BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1359

and

MIRON CONSTRUCTION COMPANY, INC.

Case 12
No. 60365
A-5958

Appearances:

Mr. Robert G. Boquist, Business Representative, Laborers' International Union of North America, Local 1359, appearing on behalf of the Union.

Mr. Gregory A. Kippenhan, Principal, Miron Construction Company, Inc., appearing on behalf of the Employer.

ARBITRATION AWARD

The Laborers' International Union of North America, Local 1359, hereinafter referred to as the Union, and Miron Construction Company, Inc., hereinafter referred to as the Employer, are parties to a collective bargaining agreement which provides for final and binding arbitration of certain disputes, which agreement was in full force and effect at all times mentioned herein. The parties asked the Wisconsin Employment Relations Commission to assign an arbitrator to hear and resolve the grievance of David Elmer, hereinafter referred to as the Grievant, regarding his termination from employment. The undersigned was appointed by the Commission as the Arbitrator and held a hearing into the matter in Wausau, Wisconsin, on December 17, 2001, at which time the parties were given the opportunity to present evidence and arguments. The hearing was not transcribed. The parties filed post-hearing briefs and reply briefs by April 9, 2002.

ISSUE

The parties were unable to stipulate to the issue presented in the case and left it to the Arbitrator to frame the issue in the award. Neither party formulated a statement of the issue for consideration by the Arbitrator. The Arbitrator frames the issue as follows:

Did the Employer violate the terms of the collective bargaining agreement when it discharged the Grievant? If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

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ARTICLE III: GRIEVANCE AND ARBITRATION

Sec. 3.1: All grievances, disputes or complaints arising under this Agreement, either by the employer, a local union or an employee, must be filed with either the Employer, Local Union or the District Council within ten (10) calendar days of the incident giving rise to the grievance. The parties shall attempt to dispose of the grievance, dispute or complaint within ten (10) calendar days. If the matter is not disposed of within the applicable time period, the same may be presented to the Wisconsin Employment Relations Commission (WERC) with a request that an arbitrator from the WERC staff be appointed. Any issue concerning the arbitrability of the grievance shall also be submitted to the arbitrator.

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Sec. 3.3: In the event the arbitrator finds a violation of the agreement, he/she shall have authority to award back pay to the aggrieved person or persons in addition to what other or further remedy may be appropriate.

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ARTICLE XIII: MISCELLANEOUS PRIVISIONS

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Sec. 13.6: When an Employee is laid off or discharged, a written notice stating the date and reason therefore shall be given to the Employee at the time of his termination.

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ARTICLE XVII: HIRING HALL

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> **Section 5.** The Employer reserves the right to accept or reject an applicant referred by the Union or to discharge for just cause an employee who has been accepted, but proves unsatisfactory, subject to the procedure contained in the basic contract.
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> . . .

BACKGROUND

At all times herein, the Grievant was a dues paying member of Laborers' Local 1359 of the Laborers' International Union of North America. The Grievant has been a member of the Union for 30 years and a mason tender for 28.

On April 23, 2001, the Grievant, pursuant to a referral from the Union Hall, reported for work as a mason tender at the Employer's Tomahawk K-12 school construction project in Tomahawk, Wisconsin. On June 15, 2001, he was notified that he was being laid off pending receipt of building materials at the site. The Grievant was recalled to work at the Tomahawk site on August 6, 2001. On August 10, 2001, Tom Murphy, the Employer's mason superintendent, told the Grievant to report to another of the Employer's job sites in Phillips, Wisconsin, the following Monday, August 13. The Grievant reported as directed and began work there as a mason tender. Two days later, at 12:00 o'clock noon on August 15, the Grievant was informed by the mason foreman at the Phillips job site, Todd Higgins, that he had been instructed by Tom Murphy to lay the Grievant off, and he did so.

On August 24, 2001, nine days following his dismissal, the Grievant filed a grievance relating to his termination and certain events preceding it. The parties attempted to reach a settlement of the matter but were unable to do so. On September 17, 2001, the Union filed a Request to Initiate Grievance Arbitration with the Commission.

