

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LABORERS' LOCAL UNION 392

and

SPANCRETE INDUSTRIES, INC. (Waukesha)

Case 16
No. 62307
A-6064

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by **Attorney Matthew R. Robbins**, P. O. Box 12993, 1555 North Rivercenter Drive, #202, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

Gill & Gill, S.C., Attorneys at Law, by **Attorney Gregory B. Gill** and **Patrick P. Gill**, 128 North Durkee Street, Appleton, Wisconsin 54911, appearing on behalf of the Company.

ARBITRATION AWARD

Pursuant to a request by Laborers' Local Union 392, herein "Union," and the subsequent concurrence by Spancrete Industries, Inc., herein "Company," the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on April 29, 2003, pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on September 24, 2003, at Waukesha, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on November 28, 2003.

After considering the entire record, I issue the following decision and Award.

STIPULATED ISSUES

1. Did the Company violate the seniority provision of the parties' collective bargaining agreement when it laid off two employees on February 24, 2003?
2. If so, what is the appropriate remedy?

DISCUSSION

On February 24, 2003, Spancrete Industries Inc. ("Company") laid off two employees by the names of James Hood and Arturo Lemus at its place of business in Waukesha, Wisconsin. The two employees were laid off due to an economic (business) slowdown. At the time of the layoff, the Company did not know how long it would be. There was only work for a few individuals until new work contracts were signed.

Neither of the two senior employees who were laid off was qualified to operate the Spancrete machine.

The Company retained two junior employees Tim Parneu and Kevin Jacques. Parneu operates the Spancrete machine and Jacques is a foreman in the yard.

At issue is whether the Company violated the seniority provision of the applicable collective bargaining agreement when it laid off the two aforesaid employees. The Union argues that the Company violated the agreement by its actions while the Company takes the opposite position.

The Union correctly points out that Article X, Section 1, explicitly provides:

When an employer is required to reduce his work force because of diminished business and lay-offs are necessary, employees with the least seniority shall be laid off first, in order, and rehired in reverse order.

As noted by the Union, this is reiterated in Article X, Section 3, which states:

The ordinary rules of seniority shall prevail in the engagement, promotion, and lay-offs of all classes of employees.

The Union contends that there is only one possible exception – Article X, Section 7. It provides:

Employers shall not be required to assign employees to operate equipment or perform work for which they are not qualified.

However, Article X, Section 1, also states:

The seniority rights of each man shall prevail, provided that capability to perform work is considered normal, including the opportunity for plant workers to, on a temporary basis, perform work in the field.

The Union argues that “perhaps” nothing is more important to employees covered by a collective bargaining agreement than employee seniority rights during layoff. The Arbitrator agrees. However, the strong seniority rights afforded employees at layoff by Article X are subject to two express limitations. The Company is not obligated to assign employees to operate equipment or perform work for which they are not qualified. In addition, seniority rights prevail at layoff unless an employee is not capable of performing work in a normal manner. The Company may disregard seniority in these instances.

Applying the above contract language to the facts of this case, the Arbitrator first turns his attention to the question of whether it was appropriate to retain junior employee, Tim Parneu. The sole reason given by the Company for retaining Parneu was that no one else was qualified to run the Spancrete machine. (Tr. p. 20).

The Spancrete machine operator is a very complex, demanding, stressful job that requires months of training and operation to learn. (Tr. pp. 15, 28-30). Parneu was the individual retained to operate the Spancrete machine during the layoff. Parneu, prior to the layoff, had been operating the Spancrete machine for approximately six months. (Tr. p. 29). It is undisputed that Parneu, although a less senior employee than the two employees laid off, was qualified to operate the Spancrete machine.

The Union argues, however, four senior employees were qualified to run the machine. For the reasons discussed below, the Arbitrator disagrees.

Roger Pagenkopf is a 26-year employee of the Company. (Tr. p. 10). He operated the Spancrete machine for seven or eight years. Id. However, he stopped running the machine in 1996. Id. He was going through a divorce, “and it just got to be too much, so I asked if I could be relieved.” (Tr. p. 11). He also had a health condition (diabetes) that was not conducive to running the Spancrete machine. (Tr. p. 15). He told Company management that he was willing to help out by running the machine for a limited period of time but never told management that he was willing to run the machine again on a permanent basis. (Tr. pp. 17-18).

Harold Woolridge is also a long-time employee of the Company. (Joint Exhibit No. 2). He has run the Spancrete machine. (Tr. p. 11). However, Woolridge “has made it clear because of his open heart surgery and his age, he will be 60 in January, that he can no longer do that on a full-time basis. It’s just too hard on him.” (Tr. p. 30). He fills in when employees are on vacation, “but he cannot run it on a full-time basis.” Id.

The Union submits that both Tony Regalado and Peter Gott have run the machine. That is true. (Tr. p. 31). However, Regalado hasn’t run the Spancrete machine for “around a year or so” and asked to get off the machine. Id. “He hated the job and asked to be put somewhere else.” Id. Gott “has never run the machine for a long period of time, but in an emergency he could go on” it. Id. When he was put on the machine for short periods of time, management always had Pagenkopf “keep an eye on him just in case he got in trouble there where he didn’t know what to do.” Id. Management told Gott that if he got in a bind he would have help. Id.

