BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LABORERS' UNION LOCAL NO. 464

and

MID-STATES CONCRETE INDUSTRIES

Case 18
No. 72728
A-6563

(Brent Neblock Discharge Grievance)

AWARD NO. 7884

Appearances:

Corey McGovern, Business Manager, Laborers' Union Local No. 464, appeared on behalf of the Union.

David Seeley, Director of Human Resources, Mid-States Concrete Industries, appeared on behalf of the Company.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and Company respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide the Brent Neblock discharge grievance. A hearing, which was not transcribed, was held on January 9, 2014, in South Beloit, Illinois. The parties did not file briefs. Based on the entire record, the undersigned issues the following Award.

ISSUE

The undersigned frames the issue as follows:

Did the Company have good cause to sever its employment relationship with Brent Neblock? If not, what is the remedy?

PERTINENT CONTRACT PROVISION

The parties 2012-2015 collective bargaining agreement contains the following pertinent provision:

ARTICLE IX. DISCHARGE AND SUSPENSION

The Employer may discharge any employee for good cause. An employee charged with an offense justifying immediate discharge will be informed of such offense in writing at the time of his discharge, and a copy thereof shall be sent to the Union. All discharges must be made in the presence of employee's Stewards. The Employer shall give at least one (1) warning notice in writing of a complaint for other offenses (those not involving immediate discharge) against such employee, to the employee and the Union. If the offense complained of in the warning letter is not repeated within six (6) months from the date of the warning letter, then such warning letter will be deemed to have served its purpose and shall no longer be in effect.

Discharge without a warning notice is authorized in cases of:

1. Dishonesty;
2. Falsification of your time card.
3. Theft
4. Sabotage
5. Leaving work during scheduled work hours without written permission from lead man or management
6. Fighting
7. Possession or use of weapons
8. Conduct that denigrates or shows hostility or aversion toward an individual because of his or her protected basis
9. Blatant disregard of safety likely to cause serious injury

Objection to any discharge must be made within ten (10) days of said discharge. The matter shall then be discussed by the

> Employer and the Union as to the merits of the case. The employee may be reinstated under other conditions agreed upon by the Employer and the Union. Failure to agree shall be cause for the matter to be submitted to arbitration as provided in Article VIII on Grievance and Arbitration. The arbitrator shall have the authority to order full, partial or no compensation for time lost. Inability to work because of proven illness or injury shall not be cause for discharge or suspension, and such employee shall be reinstated to his former position at such time as he is physically capable of doing same. (This is covered by the Family Medical Leave Act and the American Disability Act.) [FMLA – 12 Weeks WI, 12 weeks IL]

BACKGROUND

The Company manufactures precast cement slabs used in construction. The Union is the exclusive collective bargaining representative for the Company's manufacturing employees.

* * *

The following bargaining history relates to this case.

The parties' 1998-2001 collective bargaining agreement contained the following "Discharge and Suspension" provision:

> The arbitrator shall have the authority to order full, partial or no compensation for time lost. Inability to work because of proven illness or injury shall not be cause for discharge or suspension, and such employee shall be reinstated to this former position at such time as he is physically capable of doing same.

The record indicates that when the parties' negotiated a successor agreement to the one just referenced, the Company proposed deleting the last sentence referenced above. The Company's stated reason for wanting to eliminate this sentence was their concern that the existing language could lead someone to infer that an employee could be off work (due to illness or injury) for several years, and then return to work over the Company's objection. The Company considered that problematic because it did not want to keep a vacant position open for such an extended period of time.

The record indicates that in response to the Company's proposal to delete that sentence, the Union made a counterproposal whereby the following new sentence was added after the last sentence identified above. The new sentence was as follows: "This is covered by the Family Medical Leave Act and the American Disability Act." The Company accepted the Union's

counterproposal and that new sentence was added to the parties 2001-2004 collective bargaining agreement.

The record reflects that after this new language was added to the agreement, an employee named Randy Olson was discharged by the Company. The Company discharged Olson when he did not return to work after the end of his 12 weeks of Family Medical Leave Act (FMLA) leave. The Union grieved his discharge, but the grievance was not appealed to arbitration. As a result, Olson's discharge was not overturned.

The record further reflects that when the parties negotiated a successor agreement to their 2001-2004 collective bargaining agreement, Company President Hagan Harker wanted to ensure that it was clear that the meaning of the sentence added to the parties' 2001-2004 collective bargaining agreement referenced above was that there was a 12-week cap for FMLA leave. To address that stated concern, the parties added a phrase after the sentence which was added to the parties' 2001-2004 collective bargaining agreement. The new phrase which was added to the parties' 2004-2007 collective bargaining agreement was as follows: "[FMLA – 12 Weeks WI, 12 weeks IL]."

