

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SPANCRETE INDUSTRIES, INC.

and

LOCAL 392, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA

Case 14
No. 61795
A-6039

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, by **Attorney Andrea Hoeschen**, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, WI 53212, on behalf of Local 392 and the Grievant.

Mr. Gary R. Noel, Employment Relations Manager, N16W23415 Stoneridge Drive, Waukesha, WI 53188, on behalf of the Company.

SUMMARY AWARD

Pursuant to the terms of the 1999-2004 labor agreement between Spancrete Industries, Inc. (Company) and Local 392 Laborers' International Union of North America (Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding whether the Company had just cause to issue a three-day suspension to Leadman Tony Niera for fighting with Welder Scott Howell on November 7, 2002, at the Company's facility.

The Commission designated Sharon A. Gallagher, a member of its staff, as arbitrator of this case. Hearing was held on March 4, 2003, at Waukesha, WI. No stenographic transcript of the proceedings was taken.

The parties presented oral arguments, documentary evidence and the testimony of witnesses who were sworn on their oath or affirmation at the March 4th hearing. At the end of the hearing, the parties jointly agreed that the Arbitrator should issue a bench award in which

she analyzed the facts, evidence and arguments and decided the above-stated issues. The parties also agreed that the Arbitrator could issue a brief Summary Award stating her conclusions for the parties' files.

Based upon all of the evidence and argument herein, I find that the Company did not have just cause to issue a three-day suspension to Tony Niera as an "aggressor" in the fight between Niera and Howell on November 7, 2002. The Company's Rules of Conduct, Rule 8, require the Company to determine which employee in a fight was the "aggressor" — that is, the initiator of hostilities — and which employee was the "defender" in the fight — that is, the one attacked or who guards against or opposes the hostile action of another. Rule 8 then calls for the "aggressor" to receive a three-day suspension but states that the "defender" should receive a written warning for a first time offense. Here, the Company issued both Howell and Niera three-day suspensions immediately after the November 7th incident as it found both of them were aggressors in the November 7th fight.

The Company reached this conclusion based upon its interviews of Howell and Niera immediately after the fight. Company officials stated herein that they believed Niera was an aggressor in the fight because he could have walked away from the fight but chose not to do so and because he had attacked Howell from behind, knocking Howell's welding helmet down, after Howell started the fight. The evidence in this case simply does not support a conclusion that Niera attacked Howell from behind. Rather, Howell stated herein that when his helmet fell down, he was facing Niera and that the two of them then began to wrestle and that Howell fell over a stack of forms and after the fall, Howell continued wrestling with Niera on top of him.

In addition, Rule 8 only requires the Company to decide who started the fight and who opposed the hostilities — it does not require further analysis by the Company. To require the one attacked (Niera) to have greater self-control than his attacker (Howell) is unfair and not contemplated by the albeit terse language of Rule 8.

Significantly, Scott Howell admitted herein that he initiated both the verbal confrontation with Niera, and Howell admitted initiating the physical altercation with Niera on November 7th, by bumping Niera in the chest. Howell also stated that he admitted he was the aggressor in all respects to Company officials immediately after the November 7th fight. Furthermore, no Company official witnessed the entire altercation between Niera and Howell. Niera never made any statements to Company officials indicating that he was the aggressor on November 7th and Niera consistently denied initiating the fight with Howell to Company officials. In these circumstances, the Company was not privileged to discipline Niera as an "aggressor" in the November 7th fight under Work Rule 8, as Niera was, in fact, the "defender."

Therefore, the Company did not have just cause to issue Niera a three-day suspension. The grievance is sustained. The Company may issue Niera a written warning for being the “defender” in the November 7th fight with Howell. The Company is also ordered to expunge the three-day suspension from Niera’s personnel file and to make him whole (including back pay and all benefits) for the three days he was suspended.

Dated at Oshkosh, Wisconsin, this 25th day of March, 2003.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator