BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

R.W. MILLER & SONS

and

TEAMSTERS LOCAL UNION NO. 43

Case 2
No. 60639
A-5984

Appearances:

For R. W. Miller & Sons, Inc., **Attorney Daniel D. Barker,** Melli, Walker, Pease & Ruhly, S.C., 10 East Doty Street, Suite 900, P.O. Box 1664, Madison, Wisconsin 53701-1664.

For Teamsters Local 43, **Attorney John J. Brennan,** Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212.

ARBITRATION AWARD

R. W. Miller & Sons, Inc., hereinafter referred to as "Employer" or "Company," and Teamsters Local 43, hereinafter referred to as "Union," are parties to a collective bargaining agreement covering an initial period from June 1, 1999 through May 31, 2003. That agreement provides for binding arbitration of grievances as therein defined that may arise between the parties. On December 14, 2001, the Union filed a request with the Wisconsin Employment Relations Commission for a 5-person panel of WERC commissioners/staff arbitrators from which the parties could select a person to hear and decide the grievance that had arisen between the parties. Commissioner A. Henry Hempe was selected by the parties from the panel provided and was subsequently appointed by said Commission to hear and decide said dispute. A hearing was held on February 26, 2002 and a transcript prepared of the testimony provided. The Employer filed an initial brief received on April 23, 2002 and a reply brief received on May 3, 2002; the Union filed an initial brief received on April 24, 2002 and filed no reply brief.

STATEMENT OF THE ISSUE

The parties stipulated to the following Statement of the issue:

Did the Company have just cause to discharge the grievant, Mark Kotula? If not, what is the appropriate remedy?

FACTS OF THE CASE

The Employer, R. W. Miller & Sons, Inc., is a road contractor engaged in road construction that includes excavation, grading and asphalting. Culvert and other related work may also be involved. In performing its work, the Employer utilizes heavy equipment, including excavators, large graders, bull dozers and skid steers (bobcats).

The grievant, Mark Kotula, began employment with the Company in June, 1993. He was assigned to the "big grading crew" and operated road graders, bull dozers, and bobcats. For much of 2001, Kotula's wages were based on a formula: his hourly rate was about $15 an hour (above the Company's normal rate); he had a super-operator rate and then he had a daily bonus for attitude and leadership (A & L) that was paid for work well done as well as good attendance. The flat rate paid Kotula each day amounted to about $24 an hour. Subsequently, the Company had "some problems" with Kotula's attendance, both as to tardiness and failure to call-in. Consequently, Kotula was removed from the A & L bonus list. He was also removed from his operating duties and transferred to truck driving in October of 2001.

Kotula also participated in a separate snow plowing and landscaping business. Kotula's employer was aware of Kotula's separate business interests, and occasionally sold Kotula materials and rented him equipment to be used in the separate business.

In June 2001, the Company contracted with a local person named Sal Dimiceli to construct a main entrance route for access to property that Dimiceli intended to develop into residential sites. The parties subsequently increased the scope of the work to be performed. By September 5, 2001, the Company had completed the excavation, grading and graveling of the main road and the berm work along the main road. The completed work included the resetting of a very steep slope on top of the main road – work not specified in the original contract between the parties. The grievant had spent a considerable amount of Company work time on this project.

September 5, 2001 marked the last day the Company performed any work for Dimiceli. Walworth County had served the Company with a "Stop Work" order due to Dimiceli's apparent failure to have the proper permits for the additional work. According to the

Company's vice-president and secretary, Peter Miller, although the Company removed rental equipment from the job site to avoid accumulating unnecessary rental fees, it expected to return to the job once the necessary permits were obtained.

However, Dimiceli had earlier asked Miller for permission to use Kotula to work on Dimiceli's property for what Miller believed to be landscaping purposes, outside Kotula's normal hours of work for the Company. According to Miller, he believed the scope of the work Kotula would be asked to do involved finishing up the dirt work and things Dimiceli needed to cover. The work was to be performed on evenings and weekends.

Miller not only granted the requested permission, but on one occasion, at Dimiceli's request, facilitated Kotula's reporting to the Dimiceli premises that evening. Miller acknowledged having a general awareness that Kotula subsequently was performing work for Dimiceli. Kotula stated that Dimiceli paid him $24 an hour for his moonlighting efforts, and that was equal to what he was getting paid by the Company at the time.

