BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CONSTRUCTION AND GENERAL LABORERS' UNION LOCAL 464

and

MID-STATES CONCRETE PRODUCTS COMPANY

Case 16	Case 17
No. 71929	No. 71930
A-6538	A-6539

Appearances:

David Seely, Director of Human Resources, Mid-States Concrete Products, 500 South Park Avenue, South Beloit, Illinois, 61080, appearing on behalf of Mid-States Concrete Products.

Corey McGovern, Business Manager, Construction and General Laborers Union Local 454, 1438 North Stoughton Road, Madison, Wisconsin, 53714, appearing on behalf of Laborers' Local Union No. 464.

This is a dispute between Mid States Concrete Industries and Laborers Local Union No. 464 and it arises out of discharges of two employees E. Chavez and C. Tankersley. Tankersley was discharged from his employment on December 18, 2012 and Chavez on December 10, 2012. Timely grievances were filed and the matters were referred to the Wisconsin Employment Relations Commission for arbitration on January 7, 2013. The undersigned was appointed and a hearing was held on February 7, 2013. The parties agreed to hold the hearing on one day although the two grievances were heard separately. The record was closed following the hearing and matter is now ripe for decision.

AWARD

Introduction

Mid-States manufactures and installs pre-cast concrete structural components which are trucked to sites where they are installed in the form of beams, columns and wall panels forming buildings. The work is performed by two different groups of employees. One group manufactures the concrete product and the second group consists of field crews that install the product. The two disputes which are addressed here concern the manufacturing employees who are based at the Company's facility in South Beloit, Illinois.

The labor agreement between the Union and the Company provides that the employer may "discharge any employee for good cause." The agreement also provides that there must be at least one warning prior to discharge except in limited enumerated cases. One of those exceptions is contained in Article IX of the agreement and provides for discharge without warning in cases of:

"9. Blatant disregard for safety likely to cause serious injury."

For purposes of this arbitration proceeding the Union has conceded that in both cases the conduct of the grievants requires some discipline. Accordingly the parties agreed to the following statement of issue:

> Was discharge the appropriate penalty for the conduct engaged in by the grievant and if not what discipline should be imposed?

Each of the grievants in this matter were discharged for violating Rule #9. Neither had received prior written warnings and neither had any prior disciplinary record.

Safety Enforcement

Several years prior to this matter arising the Company launched a significant effort to improve safety throughout its operation. Management was motivated by a recent history of significant injuries as well as what they described as "massive" expenditures for workers compensation. They launched a comprehensive effort involving training, audits, employee meetings, as well as hiring a full-time safety director. Enforcement of the new standards was strict. A number of management personnel who were not fully supportive were terminated. From 2010 through February of 2012 two relatively long term employees from this bargaining unit and one from the bargaining unit representing field employees were discharged for singular safety violations. Certainly the discharges at the bargaining unit level as well as in management sent the message that the Company was very serious about enforcing the safety standards. None of the bargaining unit discharges were grieved by the respective labor organizations.[1] The circumstances in the cases of the individual employees here are relatively clear cut.

[1] This is not to suggest any type of waiver or other acquiescence by the Union. Certainly there are a variety of reasons why the Union may elect not to pursue a grievance.

Tankersley Termination

This employee was actually involved in separate incidents on successive days. By way of background this employee had previously been injured in an industrial accident in 2009. He had suffered extensive injury as well as a lengthy recovery. On December 17, 2012, he loaded a container on the back of a flatbed trailer. He was required to shrink wrap the container but had forgotten to do so. Rather than remove the pallet sized container with a fork lift he chose to shrink wrap the container while it was on the flatbed truck. This alone would not have been an issue except that the truck was missing a number of planks down the center of the bed. As a result the employee was shrink wrapping a large container while moving about on the bed of a truck which had a large gaping hole in its bed. The correct action would have been to remove the container to ground for shrink wrapping. A supervisor saw the problem and directed Tankersley to get down off the trailer.

The next day, Tankersley was responsible for filling a metal basket with equipment to be loaded on a truck. The basket was raised by use of a cable on which a 300-pound pulley was attached. The employee hooked the ring on the pulley to one fork on a fork lift and raised it to its full height. He then proceeded to load the basket which necessitated his working under the fork holding the pulley, which was very near the tip of the fork. Had the pulley come off the fork and fallen on the employee it would likely have resulted in his death.