POSITIONS OF THE PARTIES

The Union

The Union argues that the Grievant's termination was unjust because he was never given any indication that the level of his work was unsatisfactory and because he was not presented with a written termination notice at the time of his termination. In fact, the Union asserts that the Grievant was told he was being laid off as opposed to being terminated which led to some confusion as to what was actually taking place. The Union also asserts that the Employer did not have a good and sufficient reason to terminate the Grievant. In short, the Union argues that the Employer did not have just cause to discharge him.

The Union also argues that certain actions of the Employer during the months of April, 2001, through early August, 2001, which preceded the Grievant's termination, and which were unrelated to it, constituted violations of the collective bargaining agreement.

The Employer

The Employer asserts that the accusations set forth by the Union regarding the events between April and early August, 2001, are unrelated to the termination of the Grievant and, in any event, were not timely grieved. It refers to Section 3.1 of Article III: Grievance and Arbitration, which requires that any grievance must be filed within ten (10) calendar days of the incident giving rise to the grievance and argues that these incidents were not so filed.

With regard to the termination of the Grievant, the Employer relies on the theory that standard construction industry practice, because of its transitory and often short term nature, does not entitle an employee to continued employment. It argues that the collective bargaining agreement, specifically Article XVII: Hiring Hall, Section 5, provides a contractor leeway in making a determination that an employee's work is unsatisfactory. The Employer points to the fact that the collective bargaining agreement does not contain any specific language requiring progressive disciplinary procedures because such procedures are not the norm on construction projects. This, in conjunction with the language in Article XVII, says the Employer, supports its view that it had the virtually unfettered right to discharge the Grievant if, in its discretion, it found him to be "unsatisfactory." The Employer argues that the reasons for termination as set forth in Joint Exhibit 3, to wit: that the Grievant had a "lack of interest," that he showed "no enthusiasm" and that he seemed "to find other places to be when other work is going on" support the proposition that the Grievant was sufficiently unsatisfactory so as to justify his termination. The Employer points to an incident when the Grievant allegedly took an "unauthorized soda pop break" in the construction trailer and the fact that the Grievant talked to other workers on the job as forming the foundation for the reasons for termination as set forth in the notice of termination.

Regarding the question of the Employer's failure to provide the Grievant with a notice of termination at the time of his discharge, it agrees that the Grievant's discharge was handled badly by management and that its foreman, Mr. Higgins, confused the situation by failing to tell the Grievant that his performance was unsatisfactory. Notwithstanding the tardy notice of termination, the Employer argues that it had sufficient reason to terminate the Grievant and that the decision to terminate was not arbitrary, capricious or an abuse of discretion and that in light of the totality of the circumstances the Grievant's discharge was not excessive punishment.

Finally, the Employer argues that the Arbitrator can reasonably conclude that just cause for termination exists here by referring to LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 464, CASE 13, NO. 42976, A-4532 (BURNS, 1990), given that case's "identical substantive provisions regarding discharge for just cause and unsatisfactory performance in the 1989 collective bargaining agreement and the present CBA."

DISCUSSION

The grievance form, Joint Exhibit 2, which is dated August 24, 2001, contains a three page plus narrative written by the Grievant. This narrative includes references to the Grievant's layoff which occurred in July, 2001, and allegations that the Employer hired non-union members during his layoff period. The narrative concludes with a description of the events leading to his termination, which event is the real focus of this grievance.

Article III, Section 3.1 of the collective bargaining agreement requires that a grievance be filed with the Employer or with the Union within ten days of the incident giving rise to the grievance. All events referred to in the Grievant's narrative, save his discharge, occurred more than ten days prior to August 24, the date the grievance was filed, and are thus not properly before the Arbitrator. The discharge of the Grievant, however, is properly before me.

The Employer argues that because of the transitory and often short term nature of construction work, laborers such as the Grievant are not entitled to continued employment with any single employer. It points to the language of **Article XVII: Hiring Hall** of the collective bargaining agreement as the parties' written acknowledgement of standard construction practices and asserts that Section 5 of that article "provides a contractor leeway in making a determination that an employee's work is unsatisfactory." It observes that the CBA does not contain any provision for progressive discipline and asserts that this is so because progressive discipline is "not the norm on construction projects." It reminds the Arbitrator that laborers are constantly being "laid off or terminated."