Miller said that when he discussed the Dimiceli proposal with Kotula and granted him permission to do the requested work on Kotula's time, it was with the understanding that Kotula was not to use Company equipment. Miller insisted he understood the work would be of a landscaping nature, not road building, because Kotula couldn't perform road building work using only the landscaping equipment he owned. Miller said he told Kotula that he could work for Dimiceli " . . . as long as you do the work that you do, and we do the work that we do." Kotula, however, stated that nobody ever had a discussion with him about what he could or couldn't do for Dimiceli. Kotula claimed he was told only that he was not to use Company equipment for landscaping on weekends.

Miller further recounted that by late September or early October he had heard from other employees of the Company that Kotula was claiming time off for "personal business" reasons in order to work for Dimiceli. Miller explained that he and his brother, Jeffrey, confronted the grievant with these allegations, and that the grievant acknowledged that he had used the excuse of "personal business" to work at the Dimiceli property. Miller said that Kotula received a 3-day suspension for dishonestly claiming he needed a "personal day for personal business" and then using the time off to work for cash, doing work for a Company customer that the Company should have been doing. According to Miller, following the suspension Kotula never approached him to clarify what work, if any, Kotula was permitted to perform privately for Dimiceli.

Kotula explained the events leading up to the suspension by acknowledging that he had taken a personal day to meet with his lawyer in the morning on the day in question. When his business was concluded, Kotula admitted he had then done some work for Dimiceli. Although Kotula claimed there existed a past practice of other Company employees not returning to work on the same day once their "personal business" was completed, Kotula did not grieve the 3-day suspension.

It appears undisputed that Kotula did perform work for Dimiceli both before and after the 3-day suspension.

Kotula acknowledged that he had done some "sub work," for about a week after beginning to moonlight for Dimiceli. Kotula described the sub work he performed as " . . . the rough work where you first cut the roads and berms to a grade, and then after that you then put the black dirt on or the landscape work or gravel and to a finished grade, and then that would be the finished product." Kotula admitted using Company-rented equipment (bulldozer) that had been left on the Dimiceli premises, but claimed it was with the knowledge of Peter Miller. Kotula said Dimiceli had directed him to use the bulldozer because Dimiceli said he was responsible for paying the rental fee for it. Kotula was not disciplined for using the rental equipment.

Tom Earle is a foreman with the Company and supervised the grading/excavating crew to which Kotula had been assigned. Earle was aware that Kotula had received a 3-day suspension. After that suspension, Earle testified that he observed Kotula operating a bulldozer (not owned by the Company) on the Dimiceli property, and " . . . pushing black dirt around the pond." Earle stated that he had a conversation with Kotula, the gist of which was a warning from Earle that Kotula " . . . should be careful because of what it said in the contract [Article 36, Restriction against Competition] and not to get his nose stuck out too far on the project where Miller could come back and fire him."

Earle said Kotula's response was that " . . . he [Kotula] wasn't stupid and he wasn't doing anything against the contract, and that his partner was doing the work that would be involved in the contract . . ." In response to further questioning, Earle reiterated Kotula's response: "(h)e told me that he wasn't stupid and that he knew there would be consequences if he was caught . . . he was seen up there (Dimiceli's) . . . If [he] was seen up there by the Company it wouldn't be pretty because he knew that Miller wanted the work, and he didn't think, you know, that it was right for him to take the work away from Miller.

Earle said Kotula did not acknowledge that he (Kotula) was doing the work. " . . . All he said was that his partner was taking care of that." Earle was aware of Kotula's partnership. Earle had met Kotula's partner, Gary, twice and was aware of work that Gary had done on the Dimiceli premises. Earle explained what he had seen Gary doing on the premises with a crew: "(r)ight, one guy can't build a road by himself so you have to have a crew. He [Gary] was on that crew." Earle elaborated on his observation of Kotula "pushing black earth around a pond." Earle said that whether Kotula was engaged in landscaping or road building at that time depended on where the dirt originated and what it was being used for. Earle did not believe that Kotula was engaged in road building when Earle observed him pushing black earth around a pond.

Kotula admitted having many conversations with Earle on the Dimiceli property, but claimed that if the one to which Earle had testified had taken place, Kotula wouldn't have been doing the work. Kotula also claimed that Kotula Enterprises employed only himself, and had built no roads, only driveways.