The Company had two specific written "Safety Alerts" addressing the dangers inherent in the action Tankersley had engaged in. The "Safety Alerts" were provided to employees and included training discussions. Both were issued less than six months before the incident. Similar training had been provided regarding the hazards created by damaged beds on truck trailers. Following these two incidents Tankersley was discharged after an investigation by the Company. He was permitted to explain his actions as to the shrink wrap issue. As to the fork lift issue Tankersley denied working directly under the forklift. The employer produced two witnesses, one of whom was in the bargaining unit, that observed Tankersley working directly under the overhanging pulley. Based on that testimony, I am satisfied that he did in fact engage in an unsafe practice as to the fork lift with a clear disregard for the potential for serious injury to himself.

Chavez Termination

This employee was on a truck-like piece of equipment identified as the Tucker and was working on the second shift. He had another employee in the Tucker with him and a second employee on a platform above him on the next floor level. Chavez jumped up on the top cab of the truck in order to communicate with the employee on the higher floor. This created an immediate safety hazard for Chavez. He could have fallen off the cab roof, a fall of eleven feet or he could fallen into an active auger which would have resulted in his death. Chavez clearly understood that what he did was unsafe. He asserted that he was not allowed to present

an explanation but the record reflected that he was given the opportunity to tell his side of the story. In fact his explanation itself reflected a violation of the lockout tag out procedure at the Company. Furthermore Chavez had the additional bad luck of being seen (and photographed) by the Human Resources manager while in the precarious position on top of the truck cab.

In retrospect Chavez' action was an attempt to shortcut the process. He should have left the truck and walked up the stairs to address the employee. That would have been the safe course of action. Rather than take the extra time the employee chose to place himself in a personally dangerous situation. On December 10, 2012 Chavez was terminated for violating Rule #9.

Level of Discipline

In both cases the grievants violated safety standards in a manner that was likely to "cause serious injury". Neither was motivated by ill will. Both the employees were attempting to "cut corners" in the interest of completing the tasks at hand. Employees typically do not violate safety standards with the intention of harming their employer. Often they are motivated by an attempt to increase production or at worst make their work life easier. Unlike discipline imposed by employers for employee misconduct like absenteeism, tardiness, fighting or theft, safety rule violations primarily imperil the employee with no direct harm to the employer unless, of course, injury results. Discharging an employee for violating safety rules where no injuries occur presents a difficult situation for employers. On the other hand lax enforcement or enforcement only when injury occurs does not result in changes in behavior. If the employer is truly motivated to change behavior, strict enforcement of all violations is a necessary course to follow. It is however a course fraught with downside risk for the employer, as demonstrated here. Otherwise excellent employees must be terminated even for short term lapses in judgment. Grievant Chavez' circumstances are illustrative.

Chavez, a fifteen-year employee who had worked his way to a position as lead foreman had provided assistance to the Company in a variety of ways. He was considered a valuable and productive employee and was fully engaged in the safety program. The Company has sacrificed that experience and ability in the interest of uniform enforcement of its safety standards. It has made the business judgment that the loss of the employee's services is acceptable in light of the greater good that is accomplished. The employer has in effect created a zero tolerance standard for safety violations and the Union has tacitly accepted that standard. The Company and the Union also readily acknowledge the employer's duty under the Occupational Safety and Health Act to maintain a place of employment "free from recognized hazards that are causing or likely to cause death or serious physical harm" to employees. 29 U.S.C. sec. 654.5(a)1. The State of Illinois also imposes a statutory obligation on employers to "provide reasonable protection to the lives, health and safety" of its employees and to furnish a place of employment "free from recognized hazards". 829 ILCS 225/3.

The employer is duty bound to protect the entire workforce and it has chosen to do so through strict enforcement of its safety standards. If an employee knowingly violates the rule, even though the violation creates no personal benefit to the employee, discharge without prior warning is contractually allowed. It is a rule collectively bargained by the parties and one that has been uniformly enforced by the employer. In my view it is not the role of a labor arbitrator to second guess a business judgment made by the employer with the apparent acquiesce of labor. While the misdeeds here did not cause injury the purpose of safety rule enforcement is to avoid injury to the individuals and other employees. As should be evident from this decision, while I sympathize with the grievants, I feel compelled to uphold the discharges. Accordingly the grievances in this matter are dismissed.

Dated at Madison, Wisconsin, this 20th day of February, 2013.

James R. Scott /s/
James R. Scott, Arbitrator

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