Lack of progressive disciplinary standards and the unfettered freedom of the contractor to determine that an employee's work is so unsatisfactory as to support his or her discharge from employment may be the norm in the construction industry where the CBA fails to impose a just cause standard on the Employer. Here, however, the contract does impose such a standard. **Article XVII: Hiring Hall, Section 5:**

> The Employer reserves the right to accept or reject an applicant referred by the Union or to *discharge for just cause* an employee who has been accepted, but proves unsatisfactory, subject to the procedure contained in the basic contract. (Emphasis added.)

The general presumption in contract construction is that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect. See JOHN DEERE TRACTOR CO., 5 LA 631 (UPDEGRAFF, 1946). If the Employer had the authority to essentially discharge the Grievant at will, as the Employer argues, then the just cause language contained in the contract would have no effect. Such a result is repugnant to the principles of proper

contract interpretation. We may assume, then, that the use of the phrase *discharge for just cause* is meaningful and effective and that the parties' intent in adding it to the CBA was to impose a just cause standard on the Employer's ability to discharge an employee once that employee had been accepted for employment as a result of a referral from the Union Hall. The Employer has not argued, nor does the record imply, that the Grievant had not been accepted for employment as a result of a referral from the Union Hall. Consequently, his discharge from employment is subject to a just cause standard.

Few, if any, contracts contain a definition of "just cause" and the instant CBA is no exception. There is no uniform definition of what constitutes just cause and so it becomes the job of the Arbitrator to define such parameters based upon the facts of the case. On the function of the Arbitrator in such cases, Arbitrator Harry Platt said:

> It is ordinarily the function of an Arbitrator in interpreting a contract provision which requires "sufficient cause" as a condition precedent to discharge not only to determine whether the employee involved is guilty of wrongdoing and, if so, to confirm the employer's right to discipline where its exercise is essential to the objective of efficiency, but also to safeguard the interests of the discharged employee by making reasonably sure that the causes for discharge were just and equitable and such as would appeal to reasonable and fair-minded persons as warranting discharge. To be sure, no standards exist to aid an Arbitrator in finding a conclusive answer to such a question and, therefore, perhaps the best he can do is to decide what reasonable man, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just. RILEY STOKER CORP., 7 LA 764, 767 (PLATT, 1947)

Just cause mandates not merely that the employer's action be free of capriciousness and arbitrariness but that the employee's performance be so faulty or indefensible as to leave the employer with no alternative except to discipline him. See PLATT, *Arbitral Standards In Discipline Cases,* in The Law and Labor-Management Relations, 223, 234 (UNIV. OF MICH., 1950)

Arbitral rulings in the just cause area reveal that a determination of just cause requires two separate considerations: (1) whether the employee is guilty of misconduct, and (2) assuming guilt, whether the discipline imposed is a reasonable penalty under the facts of the case.

The Employer strenuously asserts that its termination of the Grievant, though flawed due to tardy and inadequate notice, was, nonetheless, justified "in light of the totality of the circumstances surrounding the incident, especially coupled with Mr. Elmer's admissions

regarding his unauthorized soda pop break in a construction trailer." It urges the Arbitrator to find just cause for the termination and asserts that I can "reasonably conclude, *based upon Mr. Elmer's admissions which essentially corroborate Mr. Higgin's and Mr. Murphy's testimony,* that Miron had just cause to discharge Mr. Elmer due to his unsatisfactory performance." (Emphasis in original.) I do not agree. First, the Grievant did not admit to taking an unauthorized break in the construction trailer. His testimony on this issue, which I credit, is that he had gone to the trailer to find paper cups for the water jug used by the masons. While there he met with "Craig" and discussed the fact that the fork lift was out of fuel. During this conversation, Todd Higgins came into the trailer but did not speak to either of them. The Grievant had grabbed a soda from the refrigerator in the trailer and was drinking it as Todd walked in. After Craig had instructed him as to how to deal with the fuel for the fork lift, the Grievant left the trailer and returned to his work area. I am persuaded that the Grievant not only did not take an unauthorized break in the trailer, but that he did not admit to doing so. The only other specific reason given for the Grievant's discharge was that he was "walking around, talking to people, just wasn't doing his job." This testimony was provided by Tom Murphy. When asked if he had discussed this problem with the Grievant, he replied that he had not because it was not his job to do so. The Grievant explained that in order to do his job well and to supply the right materials to the masons, he has to know "what's going in the wall." Hence, he has to talk with them from time to time. A minimal application of common sense and a fundamental understanding of the human condition leads the undersigned to conclude that workers on a construction job will, from time to time, speak with one another. If these conversations do not interrupt the business of the employer, they should be able do so without fear that this activity will cost them their jobs. The record does not reflect that any conversations the Grievant had with other employees interrupted the Employer's business in this case. Since Tom never brought this problem to the attention of the Grievant, he had no opportunity to change his behavior if, in fact, it needed to be changed. Finally, Todd Higgins testified that he had "experienced frustration" with the Grievant's work but that he was apprehensive to lay him off or to terminate him. He did not confront the Grievant prior to discharging him with any discussion regarding his "frustration" with his work so the Grievant knew nothing of this "frustration" until it was too late to address the problem.