Kotula was ultimately discharged in November 2001. He had requested the entire Thanksgiving week as vacation time and claimed he would be deer hunting. Kotula's request was granted. Other Company employees told Miller that on Monday and Tuesday of the Thanksgiving week Kotula had been working on the Dimiceli property. On the Wednesday prior to Thanksgiving, Miller drove by the Dimiceli job site and observed Kotula working on equipment that Dimiceli had personally rented. The Company's equipment was by then off the job site. According to Miller, " . . . they were cutting roads into the top plateau, was cutting roads, the main road to these homes, again up to two miles of road, was starting to cut in there. Mark was observed running a bulldozer and an excavator to do that." In his testimony, Kotula acknowledged that he had been cutting in a road on the day in question, but denied that an excavator was on the Dimiceli premises at that time.

On the same day that Miller observed Kotula working on the Dimiceli premises, Dimiceli advised Miller that he didn't intend to use the Company for any further work on the premises. Dimiceli said that he intended to try a different approach, that of purchasing his own equipment.

RELEVANT CONTRACT PROVISIONS

Article 13. Discharge or Suspension.

The Employer shall not discharge or suspend any employee without just cause

. . .

Article 31. Grievance Procedure

Section 1 ***

Section 2 ***

Section 3. *** In the event that the Employer's representatives and the Union's representatives are unable to reach a decision resolving the dispute, either party may, within five (5) days inform the co-chairman of the Joint Grievance Committee in writing requesting arbitration in accordance with this Article.

Article 4: The parties agree an arbitrator shall be selected on application to the Wisconsin Employment Relations Commission. If the Commission finds it necessary to appoint an arbitrator not a member of the Commission, the losing party shall bear the full cost of the arbitrator.

Article 5: . . . The decision of the impartial arbitrator on any matter submitted to it shall be final and binding on all parties . . .

Article 36. Restriction Against Competition

Any employee who, while listed on the Company's regular seniority list, engaged in any business or enterprise that is in competition with the employer's business or enterprise may be immediately disciplined or discharged by the employer.

POSITIONS OF THE PARTIES

Union

The Union notes that the Company was well aware of Kotula's snow plowing and landscaping business, pointing out that the Company occasionally sold Kotula materials and rented him equipment for use in his business.

The Union argues that Peter Miller was willing to allow Kotula to do landscaping work for Dimiceli because he knew it would benefit both Dimiceli and the Company's relationship with Dimiceli. Thus, the Company granted permission for the arrangement, says the Union, even though the Company, itself, occasionally did landscaping work.

According to the Union, Peter Miller advised Kotula that Dimiceli wanted Kotula to work on Dimiceli's project on a certain evening. No specifics were provided as to the actual work desired. The Company was already off the job, but a bulldozer it had rented remained on the project site for an additional week.

Kotula reported to the project site as he had been directed, the Union continues, where he was directed by Dimiceli to use the bulldozer to finish up the sub work. Kotula did so, and continued to use the dozer for a few days that week. This, according to the Union, was the only non-landscaping work Kotula performed on the Dimiceli project site.

The Union points out that Peter Miller was aware of Kotula's use of the dozer, but took no disciplinary action against him. Miller allowed the use of the dozer that week because Dimiceli was actually paying the dozer rental, says the Union.

After the initial moonlighting bulldozer work that Kotula performed for Dimiceli, the Union contends Kotula engaged in only landscaping work. The Union asserts that there is no evidence that Kotula used a bulldozer to perform any work that wasn't associated with landscaping.

The Union points to Earle's acknowledgement that Kotula's bulldozing black earth around a pond was not road building. The Union emphasizes that at no time did anyone testify that he or she saw Kotula actually performing road construction work with any type of equipment.

The Union asserts that Kotula's 3-day suspension should have been grieved. The Union argues that Company employees have historically been allowed to take off the whole day even though their personal business required only a part of a day. For this reason, says the Union, Kotula believed there was no problem with him going to work for Dimiceli in the afternoon of the personal day he had taken.

The Union further argues that Peter Miller only saw Kotula pushing dirt into an excavator when he observed Kotula the Wednesday before Thanksgiving. Miller would have had no way of knowing whether that work was associated with landscaping or not, the Union contends.

The Union summarizes the case as one where the Company had intended to please a customer by allowing Kotula to moonlight for that customer. It was only when it became clear that the customer did not intend to use the Company any further than Miller decided to fire Kotula, according to the Union. The Union asserts that Kotula was working for Dimiceli, in part, because it was helpful in promoting the business relationship between Miller and Dimiceli.

