concrete pours, so the time argument carries no weight. It does, however, further support the conclusion that the grievant added excessive water to the load. Thus, the record demonstrates that the grievant intentionally added excessive amounts of water to the load without the contractor's permission in violation of a rule he clearly understood.

With respect to the penalty of discharge, the Union contends that discharge is too severe. Here, the grievant is an experienced driver who intentionally added an excess amount of water to a load of concrete which resulted in a bad wall which the Company had to pay to have removed and replaced and this harmed not only the Company's relation with Smith but Smith's with his homeowner. The grievant did not admit he made a mistake or error in judgment but simply denied he did anything wrong. Under these circumstances, discharge is warranted and appropriate.

Based on the above and foregoing, the record as a whole and the arguments of counsel, the undersigned issues the following

AWARD

1. The grievance is not barred by any mutual settlement.

2. The grievance was timely appealed to arbitration.

3. The Company had just cause to terminate the grievant, Bruce Edington, and therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 13th day of July, 1998.

Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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