The language just referenced has not been altered since it was included in the parties' 2004-2007 collective bargaining agreement.

The record indicates that since that language was added to the collective bargaining agreement in 2004, the Company has consistently administered it as follows. When an employee is unable to work because of an on-the-job injury, they are given what the Company calls its "standard FMLA usage letter." That letter informs the employee that they have 12 weeks of (unpaid) leave time available for their use pursuant to the FMLA. The letter then informs the employee when their 12-week allotment of FMLA leave will be exhausted. The letter then goes on to say:

> Unless we hear from you otherwise and you have not reported to work by _____, you are considered terminated as of _____ in accordance with the FMLA and company policy.

This letter puts the employee on notice that if they return to work before their 12 weeks of FLMA leave are used up, they keep their job. However, if they do not return to work when their 12 weeks of FMLA leave are used up, they are terminated.

The record reflects that letters like the one referenced above were sent to Joe Rodrigues in 2005, Bruce Sanwich in 2006, Isreal Casique in 2008 and Tony Mendez in 2009. Each of these employees returned to work within 12 weeks. They kept their jobs and were not terminated.

The record reflects that in 2008, Ellen Arndt – who was out due to a work-related injury – did not return to work within 12 weeks. She was terminated. The Union did not grieve her termination.

The record reflects that in 2011, Phil Riverdahl – who was out due to a work-related injury – did not return to work within 12 weeks. He was terminated. The Union did not grieve his termination.

It is against this factual background that the following occurred.

FACTS

Brent Neblock was a maintenance employee with the Company.

Neblock originally injured his knee in an accident at home. In January 2013, Neblock had surgery on the injured knee. Following surgery, he was unable to perform the essential functions of his regular job, so the Company created light duty work for him to perform. While Neblock was performing that light duty work, he fell at work. That fall aggravated his knee injury, but he nevertheless continued to work performing light duty until June 18, 2013. (Note: All dates hereinafter refer to 2013.) On that date, Neblock was notified that the Company was no longer going to provide him with light duty work to perform, and sent him home. That was the last day that Neblock performed work for the Company.

Effective that day (June 18), the Company placed Neblock on FMLA leave. It did so because Neblock's injured knee prevented him from performing the essential functions of his regular job, and the Company had decided there was no more light duty work for him to perform. Also, the record shows that Neblock had used up all of his accrued paid leave time by that date. In other words, all the paid time off that he was entitled to per the parties' collective bargaining agreement had been exhausted.

On June 28, Human Resources Director Dave Seeley sent Neblock the Company's "standard FMLA usage letter" (that was referenced in the Background section). The letter provided in pertinent part:

> Per the information you have provided to the Company, your current absences from work qualify as a leave under the Family and Medical Leave Act because it is the result of a serious health condition that makes you unable to perform the essential functions of your job.

The letter then went on to inform Neblock that he was entitled to 12 weeks of (unpaid) leave under the FMLA. The letter informed him that his FMLA leave period started to run on June 18, 2013.

Neblock's 12 weeks of FMLA leave ended September 9, 2013. After his FMLA leave time ended, Neblock did not return to work because he was still not physically able to do so. Specifically, his injured knee still precluded him from performing the essential functions of his regular maintenance job.

On September 24, Seeley sent Neblock a letter which provided in pertinent part:

> On June 18, 2013, you were granted leave under the Family and Medical Leave Act (FMLA). At that time, you were advised that you had 12 weeks of FMLA leave time available to you. This letter is to inform you that, as of September 9, 2013, your 12-week FMLA allotment was exhausted for this year.
>
> You are not entitled to any additional leave under federal or state family / medical leave laws and your accrued, paid leave time has been exhausted.
>
> Please be advised that you are considered terminated as of September 23, 2013 in accordance with the FMLA and company policy.

Following his termination, the Union filed a grievance on Neblock's behalf.

Neblock is currently drawing worker's compensation benefits from the Company's worker's compensation insurance carrier.

Neblock is still physically incapable of returning to work. At the hearing, he could not give any kind of timetable when he would be physical able to return to work.

DISCUSSION

The question to be answered here is did the Company have good cause to sever its employment relationship with Neblock. I answer that question in the affirmative. My rationale follows.

I begin by noting at the outset that normally when an employee is discharged by an employer, it's because the employee did something wrong (in the conventional sense) or is at fault in some regard. That's not the situation here, so that makes this case unique. In this case,

the Company is not claiming that Neblock did anything wrong (in the conventional sense), nor is the Company claiming that Neblock is at fault in some regard. Instead, what happened here is that Neblock's medical condition prevented him – and is still preventing him – from performing the essential functions of his regular job.