The Union finds no evidence that Kotula had anything to do with the Company's loss of work at the Dimiceli property. Neither, says the Union, is there any evidence that Kotula engaged directly in road building. The fact that road building was being performed proved nothing against Kotula, the Union asserts, particularly since other contractors also worked for Dimiceli (according to the grievance filed by the grievant).

The Union believes the Company has failed to meet its burden of proving that Kotula was "engaged in any business or enterprise that is in competition with the employer's business or enterprise." The Union contends that the only work in which Kotula engaged was work that the Company, itself, facilitated.

The Union believes the grievance should be sustained and the grievant reinstated and made whole.

Company

The Company argues that the grievant knew that the Company objected to his performing road construction work for Dimiceli for three reasons: 1) the Company had restricted Kotula from using Company equipment while moonlighting for Dimiceli; 2) Kotula had already been suspended once for working for Dimiceli during a "personal business day" off that Kotula had been granted; 3) after the suspension, Kotula's foreman warned him about the possible consequences that Kotula faced by working for Dimiceli. Thus, says the Company, when it discovered that Kotula was competing with it by helping a Company customer avoid purchasing the Company's services, it discharged him, and that was appropriate.

The Company argues that Kotula violated Article 36 of the parties' labor contract when he went beyond doing simple landscaping work for Dimiceli and began cutting in roads. According to the Company, this not only undermined the Company's efforts to perform further road construction work for Dimiceli, but it also undermined employment opportunities for other bargaining unit members.

The Company denies that Kotula had unrestricted permission to work for Dimiceli as long as Kotula didn't use the Company's bulldozer. But, says the Company, it never gave Kotula express or implied permission to do road construction work for Dimiceli. It allowed Kotula only to perform small-scale work that Kotula's landscaping business would normally do – work that did not compete with the Company's primary business. Moreover, the Company adds, the road construction Kotula performed could not be construed to be within the scope of the permission given, for it occurred on a different, later (by 2-months) stage of the project.

The Company argues that the testimony of Tom Earle supports the conclusion that Kotula knew there was a line he must not cross. The Company suggests that Kotula's apparent motivation in crossing that line was to earn money equal to what he had been earning from the Company before the Company discontinued his A & L bonus.

The Company denies that it arbitrarily changed its mind about Kotula's work for Dimiceli when it learned it would receive no further work from the former customer. What the Company objected to, it says, was Kotula's efforts to help Dimiceli do the large-scale road construction work himself at the expense of the Company's receiving the work.

In its reply brief, the Company contends that the Union has ignored the explicit testimony of Peter Miller that he observed Kotula cutting in a road. Moreover, says the Company, Kotula, himself, never denied performing road building work and never contended that he limited his work to landscaping.

DISCUSSION

It is apparent that R. W. Miller & Sons, Inc. wanted to stay in the good graces of its customer, Sal Dimiceli. The Company had apparently completed the work the parties had originally contracted, and had begun new work the customer had added. It suspended operations on that work only after being served with a "Stop Work" order from the County, due to the customer's failure to have obtained the necessary permits for the work.

It also seems clear that the Company had some hope and expectation of resuming its work for Dimiceli once the necessary permits were obtained. The Union is probably correct when it links the Company's initial permission to Kotula to work for Dimiceli with its hope and expectation of finishing the additional work it had undertaken at the Dimiceli premises. But, as the Company argues, its permission to Kotula was not unrestricted. I find credible the Company's contention that the permission it granted Kotula to work for Dimiceli extended only to the performance of landscaping work.

The Company's benign reaction to its discovery that Kotula had used a Company-rented bulldozer in road building activity for the first few days of his work for Dimiceli is understandable: according to hearing testimony, Dimiceli had induced Kotula to use the equipment with the argument that Dimiceli was ultimately responsible for paying the rental fee for the bulldozer. Although Peter Miller testified that he had expressly limited Kotula from using any Company-provided equipment in performing his private work for Dimiceli, with Dimiceli's admission that he was responsible for the breach, any subsequent discipline of Kotula would run the risk of irritating the customer for whom Miller expected to perform work in the future.

