

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LABORERS' UNION, LOCAL NO. 1086

and

ADVANCE CAST STONE COMPANY

Case 8
No. 57085
A-5734

Appearances:

Mr. Thomas Klein, Business Manager, and **Mr. Miles Mertens**, Business Agent, appeared on behalf of the Union.

Mr. Matthew Garni, President, Advance Cast Stone Company, appeared on behalf of the Company.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and Company respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was not transcribed, was held on February 15, 1999 in Random Lake, Wisconsin. Afterwards, the parties filed briefs, whereupon the record was closed on February 23, 1999. Based upon the entire record, the undersigned issues the following Award.

ISSUE

The undersigned frames the issue as follows:

Pursuant to the parties' side agreement, are employees Pardee, Ponath and Beversdorf entitled to pay increases after they complete 8, 16, and 32 weeks of employment with the Company? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1998-2001 collective bargaining agreement contains the following pertinent provisions:

ARTICLE 19 WAGES

Section 19.1. Any employee receiving more than the wage rate specified in Section 19.2 shall not suffer reduction in pay because of this Agreement. All increases shall be granted to all employees covered under the bargaining agreement regardless of what their pay rate is.

Section 19.2. Economics. (a) The increases negotiated for a three (3) year agreement are as follows: Fifty cents (\$.50) effective November 1, 1998; Fifty-five cents (\$.55) effective November 1, 1999; and sixty-five cents (\$.65) effective November 6, 2000. All foremen shall receive an additional One dollar and fifty cents (\$1.50) per hour over their base wage rate. All lead persons shall receive One dollar (\$1.00) per hour over the base wage rate.

All foremen and lead persons are selected by the Employer.

Any wage increases may be used for fringe benefits and/or wage increases.

Employees who are currently employed and who have worked less than fifty-two (52) weeks shall receive the increase set forth above.

New hires after November 1, 1995 shall be paid as follows:

Start	\$9.20
After 8 weeks:	\$9.40
After 16 weeks:	\$9.70
After 32 weeks:	\$10.00
After 52 weeks:	The regular hourly rate then in effect.

(b) The "after 52 weeks" wage rates specified in subsection (a) of this Section shall be the respective minimum hourly wage rates for the various classifications of employees who have been in the continuous employ of the Company for more than fifty-two (52) weeks and who are represented by the

Union. Such classifications include, but are not limited to the following: General Laborer; Working Foreman; Carpenter Foreman; Lead person; Maintenance person; Truck Driver; and Working Plant Superintendent.

FACTS

The Company manufactures and installs precast concrete. The production workers in the plant are represented by Laborers' Local 1086. Brian Beversdorf, Perry Pardee and Steve Ponath are bargaining unit members whose wages are the subject of the instant grievance.

When the parties negotiated their 1995-1998 collective bargaining agreement, they agreed that effective November 1, 1995, new employees would be paid a starting wage of \$9.20/hour. They further agreed that these new hires would receive the following wage adjustments at the following intervals:

Start	\$9.20
After 8 weeks:	\$9.40
After 16 weeks:	\$9.70
After 32 weeks:	\$10.00
After 52 weeks:	The regular hourly rate then in effect.

In the summer of 1998, the full scale pay rate referenced above (i.e. the rate after 52 weeks of employment) was \$11.60/hour.

When the parties negotiated their current collective bargaining agreement in 1998, they did not change any of the new hire wage rates listed above. Thus, they left the start rate at \$9.20/hour. Similarly, all the other wage rates listed above for new hires were unchanged. Under this contract, the full scale pay rate (i.e. the rate after 52 weeks of employment) is \$11.95/hour. When the parties negotiated their current collective bargaining agreement, they did not address the matter of what would happen if the Company hired a new employee at a pay rate higher than the start rate listed above (i.e. \$9.20/hour).

While the new hire start rate listed in the contract is \$9.20/hour, the record indicates that the Company has had to pay more than that to attract new workers. The Company's current new hire start rate is \$10.20/hour. This figure of \$10.20/hour as the new hire start rate is not referenced in the contract; instead, as previously noted, the new hire start rate referenced in the contract is \$9.20/hour. The record indicates that the Company has hired an unspecified number of new employees at \$10.20/hour. When it has done so, it has given them wage increases after 8, 16, 32, and 52 weeks of employment. Specifically, the Company has been paying new hires according to the following schedule:

Start	\$10.20
After 8 weeks:	\$10.40
After 16 weeks:	\$10.70
After 32 weeks:	\$11.00
After 52 weeks:	The regular hourly rate then in effect.

In essence, the Company has been paying \$1.00 an hour more than what the contract specifies at the start rate, and after 8, 16, and 32 weeks of employment. The record indicates that the Union was aware of, and consented to, these higher pay rates.

Among the employees hired in 1998 were Perry Pardee, Steve Ponath and Brian Beversdorf. In order to hire them, the Company had to pay them more than the Company's normal start rate of \$10.20/hour. Thus, these three employees started at a higher start rate than the other new hires did. Specifically, Pardee began at \$10.60/hour and Ponath and Beversdorf began at \$11.00/hour.