As noted above, the agreement specifically states that the Company is not required “to assign employees to operate equipment or perform work for which they are not qualified.” (Emphasis added). It also states that an employee’s seniority rights at layoff “shall prevail, provided that capability to perform work is considered normal.” (Emphasis added).

When interpreting contract language, arbitrators use the ordinary and popular meaning of words, unless there is an indication that the parties intended a special meaning. The Common Law of the Workplace, The Views of Arbitrators, National Academy of Arbitrators, Theodore J. St. Antoine, Editor, Chapter 2, “Contract Interpretation”, Carlton J. Snow, Chapter Editor, s. 2.5 Ordinary and Popular Meaning of Words, p. 69 (1998). The word “qualified” is defined as “Competent, suited, or having met the requirements for a specific position or task.” The American Heritage Dictionary of the English Language, New College Edition, (10th Ed., 1981) p. 1067. The word “normal” is defined, in part, as “anything that is normal; the standard” and “the usual or expected state, form, amount or degree.” The American Heritage Dictionary of the English Language, New College Edition, supra, p. 894. Applying this standard to the four employees in question, it is clear that they do not have the qualifications and ability required by the agreement to perform the Spancrete machine operator work. In this regard, the Arbitrator notes that both Pagenkopf and Woolridge were physically unable to do the work in question primarily because it was of an indefinite duration. Both employees informed the Company that they could no longer physically do the job on a regular basis because of health concerns. If circumstances changed, it was their obligation to inform the Company that they could now work on the Spancrete machine on a permanent basis.

Regalado also was not “suited” for the position because he was not interested in performing it. He also hasn’t run the Spancrete machine for a while so it is not clear that he is currently “qualified” to do that work. In addition, the record indicates that Gott was not

“qualified” for the position because he has not run the machine on a permanent basis and without “help” from other employees. The Company is under no contractual obligation to assign an additional worker to the Spancrete machine in order for Gott to run it properly.

Based on all of the above, the Arbitrator finds that the Company did not violate the agreement when it retained Parneu and laid off a senior employee. The Arbitrator turns his attention to the Company’s retention of Kevin Jacques over a more senior employee.

The agreement recognizes that layoff is by seniority except where an employee is not qualified or able to perform the work in a normal manner. However, as pointed out by the Union, the agreement does not expressly permit the Company to disregard seniority when it reduces its work force by providing an exception or exclusion for foremen.

The Company argues, however, that there is a distinct difference between the classification of foreman and a laborer and the two classifications cannot be treated the same with respect to retention during a layoff.

Article IV, Section 1, does recognize the classifications of laborer and foreman. There are separate laborer and foreman wage scales set forth in the provision, but no separate foreman department. (Tr. p. 55). In addition, Article X, Section 1, does not provide for lay-off by classification. Instead it provides: “For purposes of lay-off there shall be a separate seniority list for each of the employer’s three plants.” (Emphasis added). A conclusion that layoff shall be by plant seniority, not by classification, is supported by a review of the Company’s seniority list which includes employees from all the classifications in the bargaining unit (laborer, welder, foreman and leadman) and from inside the plant and in the yard on one seniority list. (Joint Exhibit No. 2). Therefore, the Arbitrator rejects the aforesaid argument of the Company.

The Company also argues that to uphold the Union’s position regarding Jacques would mean giving up the its right in the agreement to select a foreman pursuant to Article XI, Section 1 and to assign a foreman pursuant to Article III, Section 6(a). However, the Company offered no evidence to support this claim. A ruling that the Company should have laid off the junior employee (Jacques) does not on its face effect the Company’s authority to select foremen, assign them or maintain the proper “ratio of one (1) qualified foreman or leadman for up to four (4) laborers” pursuant to Article III, Section 6 of the agreement.

The Company further argues that neither of the two laid off employees were qualified to handle the job responsibilities of a foreman. That may be. However, the Company did not argue or offer evidence to establish that it could not select a qualified foreman, if necessary, from employees not on layoff.

Based on the foregoing, the Arbitrator finds that the Company violated the agreement when it retained Jacques and laid off a senior employee.

Based on all of the above, I find that the answer to the stipulated issue is Yes, in part, and NO, in part. The Company did not violate the seniority provision when it retained Parneu and laid off a senior employee. However, the Company did violate said provision when it retained Jacques and laid off a senior employee. Therefore, I am sustaining that part of the grievance which pertains to Jacques. (Joint Exhibit No. 3).

In light of all of the foregoing, it is my

AWARD

The instant grievance is sustained in part and denied in part. The Company is ordered to make James Hood whole for all wages and benefits lost as a result of his layoff.

To resolve any questions that may arise over application of the remedy portion of my Award, I shall retain jurisdiction for at least sixty (60) days.

Dated at Madison, Wisconsin, this 26th day of January, 2004.

Dennis P. McGilligan /s/

Dennis P. McGilligan, Arbitrator