At the same time, the Company's failure to discipline Kotula for violating an express condition of Miller's permission for Kotula to work for Dimiceli may have also created some confusion in Kotula's mind as to the permissible scope of work he could perform for Dimiceli. Any confusion that Kotula experienced, however, should have begun to dissipate after receiving his 3-day suspension with the implicit message that working for Dimiceli in preference to working for Kotula's regular employer was unacceptable.

Whatever initial confusion Kotula may have felt, it is evident that there was certainty in Kotula's mind that the collective bargaining agreement between the parties prohibited him from competing with the Company at least by time he had the conversation with Tom Earle to which Earl testified.

I find Earle to be a credible witness. Earle warned Kotula to be careful not to violate the anti-competition stricture in the parties' labor agreement. Earle reported that Kotula was unequivocal in his response: "(h)e said he wasn't stupid and he wasn't doing anything that was against the contract, and that his partner was doing the work that would be involved in the contract, I guess."

I am also impressed that Earle did not conclude that Kotula was engaged in road building based on Earle's observation of Kotula pushing dirt around the pond. In fact, Earle testified to having reached the opposite conclusion, i.e., Kotula was engaged in landscaping when Earle saw him moving dirt.

In my opinion, Earle testified forthrightly. His testimony had the ring of truth that was fully supported by his demeanor. He did not fidget, he made good eye contact with his questioner or the arbitrator, and appeared reasonably comfortable while testifying.

I am, therefore, satisfied that Earle testified truthfully about his conversation with Kotula. Although Kotula made a curiously worded denial of that conversation ("If he did, I wouldn't have been doing it") he did not deny that he was in partnership with "Gary" or that "Gary" was doing the work Kotula perceived that he, himself, was contractually barred from performing.

From this several reasonable inferences can be made: 1) Kotula was fully aware of the contractual prohibition against competition; 2) road construction work was being performed for Dimiceli after the Company had suspended its operations on Dimiceli's behalf; 3) Kotula may have been under the misapprehension that the contractual prohibition merely barred Kotula from personally doing work in competition with his regular employer; and 4) Kotula was in partnership with a person who was performing road construction work for Dimiceli.

But Article 36 of the parties' labor agreement proscribes Company employees from more than personal labor that is in competition with the Company. The article reads as follows:

> **Article 36. RESTRICTION AGAINST COMPETITION**
>
> Any employee who, while listed on the Company's regular seniority list, engaged in any business or enterprise that is in competition with the employer's business or enterprise may be immediately disciplined or discharged by the employer. (Emphasis supplied)

Certainly, Article 36 would prohibit Company employees from personally engaging in labor that is in competition with the employer's business. But the wording of the prohibition is broader than that. It prohibits Company employees from engaging in any business or enterprise that is in competition with the company. By definition a business partnership is "a business or enterprise." Thus, inferentially Kotula's response to Earle in effect admits that Kotula is engaged in a business (partnership) that is doing road building work in competition with the Company.

In the end, under cross-examination Kotula admitted that on the Wednesday before Thanksgiving he had been cutting in a road on the Dimiceli property. (Tr. 69) The admission appears generally consistent with Peter Miller's testimony that he observed Kotula cutting in roads on the Dimiceli property on the same day. Whether or not an excavator was on or off the premises that day does not appear to be a critical point. The grievant agrees that a bulldozer, roller, and front-end loader were on the Dimiceli premises that day. There is nothing in the record that suggests road construction work could not proceed or be advanced with this equipment. In view of Kotula's admission that he had been cutting in a road on said date, it appears that Kotula did perform some road construction at least on that Wednesday.

Based on 1) the broadly stated non-competition provision of Article 36 of the parties' collective bargaining agreement, 2) the admission by Kotula to Tom Earle that his partner (later identified as "Gary") was performing road building work for Dimiceli, and 3) the acknowledgment by Kotula that he, himself, was cutting in a road on the Wednesday before Thanksgiving I believe that Kotula was engaged in a business or enterprise that was in competition with his employer's [the Company's] business or enterprise.

This, of course, subjects Kotula to immediate discipline or discharge by employer. The employer chose to discharge Kotula. The employer was within its contractual rights.

Accordingly, based on the aforesaid and the entire record, the grievance is denied.

AWARD

The Employer had just cause to discharge the grievant, Mark Kotula.

The grievance is dismissed.

Dated at Madison, Wisconsin, this 29th day of July, 2002.

A. Henry Hempe /s/
A. Henry Hempe, Arbitrator

rb
6410