BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LABORERS' UNION, LOCAL NO. 1440

and

MID-STATES CONCRETE PRODUCTS COMPANY

Case 8
No. 61030
A-6003

Appearances:

Mr. Daniel Burke, Business Manager, Laborers' Local 1440, appeared on behalf of the Union.

Mr. Kevin Wald, Representative, Mid-States Concrete Products, 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 May 14, 2002, in Beloit, Wisconsin. The parties did not file briefs. Based on the entire record, the undersigned issues the following Award.

ISSUE

The undersigned frames the issue as follows:

Did the Company violate the collective bargaining agreement when it failed to offer the grievant the overtime work available on Sunday, March 3, 2002? If so, what is the appropriate remedy?

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PERTINENT CONTRACT PROVISIONS

The parties' 2001-2004 collective bargaining agreement contains the following pertinent provisions:

ARTICLE IV. SENIORITY

> Section 1. Seniority rights shall prevail at all times during the life of this Agreement provided ability and skill are reasonably equal.
>
> . . .
>
> Section 5. Seniority shall prevail when extra work is available; provided, however, the employee has worked all regularly scheduled hours during the week or has excused absences for hours missed. If a particular job is customarily performed by a particular employee, he shall have the first opportunity to perform said extra work.

BACKGROUND

The Company manufactures flexicore concrete slabs. The Union is the exclusive collective bargaining representative for the Company's laborers. The grievant in this case, Randy Olson, is a member of that bargaining unit.

Olson has trouble moving his left shoulder due to a torn rotator cuff. It is a painful condition. In January, 2002 (all dates hereinafter refer to 2002), his doctor imposed a restriction on what he could do at work. The restriction was that he was limited to lifting 10 pounds or less. On February 4, his doctor imposed another restriction on what he could do at work (in addition to the one just noted). The second restriction was that he was not to lift anything to his shoulder level or above. These restrictions were in effect through at least March 4. Company representative Kevin Wald was aware of Olson's shoulder condition and his work restrictions.

On February 14 and 15, Olson was absent from work because of shoulder pain.

On February 27, Olson brought a note in from his doctor that said that his (Olson's) shoulder pain was not subsiding, that he could not sleep, and that he (Olson) was going to have an MRI (Magnetic Resonance Imaging) test done on his shoulder. The doctor then requested that Olson be "accommodated" at work.

On Friday, March 1, Olson took a day of sick leave. That morning, he had an MRI test performed on his shoulder. Early that afternoon, Olson took the MRI paperwork into work and gave it to Wald.

On Tuesday, March 5, Olson had another doctor appointment concerning his shoulder. This time, the doctor imposed a third work restriction (in addition to the two already noted). This third restriction was that he was not to work more than eight (8) hours daily.

Olson had surgery on his shoulder on April 26.

FACTS

On Friday, March 1, Company officials Kevin Wald and Hagen Harker discussed snow removal arrangements for the upcoming weekend. They did so because the weather forecast was for heavy snow. In the course of their discussion, they made the following decisions concerning same. First, they decided to use Company employees to remove the snow from their large job site. In the past, the Company had sometimes used an outside contractor to perform snow removal. This time though, it was decided to not use the outside contractor, but instead have Company employees do that work. Second, they decided to have four employees perform this work on either Saturday or Sunday in eight hour shifts. They decided that, for safety purposes, two employees would work together. Specifically, two employees would be on the first shift and two employees would be on the second shift. Third, they decided that the employees who worked these shifts were to perform the following tasks: they were to plow snow for two hours with an endloader, and then they were to go inside the shop and cut steel rebar for two hours. Additionally, when they were in the shop, they were to periodically go outside and shovel snow off the sidewalks by hand. Fourth, they decided which employees would perform this overtime work.

This last decision (namely, who would perform the overtime work) was made as follows. First, Wald and Harker decided to use maintenance employees to perform this work. Second, after making that decision, they consulted a seniority list to determine who the most senior maintenance employees were. One of the senior employees on this list was Olson. Olson has done snow removal work in the past. Third, Wald and Harker decided that notwithstanding Olson's high seniority, and the fact that he had done snow removal work in the past, he would not be offered this particular overtime work. Their rationale for doing so was this: they knew that Olson was still on restricted duty because of his shoulder injury, and they did not want him to aggravate his injury by doing the work in question. In their view, the work which was problematic for Olson to perform was not plowing snow with the endloader; it was cutting rebar. Steel rebar weighs 28 pounds, and Olson had a 10-pound weight restriction. They thought cutting rebar (a process which involves lifting it), would aggravate Olson's shoulder injury. Additionally, they knew that it is Company policy to not have employees on

restricted duty work overtime, and Olson was on restricted duty. Fourth, another senior employee, Bill Carpenter, was offered the overtime, but he declined it. Fifth, after Wald and Harker decided to not offer the overtime work to Olson, and Carpenter declined to work it, the overtime work was ultimately offered to the following four employees who accepted it: Richard Lance, Scott Johnson, Chuck Engen and Bob Buckner. Olson has more seniority than all of these employees but Lance.

As expected, it snowed over the weekend of March 2 and 3. After reviewing the weather forecast, Wald decided to have the four employees work on Sunday rather than Saturday.

The overtime work done on Sunday, March 3 was performed as planned. Lance and Johnson worked the first shift and Engen and Buckner worked the second shift. Each shift lasted eight hours. All four employees did the following work: they plowed snow with an endloader for two hours, and then they went inside the shop and cut rebar for two hours. When they were in the shop, they periodically went outside and shoveled the sidewalks by hand.

When Olson went into work the next day (Monday, March 4), he saw that some snow in the yard had already been plowed.

That day, Olson was assigned the task of plowing snow with an endloader. He performed that work as assigned. He did the same work for the following three days. Thus, he plowed snow on March 4, 5, 6 and 7. When he plowed snow on those four days, what he did was this: he pushed the snow into piles with his endloader, and then loaded it (with his endloader) into semi-trucks so that it could be hauled away. He did not shovel any snow by hand that week. Additionally, he did not cut any rebar that week either.

Olson filed a grievance which contended that he should have been offered the Sunday overtime work. The grievance was not resolved, and was ultimately appealed to arbitration.

DISCUSSION

At issue here is whether the Company had to offer Olson the overtime work available on Sunday, March 3. The Union contends that it did while the Company disputes that contention. Based on the rationale which follows, I find that the Company did not have to offer him the overtime in question.

My discussion begins with an overview of the applicable contract language. The contract language which the Union claims the Company violated here is the seniority provision. Section 1 of that provision provides that "seniority rights shall prevail at all

times . . .provided skill and ability are relatively equal." The first sentence of Section 5 then goes on to repeat this same principle ("seniority shall prevail") and applies it to a specific kind of work named "extra work". The rest of that sentence then establishes a pre-condition for this to happen (namely, for seniority to prevail for the extra work). The pre-condition is that the employee must have worked all regularly scheduled hours during the week or have an excused absence for the hours missed.

The meaning of this language is not disputed. Both Sections 1 and 5 provide in plain terms that seniority "prevails." When the term "prevail" is read in its overall context and given its commonly-accepted meaning, it means to be predominate. This language therefore establishes that a senior employee has predominance over a less senior employee. That is supposed to be the general rule. Section 5 makes it especially clear that seniority applies "when extra work is available." While the phrase "extra work" is not defined in Section 5, the phrase is certainly broad enough to cover Sunday overtime work. Thus, "extra work", such as Sunday overtime, is supposed to go to the senior employee.

In situations like this where the contract language is clear and unambiguous, the arbitrator's job is to apply its plain meaning to the facts. Attention is now turned to making that call.

In this case, the outcome depends on what facts are relied on. The following shows why.

From the Union's perspective, the only facts pertinent to this case are the ones pertaining to Olson's seniority and the type of work involved. With regard to the former (i.e. Olson's seniority), the Union notes that Olson has more seniority than three of the employees who were selected to do the overtime work. With regard to the latter (i.e. the type of work involved), the Union notes that the work done on Sunday, March 3 was snow plowing, and that Olson has done snow plowing in the past. It further asserts that he could have done it on Sunday, March 3. Building on all these facts, the Union asserts that Olson should have been offered the opportunity to work the Sunday overtime in question.