A review of the following facts shows this. Neblock had surgery on his knee in January 2013. Afterwards, the Company created light duty work for him to perform. That went on for months (meaning Neblock performed the light duty work the Company created for him rather than the work of his regular job). At some point though, the Company decided it was no longer going to continue to provide Neblock with light duty work. Said another way, the Company decided that the light duty work it had let Neblock perform for months had been exhausted. It was permissible for the Company to do that (i.e. decide that the light duty work it had for Neblock to perform was exhausted) because there is nothing in the collective bargaining agreement that obligates the Company to indefinitely provide light duty work to an employee who can no longer perform the essential functions of their regular job. On June 18, 2013, the Company sent Neblock home for the following reasons: (1) the light duty work he had been performing was exhausted; and (2) he could not return to his regular job because his injured knee precluded him from performing the essential functions of that job. Also, the record reflects that as of that date, Neblock had used up all of his accrued paid leave time. The Company therefore put Neblock on unpaid FMLA leave as of that date. The Company later sent Neblock a letter which informed him that he had 12 weeks of (unpaid) leave available to him pursuant to the FMLA. When that 12-week period ended, Neblock did not return to work because his knee injury still precluded him from performing the essential functions of his regular job. When he did not return to work, the Company terminated him. The Union grieved Neblock's discharge and it was appealed to arbitration. At the hearing – which was held four months later – Neblock indicated that his injured knee still prevents him from working, and he was unable to give an estimate of when he would be able to return to work. The Union asks the arbitrator to overturn Neblock's discharge and direct the Company to hold a position open for Neblock, so that at some unspecified point in the future, he can return to work after his knee heals.

Next, I'm going to look at the relevant contract language. It's found in Article IX. The first sentence in that article specifies that the Company has to have "good cause" to discharge an employee. That phrase is not defined in that article or elsewhere in the agreement.

In this case, the Union hangs its proverbial hat on the next to the last sentence in Article IX. That sentence provides thus:

> Inability to work because of proven illness or injury shall not be cause for discharge or suspension, and such employee shall be reinstated to his former position at such time as he is physically capable of doing same.

When you first read this sentence, it appears to be directly on point and support the Union's position in this matter. Here's why. When that sentence is given its plain meaning and applied to the facts involved here, it seemingly means that Neblock's "inability to work" because of his knee injury "shall not be cause for discharge." Additionally, it further seemingly means that the Company has to keep a position open for Neblock until "he is physically capable of doing same." Since that sentence doesn't contain a time limit for that to occur, the inference is that the Company has to keep the position open for the employee indefinitely. Given the foregoing, my initial presumption is that this sentence requires that Neblock's discharge be overturned.

However, there is contract language that essentially changes – and trumps – that initial presumption. I'm referring to the sentence that follows the one just reviewed. It's the last sentence in Article IX. I'm going to call it the parentheses and brackets language. It provides thus:

> (This is covered by the Family and Medical Leave Act and the American Disability Act.) [FMLA – 12 Weeks WI, 12 weeks IL]

Although the words used in this sentence are relatively plain and simple, that doesn't necessarily make its meaning plain and simple. The following discussion shows why. While we know after reading that sentence that something is covered by the FMLA (Family Medical Leave Act) and the ADA (Americans with Disabilities Act), the sentence uses just one word to describe what it is that is covered by the FMLA and the ADA. That word is the word "this" which is used at the beginning of the sentence. Given its placement at the beginning of the sentence, a logical inference is that the word "this" refers to the previous sentence. That sentence, which has already been reviewed, deals with a factual situation which involves an employee who can no longer work because of an illness or injury. By using the word "this" to start the last sentence in Article IX, the writers of the contract language chose to link this sentence with the sentence that precedes it. Taking that premise to the next step, and reading the two sentences together, my initial inclination is that the last sentence means that when there's a factual situation where an employee can no longer work because of illness or injury, that employee can go on FMLA leave for 12 weeks. That said, what happens if the employee does not return when the 12-week period is over? According to the Company, 12 weeks is a cap, and if the employee does not return to work at the end of that time period, the employee can rightfully be terminated. The Union disagrees, and does not see 12 weeks as being a cap. Just looking at the last sentence of Article IX standing alone, I can't answer that question and say definitively which interpretation is correct. That being so, the last sentence of Article IX is ambiguous on whether the 12 weeks referenced therein is to be considered a cap or not.

When contract language is considered ambiguous – as is the situation here – arbitrators routinely look beyond the agreement itself to help them interpret the ambiguous language.

In presenting their case, the Company relied on both bargaining history and their past practice to buttress their position that the 12 weeks referenced in the last sentence in Article IX is a cap. Bargaining history and past practice are forms of evidence which are commonly used to help interpret ambiguous contract language. The rationale underlying their use is that they can yield reliable evidence of what ambiguous language means. Thus, the manner in which the parties have carried out the terms of their agreement in the past provides reliable evidence of its meaning.