After these three employees were hired, a question arose as to whether they were contractually entitled to receive wage increases after they completed 8, 16, and 32 weeks of employment. The Union took the position that they were so entitled. According to the Union, all three employees were entitled to a \$.20 increase after 8 weeks of employment, a \$.30 increase after 16 weeks of employment, and a \$.30 increase after 32 weeks of employment. The Company took the position that these three employees were not entitled to these wage increases because they were hired above the Company's normal start rate of \$10.20/hour. Thus, according to the Company, these three employees were not entitled to increases after 8, 16, and 32 weeks of employment. Both sides agree however that after 52 weeks of employment, all three employees are to be paid full scale (i.e. the regular hourly rate then in effect).

This wage dispute was not resolved, so a grievance was filed and processed to arbitration.

DISCUSSION

At issue here is whether employees Pardee, Ponath and Beversdorf are entitled to receive wage increases after they complete 8, 16, and 32 weeks of employment with the Company. The Union contends that they are while the Company disputes that contention. The parties agree that the new hires are to be paid the full scale rate after 52 weeks of employment.

My discussion begins with an overview of the applicable contract language. Since the pay dispute involved here deals with new hires, it stands to reason that the portion of the contract applicable here is Article 19, Section 19.2 which specifies, among other things, the start rate and a pay schedule for new hires. It provides as follows:

Start	\$9.20
After 8 weeks:	\$9.40
After 16 weeks:	\$9.70
After 32 weeks:	\$10.00
After 52 weeks:	The regular hourly rate then in effect.

This section provides in plain terms that a new hire starts at \$9.20/hour. It also provides in plain terms that the employee hired at \$9.20/hour gets pay increases after 8, 16, 32, and 52 weeks whereby their hourly pay increases respectively to \$9.40, \$9.70, \$10.00 and the full scale rate.

Notwithstanding this clear and unambiguous language, the Company has been paying new hires a different amount than what is specified above. Specifically, it has been paying new hires \$10.20/hour to start rather than \$9.20/hour. The Company is therefore paying new hires \$1.00/hour more than what is specified in the contract. The Company has also been giving these employees pay increases after 8, 16, and 32 weeks that are \$1.00/hour higher than what is specified in the contract. Specifically, the Company has been paying these employees \$10.40/hour after 8 weeks rather than \$9.40/hour, \$10.70/hour after 16 weeks rather than \$9.70/hour, and \$11.00/hour after 32 weeks rather than \$10.00/hour. Since the contract specifies that a certain wage rate is to be paid to employees at these respective levels, and the Company is not paying that rate, it is apparent that the Company's actions conflict with the express terms of the labor agreement.

Normally when an employer does something that conflicts with the express terms of a labor contract, the union cries foul over same. That is not the situation here. In this case, the Union was aware of, and consented to, the Company paying new hires more than the amount listed in the contract. Since the Union does not object to the Company paying new hires more than the amount listed in the contract, the undersigned will not object either.

For all intents and purposes, what happened here is that the parties made a side agreement which modified the terms of the labor agreement as it relates to the wages for new hires. The parties to a labor agreement (namely the Union and the Employer) may amend or add to it by subsequent agreement if they wish. While the labor agreement is the chief instrument that guide the parties in their relationship, on occasion it becomes necessary to clarify, add to, or make exceptions to the labor agreement in some manner. This is what a side agreement does. Such side agreements are very common in labor relations. In this case,

the parties made a side agreement which increased the start rate for new hires by \$1.00/hour and increased the subsequent rate increases on the new hire salary schedule by \$1.00/hour as well. While this side agreement has never been reduced to writing, there is no dispute about its terms. At the hearing, the parties agreed that new hires are to be paid pursuant to the following schedule:

Start	\$10.20
After 8 weeks:	\$10.40
After 16 weeks:	\$10.70
After 32 weeks:	\$11.00
After 52 weeks:	The regular hourly rate then in effect.

This side agreement will now be applied to the instant facts.

The facts pertinent to making this call can be simply stated: when the Company hired Pardee, Ponath and Beversdorf in 1998, it had to pay them more than the start rate just referenced (i.e. \$10.20/hour). Specifically, Pardee began at \$10.60/hour and Ponath and Beversdorf began at \$11.00/hour.

It is undisputed that when each of these employees hits their one year anniversary (i.e. 52 weeks of employment), their pay will increase to “the regular hourly rate then in effect” (i.e. the full scale rate). It is disputed though whether these employees are also entitled to pay increases after 8, 16, and 32 weeks of employment. According to the Union, all three employees are entitled to a \$.20 increase after 8 weeks of employment, a \$.30 increase after 16 weeks of employment, and a \$.30 increase after 32 weeks of employment. The Company disagrees. It asserts that these three employees are not entitled to those pay increases because they were hired above the regular start rate of \$10.20/hour.