If the facts just noted were the only facts pertinent here, the Union would have a slam-dunk case, so to speak. What I mean is that if those facts were the only ones pertinent here, the Company would have indeed been contractually obligated to offer Olson the overtime work, just as it did to Carpenter, because no reason existed for not following seniority. However, as was noted in the **BACKGROUND** section, there is more to this story. Other facts yet to be reviewed trump the presumption just noted that Olson had to be offered the overtime work in question.

What I am referring to, of course, is Olson's shoulder condition and his doctor-imposed work restrictions. The Company knew that as of Sunday, March 3, Olson was still under the following work restrictions due to his shoulder condition: he was not to lift more than 10 pounds and he was not to lift anything to his shoulder level or above. These medical restrictions prevented Olson from doing at least one part of the work which management wanted done on Sunday, March 3. The following shows this.

One task which management wanted done that day was to have snow plowed with an endloader. Olson could do that work, even with his work restrictions, because it just involved sitting in the endloader and operating it. According to Olson, operating the endloader did not aggravate his shoulder. Another task which management wanted done that day was to shovel snow off the sidewalks by hand. It is unclear whether Olson's work restrictions allowed him to do that work or whether doing it would aggravate his shoulder. Be that as it may, it does not matter. The reason is this. The final task which management wanted done that day was to have the employee cut rebar. That task involves lifting the rebar which weighs 28 pounds. Since Olson had a 10 pound weight restriction, it is obvious that if he lifted any rebar, he would violate that weight restriction.

The foregoing shows that Olson could not do *all* the work which the Company wanted done on Sunday, March 3. While he certainly could operate the endloader and plow snow with it, he could not lift and cut rebar because of his 10 pound weight restriction.

The reason this point is important is because employees do not get to pick and choose what work they will perform; the employer gets to make that call. In this case, the Company's representatives decided that they needed three tasks done on Sunday, March 3: plow snow with an endloader, shovel the sidewalks by hand and cut rebar. That was their call to make. To be eligible for this overtime work, the employee had to be able to perform all three tasks. If Olson performed the latter task (cutting rebar), he would violate his weight restriction. That being so, the Company had a justifiable basis for concluding that Olson could not perform that task. This made him ineligible for the overtime work done on March 3.

In so finding, I am well aware that on the very next day (Monday, March 4), and for the next three days as well (March 5, 6 and 7), Olson performed the task of plowing snow with an endloader. In his view, this proves that he could have done the work done on Sunday, March 3. He asks rhetorically why he could plow snow on those four days, but not on the previous Sunday when it would have been more financially lucrative because it paid double time. I certainly see his point. However, the work which Olson did on March 4-7 was not the same as the work done on Sunday, March 3. As previously noted, the employees who worked on Sunday, March 3 did all three tasks (plow snow with an endloader, shovel the sidewalks by hand and cut rebar). During the week of March 4-7, Olson did not shovel snow by hand or cut rebar in the shop. Instead, he simply plowed snow. In making this statement, I am not

minimizing the work Olson did that week. I am simply showing that there was a distinction, even if it was a small one, between the work Olson performed on March 4-7, and the work performed by the other employees on Sunday, March 3.

Based on the above rationale, I have found that Olson was ineligible for the overtime work in question. To repeat, the reason he was ineligible was because the Company decided that they needed three tasks done that day, one of which was cutting rebar, and Olson could not do that task because of his shoulder condition and weight restriction. The fact that he could, and later did, plow snow with an endloader does not carry the day, so to speak, because that task was just one of three that the Company wanted performed that day. To be eligible for the overtime, Olson had to be able to perform all three tasks, and he could not because of his doctor-imposed work restriction. That being so, the Company did not have to offer him the overtime work in question.

In light of the above, I issue the following

AWARD

That the Company did not violate the collective bargaining agreement when it failed to offer the grievant the overtime work available on Sunday, March 3, 2002. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 19th day of June, 2002.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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