It is important to note that the reasons in support of the Grievant's discharge were first expressed to the Grievant at a meeting on September 10, 2001, some two weeks following the discharge, at the job site in Tomahawk. This meeting was convened to attempt to settle the matter. It is also important to note that at the time of his discharge, the Grievant asked Todd why he was being discharged. Todd responded by saying that he did not know; that Tom simply directed him to "lay off" the Grievant. When the Grievant asked Tom why he was let go, the record reflects that Tom told him that he didn't know why and blamed it on *Todd*. If the Employer's management team knew why they were discharging the Grievant, and I believe they did, they kept it from him until after the fact, giving the Grievant no chance to conform to their secret set of work standards. This clandestine approach does not appeal to reasonable and fair minded persons and does not embrace standards of justice and fair dealing. This behavior frustrates the core principals of just cause.

It is also interesting to note that the Notice of Termination, Joint Exhibit 3, states that the Grievant was laid off as opposed to terminated. This observation is not dispositive of anything but does follow the ambiguous and confusing track leading to the termination of the Grievant. The reasons for his "layoff" as set forth on the notice are: "Lack of interest;" "Shows no enthusiasm;" and "Seems to find other places to be when other work is going on." These things may or may not, given the specific circumstances of each, support some measure of discipline under a just cause standard, but the record is silent on the meaning of these entries. Thus, the Arbitrator is provided with no scale of reference by which to evaluate the gravity of these reasons and consequently gives them little or no evidentiary weight.

The undersigned is mindful of the constraints of the construction industry and of the argument that lengthy periods of progressive discipline may serve to frustrate the orderly flow of progress on the job. The Employer is right when it argues that such a disciplinary regime may be unworkable in the construction setting. This is not to imply, however, that a construction company employer is justified in taking the position that it may unilaterally discharge employees in the face of a contract which imposes a just cause standard. The just cause standard does not necessarily require a lengthy progressive disciplinary scheme but it does, at a minimum, if it is to have any meaning, require a significant showing that the Grievant is guilty of misconduct and that that misconduct is serious enough to merit the discipline imposed. The burden rests with the Employer to prove these things and, in this case, the Employer has failed to carry that burden.

The Employer cites LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 464, CASE 13, NO. 42976, A-4532 (BURNS, 1990) as being illuminating because it describes the "reality of work in the construction industry." The undersigned found that case to be illuminating in that regard and in that regard only. For all other purposes relating to the issue to be decided here, it was off point.

In light of the above, it is my

AWARD

1. That the Employer violated the terms of the collective bargaining agreement when it discharged the Grievant.

2. That the Employer shall reinstate the Grievant effective August 15, 2001, at 12:00 o'clock noon, without loss of pay, computed on the basis of straight time hours he would have otherwise worked but for his wrongful separation from the payroll. Any monies received by him in lieu of his wages, including unemployment compensation, shall be deducted from the sum due him, and he shall submit a sworn statement of such earnings to the Employer as a condition precedent to receipt of back pay.

3. That to resolve any question that may arise over application of this remedy, I shall retain my jurisdiction for at least sixty (60) days.

Dated at Wausau, Wisconsin, this 8th day of July, 2002.

Steve Morrison /s/
Steve Morrison, Arbitrator

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