

IN RE ARBITRATION BETWEEN:

BAKERY, CONFECTIONARY, TOBACCO WORKERS AND GRAIN MILLERS LOCAL

and

NORTHERN MANAGEMENT CORP.

DECISION AND AWARD OF ARBITRATOR

FMCS CASE # 08-53296

JEFFREY W. JACOBS

ARBITRATOR

7300 Metro Blvd. #300

Edina, MN 55439

Telephone 952-897-1707

E-mail: jjacobs@wilkersonhegna.com

July 2, 2008

IN RE ARBITRATION BETWEEN:

BCTGM, Local 22

and

DECISION AND AWARD OF ARBITRATOR
FMCS CASE # 08-53296
Severance Pay contract interpretation grievance

Northern Management Corp.

APPEARANCES:

FOR THE UNION:

Jerry Ockenfels,
Tom Holloman
Allen Hermanson
Ron Mohrland, Pres. Local 22
Bruce Peglow, Vice President

FOR THE EMPLOYER:

Dennis Johnson, Chestnut & Cambronne
David Petersen, Pres. & Owner of Northern Mgt. Corp.

PRELIMINARY STATEMENT

The hearing in the matter was held on June 17, 2008 at 1:00 p.m. at the office of Chestnut & Cambronne in Minneapolis, MN. The parties presented oral and documentary evidence at that time and submitted post-hearing Briefs on June 27, 2008 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement dated October 1, 2000 through September 30, 2004. The grievance procedure is contained at Article XI. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service.

ISSUE

Whether the Company violated the collective bargaining agreement when it refused to pay severance pay for the time the affected employees worked for both Northern Management Corp. and Froedtert Malt, the predecessor employer? If so what shall the remedy be?

UNION'S POSITION

The Union took the position that the contract requires that the grievants be credited for all the time worked for both Froedtert Malt and Northern Management Corp., pursuant to the language of Article XIV. In support of this position the Union made the following contentions:

1. The Union argued that the employees in question started working for Froedtert Malt Co. on 6-6-77 and 8-20-73 and that one other employee who did not testify at the hearing began there on 9-17-79. All these employees thus had far more than 25 years in with the two companies involved in this case, i.e. Froedtert and Northern Management.

2. When Northern took over the management of the grain elevator where these employees worked the Union and the President and Owner of Northern negotiated a new contract for these employees. It was not a continuation contract but a brand new agreement.

3. The Union asserted that they added specific language to make sure that in the event the elevator closed the employees' severance pay rights would be protected. The Union pointed to prior contracts, some going back as far as 1982, which provided quite clearly that any employee who lost employment due to the shutdown of the facility would be eligible for severance pay provided they had 5 years or more of continuous employment with the Company as well as other conditions not at issue in this case. Thus if an employee had more than 5 years in, they were entitled to severance pay.

4. When Northern took over, the Union asserted that they very much wanted that benefit to continue and that they were quite clear that any time spent working for Froedtert Malt would count towards the severance pay calculation. The Union asserted that this was everyone's intent and that this was clearly stated in the language that was negotiated. The Union pointed to its negotiation notes from the 2000 bargaining session and noted that there were several changes to the terms of the agreement between the Union and Froedtert but that there was specific agreement that the "rest of the agreement to stay the same," including the severance pay provisions. They added specific language to the agreement to protect the employees that the Union claims is clear and unambiguous.

5. The current language of Article XIV provides as follows:

If NORTHERN MANAGEMENT CORPORATION should decide to completely and permanently shut down the entire facilities and operations at Union Elevator covered by the Labor Agreement between this Company and Bakery, Confectionary, Tobacco Workers and Grain Millers International Union – Local No. 1G, of the City of Minneapolis, affiliated with the BCTGM, Local 1-g, an employee covered by this Labor Agreement who loses employment thereby will be eligible for severance pay provided:

1. He has completed five (5) years of continuous service with the Company (INCLUDING THE PRIOR EMPLOYER FROEDTERT MALT) at the time his employment is terminated, and
2. he continues to work until the date of termination, and
3. he is not discharged for just cause, and
4. he is not eligible for normal retirement or disability retirement benefits under the provision of the Retirement Plan of the prior employer, Froedtert Malt, and
5. he has not accepted an offer of other employment elsewhere with a successor employer.

An Employee will be paid one week's pay (40 times his straight hourly rate) for each full year of continuous service with the Company, to a maximum of twenty five (25) weeks' pay. Continuous services will no longer be required as specified in the Company's written notice to him. The severance allowance will be paid to eligible Employees within thirty-one (31) days after their termination becomes effective. Upon receipt of severance allowance, an Employee will relinquish all recall, seniority and employment rights with the Company.