Some labor agreements contain language which specifies that new hires will receive a salary increase after a certain time period has elapsed. When such language exists, it can be in the following format:

After ____ months of employment, a ____ cents per hour increase

In this case, the parties’ labor agreement contains language which is conceptually similar to the example just given. This language is found in Section 19.2, namely the new hire salary schedule. While that contract language is conceptually similar to the example just given, it differs in one critical respect. The difference is this: while the new hire salary schedule in Section 19.2 does contain the first part of the example specifying a time table (i.e. after 8 weeks, after 16 weeks, etc.), it does not contain the second part of the example specifying a certain cents per hour increase. Instead, the salary schedule in Section 19.2 specifies an

hourly rate. In point of fact, the salary schedule in Section 19.2 does not say that “after 8 weeks” the employe gets a “\$.20 increase”; what it says is “after 8 weeks: \$10.40”. The same is true of the 16 and 32 week categories. Those categories likewise do not say that the employe receives a \$.30 increase; rather, it simply lists an hourly wage rate (namely, \$10.70/hour and \$11.00/hour, respectively). While obviously a pay differential is built into this salary schedule (namely \$.20 at the 8 week category and \$.30 at the 16 and 32 week categories), it is the hourly rate that controls; not the pay differential that is built into the schedule. This distinction is of critical importance herein. If the parties had wanted a pay schedule for new hires which provided that they get a \$.20 increase after 8 weeks of employment no matter what their hourly rate was, and a \$.30 increase after 16 and 32 weeks of employment no matter what their hourly rate was, the parties could have explicitly said so. They did not. Since they did not, the undersigned will not infer it.

Application of this rationale to the facts yields the following results. Ponath and Beversdorf are not entitled to a wage increase until they complete 52 weeks of employment. Thus, they are not entitled to pay increases after 8, 16 or 32 weeks of employment. The reason is this. Both employes started their employment with the Company at \$11.00/hour. Their start rate was \$.80/hour over the regular start rate and equaled the 32 week rate specified in the side agreement (\$11.00/hour). Having started at that rate, the salary schedule in the side agreement simply does not allow them further movement until they complete 52 weeks of employment. If those employes were to get the wage increases sought by the Union (namely a \$.20 increase after 8 weeks and a \$.30 increase after 16 and 32 weeks), they would be paid \$11.20, \$11.50 and \$11.80/hour respectively. Those figures are not referenced in the side agreement so the Company need not pay them those amounts. These employes are to be moved though to the full scale rate after they complete 52 weeks of employment. Pardee’s factual situation differs from that of his two co-workers and, as a result, he is entitled to a wage increase (albeit not what the Union sought). The reason is this. Pardee started his employment with the Company at \$10.60/hour. While his start rate was \$.40/hour over the regular start rate of \$10.20/hour, there was still room on the side agreement’s new hire salary schedule for him to advance upward. Specifically, he can still move to the \$10.70/hour rate and the \$11.00/hour rate. The Company failed to move Perry to those steps, so it did not comply with the side agreement it made with the Union. The undersigned finds that the way to remedy this violation is for the Company to move Pardee from \$10.60 to \$10.70/hour after 16 weeks of employment, and then to move him to \$11.00/hour after 32 weeks of employment. Like his co-workers, Pardee is also to be moved to the full scale rate after 52 weeks of employment.

One final comment is in order. If the Company hires someone above the regular start rate again, that employe can still proceed through the steps of the new hire salary schedule so long as they start at a wage rate below the wage rate corresponding to the 32 week step. Thus, an employe is not precluded from advancing through the new hire salary schedule simply

because they were hired at a wage rate that was over the regular start rate. What controls is how far over the start rate they are when they are hired. For example, if the Company hires a person at just \$.05/hour over the current start rate, that person can still advance through the various steps of the new hire salary schedule because the employe has not topped out, so to speak. However, if the Company hires a person at \$.80/hour over the current start rate (as happened to Ponath and Beversdorf) that person cannot advance further under the new hire salary schedule because they have topped out – they are already paid the wage corresponding to the 32-week step. 1/ This case therefore establishes that the only employes who cannot

1/ This person can still advance though to the full scale rate after 52 weeks of employment.

advance on the new hire salary schedule are those who are hired at a wage rate that is equal to or greater than the 32-week step of that schedule.

In light of the above, I issue the following

AWARD

The grievance is denied in part and granted in part. The grievance is denied to the extent that Ponath and Beversdorf are not entitled to pay increases after 8, 16 or 32 weeks of employment. For the reasons set forth above, they are not entitled under the side agreement's new hire salary schedule to a pay increase until they complete 52 weeks of employment. The portion of the grievance relating to them is therefore denied. The grievance is granted to the extent that Perry is entitled, for the reasons set forth above, to advance to the 16 and 32 week steps of the side agreement's new hire salary schedule. The Company violated the side agreement when it failed to move him to those steps. In order to remedy this violation, the Company shall move Perry from \$10.60 to \$10.70/hour after 16 weeks of employment, and from \$10.70 to \$11.00/hour after 32 weeks of employment, and make him whole.

Dated at Madison, Wisconsin this 15th day of April, 1999.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

REJ/gjc
5844