First, let's look at the parties' bargaining history. The record shows that the FMLA and ADA sentence was added to the parties' 2001-2004 collective bargaining agreement. After that language was added, an employee named Randy Olson was discharged when he did not return to work after the end of his 12 weeks of FMLA leave. While that discharge was grieved, it did not go to arbitration and thus it was not overturned. The Olson grievance prompted the Company to address this contract language again in the next round of bargaining. In that round of bargaining, the Company told the Union that they (i.e. the Company) wanted to ensure that it was clear that the meaning of the sentence added to the end of Article IX in the 2001-2004 collective bargaining agreement (i.e. the FMLA and ADA sentence) was that there was a 12 week cap for FMLA leave, and if the employee didn't return after that leave ended they were terminated. To address that stated concern, the parties added the following phrase: "[FMLA – 12 Weeks WI, 12 weeks IL]" at the end of the last sentence in Article IX. This language has not been altered since it was included in the parties' 2004-2007 collective bargaining agreement.

Second, let's look at what is generally called past practice. The record shows that since that contract language was added to the agreement, the Company has administered and applied it as follows. When an employee is unable to work because of an on-the-job injury, they are given what the Company calls its "standard FMLA usage letter." That letter tells the employee that they have 12 weeks of (unpaid) leave time available to them pursuant to the FMLA. The letter then informs the employee when their 12-week allotment of FMLA leave will be exhausted. The letter then goes on to say:

> Unless we hear from you otherwise and you have not reported to work by _____, you are considered terminated as of _____ in accordance with the FMLA and company policy.

This letter puts the employee on notice that if they return to work before their 12 weeks of FMLA leave are used up, they keep their job. That happened to Joe Rodrigues in 2005, Bruce Sanwich in 2006, Isreal Casique in 2008 and Tony Mendez in 2009 (meaning they all returned to work within the 12-week period and they were not terminated). This letter also puts the employee on notice that if they do not return to work when their 12 weeks of FMLA leave are used up, they are terminated. That happened to Randy Olson in 2002, Ellen Arndt in 2008 and

Phil Riverdahl in 2011 (meaning they all did not return to work after the 12-week period and they were terminated). None of these discharges went to arbitration.

When the parties' bargaining history and the Company's administration of the contract language are considered together, they conclusively establish how the last two sentences in Article IX have come to be interpreted by the parties themselves. It's this: when an employee is off work for a long period of time because of an on-the-job injury, and they have exhausted all their contractual paid leave, then they can be off work for an additional 12 weeks pursuant to the FMLA. While the last sentence in Article IX doesn't expressly say that 12 weeks is a cap, that's what the parties have nonetheless decided – via their bargaining history and administration of the contract provision – that it means. They could do that (i.e. reach that conclusion about the meaning of the last sentence in Article IX) because this is their collective bargaining agreement. Consequently, consistent with the parties' bargaining history and the administration of that contract provision, I find that the last sentence in Article IX (i.e. the sentence I previously called the parentheses and brackets language) modifies the sentence that precedes it. It does that by capping the length of time that an employee can be away from work at 12 weeks. That's the maximum amount of time an employee can be away from work (once they are placed on FMLA leave by the Company). If they return to work within that 12-week period, they still have a job with the Company. However, if they do not return to work when that 12-week period is over, the protection given them by the preceding sentence does not apply and they are terminated. Said another way, notwithstanding what the next to last sentence of Article IX says, the parties have decided that if an employee does not return to work when their 12 weeks of FMLA leave is over, the Company has good cause to discharge them.

In this case, the Company treated Neblock the same as other employees who did not return to work when their 12 weeks of FMLA leave was over. Specifically, the Company terminated him, just like it did every other employee who did not return to work when their 12 weeks of FMLA leave was over. Given that consistent treatment of employees, no disparate treatment occurred here.

Based on the above, I conclude that the Company had good cause to sever its employment relationship with Neblock because his current medical condition prevents him from performing the essential functions of his job.

Finally, the Union asks me to order the Company to keep a position open for Neblock, so that he can eventually return to it. The problem with that is that even at the hearing, Neblock was unable to say when he would be able to return to work. It could be months or years. Thus, there is little likelihood of improvement in Neblock's medical condition. The Company decided for various business reasons that it did not want to keep a position open for Neblock indefinitely. That was their call to make because the Company has a legitimate need to plan for the performance of work.

In light of the above, it is my

AWARD

That the Company had good cause to sever its employment relationship with Brent Neblock. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 26th day of February 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones, Arbitrator