Severance pay to which Employee is eligible will be payable to the Employee's estate in the event of his death after he becomes eligible and before he has been paid Severance Pay.

6. The Union pointed to the clear language including the prior employer Froedtert Malt as clear indication of contractual intent to include the years the employees spent working with that company as a part of the calculation of severance pay.

7. The Union noted that there is no dispute that the other conditions of the severance pay language have been met. The elevator in question was closed permanently and the affected employees lost employment because of it. They all worked until the date of termination and none were terminated for just cause. Further, they were not apparently eligible for normal retirement as of the date of the closure and none accepted employment with a successor.

The Union seeks an award ordering the Company to honor its contractual commitment to credit all time worked for both Froedtert Malt and Northern Management for purposes of calculating severance pay.

COMPANY'S POSITION:

The Company took the position that the contract does not require the Company to pay any more than the number of years these employees have spent working for Northern Management Corp. and that the language does not require it to pay for years these employees spent working for Froedtert. In support of this the Employer made the following contentions:

1. The Employer argued that Northern is not the owner of the grain elevator in question but rather a manager and is paid a \$3,000.00 per month management fee. From this must come a great many expenses including but not limited to a part time secretary, taxes and other expenses. There is simply no way the Company would have agreed to a payment of nearly \$60,000.00 when being paid only \$36,000.00 per year.

2. More to the point, the Company pointed to the language of Article XIV and argued that the term “the Company” as it is used there can only mean Northern Management. The Company is defined in the very preamble of the contract as Northern Management Corporation, not Froedtert.

3. The Company argued that since this was a new contract, it is not only inequitable but contrary to the contractual language to saddle this employer with the time these employees spent working for another employer.

4. The Company further argued that the first clause of Article XIV merely provides for the conditions under which any severance will be paid. However in the second clause of Article XIV, there is only a reference to “the Company,” which can only mean Northern Management. The language specifically provides as follows: “An Employee will be paid one week’s pay (40 times his straight hourly rate) for each full year of continuous service with the Company, to a maximum of twenty five (25) weeks’ pay.

5. If the Union had truly wanted to protect the workers and assure they would be paid severance for the time spent working at Froedtert they could simply have amended the contract with Froedtert but they did not do that.

6. Finally, the Company asserted that there was no specific discussion about severance during the bargaining for this and no one ever indicated to Mr. Petersen that he or his company would be liable for the time the employees spent working at Froedtert. Further, he relied on the representations of Froedtert's Human Resources Representative, Jim Kaja, who never told him of any such potential liability.

7. The essence of the Company's claim here is that the language that actually provides for the severance pay and how it is to be calculated is contained in the second paragraph of Article XIV, which references only "the Company," i.e. Northern, and contains no reference to Froedtert. Moreover, there was neither clear intent nor any rational basis for Mr. Petersen to have ever signed this if he had known of this potential liability.

The Company seeks an award denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

There were virtually no disputes about the underlying facts of this matter. The issue was the interpretation of the language of Article XIV as set forth above. At issue is whether the affected employees laid off due to the closure of the Union grain elevator, are entitled to severance pay for the time spent working at the predecessor employer, Froedtert Malt, or whether they are entitled to severance based only on the time worked at Northern Management Corp.

There was no apparent dispute as to whether these employees were otherwise entitled to severance pay under the provisions of Article XIV. The employees lost their jobs due to the closure of the elevator in question. They apparently worked until the date of termination and none were discharged for just cause.

Further, none were apparently eligible for normal retirement and none accepted alternate employment with a successor employer. At least no such allegations were raised by the Company and the inference is that no such facts existed. The sole question here is whether these employees are to be credited for the time they worked at Froedtert Malt for the purpose of calculating severance pay. There was also no dispute that the rate of pay for purposes of calculating severance is the last rate of pay worked by the affected employees. The parties in fact stipulated to this at the hearing.

The evidence showed that the Company took over management of the elevator in question from Froedtert Malt on October 1, 2000. See Joint exhibit 5. It was not entirely clear how long the parties negotiated for the current labor agreement, but the evidence did establish that the parties sat down and negotiated for the current agreement on September 15, 2004. The notes of that meeting showed that the parties agreed to wage increases, SEP IRA contributions, vacation entitlements, a 4-year agreement and an agreement that “the rest of the agreement to stay the same.” The prior contract between the Union and Froedtert contained a provision that was very similar to Article XIV in the current agreement. A close review of the provisions of the prior agreement, Joint Exhibit 4, reveals that the provisions are virtually identical in every material way. The name of the Union apparently changed and of course there is a reference to Froedtert Malt Corporation as opposed to Northern Management Corporation, but the conditions of entitlement to severance are the same. The language of the second paragraph, relied upon by the Company, are also the same. The only material difference is the addition of the clause “INCLUDING THE PRIOR EMPLOYER FROEDTERT MALT.” (Caps in original).

It is this language that controls the result here. Mr. Petersen testified that he would never have agreed to this language if he had thought it would cost him so much money in the event the elevator closed. There was apparently no firm knowledge that the elevator would close. It was also clear that Northern Management did not make the actual decision to close the facility as it is the manager not the owner. That decision was apparently made by the owner who is in Milwaukee.

Elkouri notes that “there is no need for interpretation unless the agreement is ambiguous. If the words are plain and clear, conveying a distinct idea, there is no occasion to resort to technical rules of interpretation and the clear meaning will ordinarily be applied by arbitrators. Elkouri and Elkouri, *How Arbitration Works*, 5th Ed. P. 470. Frankly, the plain meaning of this language could hardly be clearer – it clearly states that an employee is eligible for severance provided the employee completes 5 or more years of service with “the Company.” If that were all it said the Company’s argument would have at least some cogency but it does not. The parties added the clause the specifically including the prior employer Froedtert. It would be hard to imagine how the parties could have crafted language any clearer than this to include that time.

Moreover, even if a resort to interpretive tools were necessary, these rules still mitigate in favor of the Union in this case. The Company argued that the language cited in the second paragraph references only the Company and asserted that the definition of the term, “Company” must revert to the definition found in the preamble of the agreement. Several interpretive rules come into play here.

First, the language including the prior employer Froedtert was added later. While it is true that this was a “new” contract, it was equally apparent that the parties used the prior contract as the basis for their own and in fact with only a few changes, essentially left it as it was. Clauses added later tend to take precedence over clauses that were existing in prior agreements.

Second, the evidence showed clearly that this language was added for the specific purpose to protect the employees in the event the facility did close. It is axiomatic that contract language, especially contract added under these circumstances and for this purpose, must be given some meaning. To read the language as the Company suggests would be to completely ignore the cited clause and essentially read it out of the contract entirely. See Elkouri 5th Ed. at 493.

Third, the language in Article XIV (1) cited above is certainly specific language and would again take precedence over more general language found in the preamble or even in the second paragraph of Article XIV. The general definition of the Company is indeed found in the preamble but the more specific addendum to that definition for the limited purpose of defining who is eligible for severance pay is found in the additional language to Article XIV. Here it is clear that the intent as expressed by the language of the contract is to include the time spent working for Froedtert in the definition for this limited purpose, as “the Company.” See Elkouri 5th Ed. At 498. Moreover, the language of the second paragraph does nothing to diminish or detract from this clear language.

The Company raises the argument that if the new owner of Northern had any idea what he was really agreeing to or if he had known that the facility would close causing him to incur such a large liability for severance he would not have done it. The arbitrator’s jurisdiction is limited to the question of interpreting the language as it is written and cannot and should not be to pass on the wisdom of agreeing to certain language. Contracts are like that; sometimes they work to the detriment of one side or the other as circumstances, market conditions or other economic factors come into play. It is the role of the arbitrator to enforce the contract as written and as the parties intended based on the language they themselves placed into that contract. It is that language that controls the result.

It was clear that neither side was represented by counsel in the negotiations. It was also clear that Mr. Petersen relied to some degree on the representations made to him by Mr. Kaja who was apparently advising him to some extent during the transition of management and in the labor negotiations. No one from Froedtert testified at the hearing and no specific findings can be made as to whether any misrepresentations were made during those discussions. What was also clear was that the parties knew what they were doing and knew what the language said and what it meant when it was placed in the contract.

The contract language thus could not be clearer in its requirement that the time worked for Froedtert as well as Northern Management Corp. must be counted toward severance pay. For the two grievants who testified in this matter that requires payment of 25 weeks of severance pursuant to the language of Article XIV. If there are other employees similarly situated they must also be credited for the time spent working for Froedtert as well and be paid severance pursuant to the language of Article XIV as well, assuming they would otherwise qualify for such pay under the other terms of that language.

AWARD

The Grievance is SUSTAINED as set forth above. The Company is ordered to credit the grievants for the time they worked for Froedtert Malt as well as Northern Management Corp. and pay severance pay based on that figure pursuant to the provisions of Article XIV of the collective bargaining agreement.

Dated: July 2, 2008

Jeffrey W. Jacobs, arbitrator

BCTGM and Northern Mgt. Corp.doc