

IN THE MATTER OF THE ARBITRATION BETWEEN:

International Brotherhood of)	
Teamsters, Local 120 and)	
Theodore Litzner,)	ARBITRATION OPINION
)	AND AWARD
Grievant,)	
)	
And)	
)	
University of St. Thomas,)	FMCS CASE NO.
)	090519-56841-3
Employer.)	

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Arbitrator

Richard A. Beens
FMCS Arbitrator #3937

Appearances

Mr. Martin J. Costello, Esq., Hughes and Costello, 1230 Landmark Tower, 345 St. Peter Street, St. Paul, MN 551-2-1216 for Local 120 and Litzner

Ms Phyllis Karasov, Esq., Moore, Costello & Hart, P.L.L.P., 55 East Fifth Street, #1400, Saint Paul, MN 55101-1792 for the University of St. Thomas.

JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement (“CBA”) between International Brotherhood of Teamsters Local 120 (“Union”) and the University of St. Thomas (“Employer”). Theodore Litzner (“Grievant”) is a member of the Union and employed by the Employer.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and to render a binding arbitration award. The hearing was held on December 16, 2009 in St. Paul Minnesota. The parties stipulated that the matter was properly before the Arbitrator. Each party was afforded the opportunity for examination and cross-examination of witnesses and for the introduction of exhibits. Written closing arguments were submitted on February 5, 2010. The record was then closed and the dispute deemed submitted.

ISSUE

The parties deferred formulation of the Issue to the Arbitrator. I conclude it can be stated as follows:

Does the collective bargaining agreement compel Employer to hold Grievant's job open and continue recognition of his seniority when he has been on disability leave for more than six months?

FACTUAL BACKGROUND

Grievant was employed for 24 years as a Building Service worker at the University of St. Thomas and a member of Local 120. He was, by all accounts, an excellent employee with no disciplinary history. As a result of several adverse health conditions, Grievant was placed on Short Term Disability (“STD”) on October 20, 2008. Six months later, on April 11, 2009, Grievant was still unable to return to work. The Employer had advised that it would no longer hold his current position open, and that it would be posted and filled as soon as a qualified candidate is hired.¹ After six months on STD, Grievant was transferred to Long Term Disability (“LTD”), removed from the Employer’s seniority list and, in effect, terminated.

Article Two of the CBA governs the acquisition and exercise of seniority rights by bargaining unit members.² A sentence within Section 7 of Article Two states, *“Inability to work because of proven illness or injury shall not result in loss of seniority rights.”* The CBA also provides that full-

¹ Employer Exhibit 12

² Employer Exhibit 4 and Union Exhibit1, Article Two.

time Union members will be covered, at Employer's expense, by both the Employer's STD and LTD Programs.³ The STD plan is funded and administered by the Employer. It provides 100% of pre-disability salary during the 1st to 60th day of disability, 80% during the 61st to 120th day and 60% during the 121st to 180th day.⁴ The LTD plan was purchased by Employer from Unum Life Insurance Company.⁵ Assuming continued disability, it provides for payment of 60% of the employee's pre-disability salary from the 181st day through the recipient's Social Security Retirement age.⁶

As of March, 2009, Grievant was 15th on an 85 employee seniority list.⁷ The Employer removed Grievant from the next Building Service Worker seniority list it published in October, 2009.⁸ In reposting Grievant's job and removing him from their seniority list, St. Thomas was relying on a provision contained in their Short-Term Disability Plan⁹ and its reiteration in their Employee Handbook which provides,¹⁰

“Positions for employees on an approved short-term disability leave will be

³ CBA, Article Ten, Sections 3 and 4.

⁴ Employer Exhibit 1.

⁵ Employer Exhibit 2.

⁶ The LTD plan provides for certain coverage limitations and benefit payment set-offs that are not relevant to the issues in this arbitration. Employers Exhibit 2.

⁷ Union Exhibit 3.

⁸ Union Exhibit 3.

⁹ Employer Exhibit 1, Section 1.11.

¹⁰ Union Exhibit 4, Benefits, p.9.

held for at least 12 weeks but not longer than 6 months. If an employee not released to work before the end of the period, their position will be posted and filled...”

The Union grieved the Employer’s action, arguing that the University had violated a seniority provision in the CBA.

At this point, Grievant remains disabled. Whether or not he can ever again physically perform his prior job is unknown. However, Grievant has neither resigned nor been formally terminated from employment at the University.

UNION POSITION

It is the Union’s position that the employer is obligated under the terms Article Two, Section 7 of the CBA to continue recognition of Grievant’s seniority and hold his job open until such time as he is able to return to work or formally resigns his University employment. Second, the Union contends removal of Grievant’s name from the seniority list is a de facto termination in violation of the CBA provision relating to discipline and discharge.

EMPLOYER’S POSITION

The University contends it is simply following the provisions of a

Short Term Disability Plan which was specifically agreed to by the Union in Article Ten, Sections 3, 4, and 5 of the CBA. Under that plan, the employer is only obligated to hold open Grievant's job for the six months he is on STD. If not released for a return to work within the six month period, the plan provides the employee's job will be posted and filled. The Employer denies any termination of Grievant under the Discharge and Discipline sections of the CBA.

RELEVANT CONTRACT AND DISABILITY PLAN PROVISIONS

Collective bargaining agreement provisions:¹¹

ARTICLE TWO, Section 7:

An employee desiring a leave of absence from the job shall secure written permission for the leave from the Employer and shall register same with the Union.. Failure to comply with this provision shall result in a complete loss of seniority rights of the employee involved. The leave of absence shall not be in excess of ninety(90) days, but may be renewable by mutual written agreement between the Employer and Union up to a maximum of one (1) year. Inability to work because of proven illness or injury shall not result in loss of seniority rights. Employees on leave of absence shall accrue seniority rights during the absence. (Emphasis added)

ARTICLE THREE, Section 1:

The Employer shall have the ability to discharge an employee for legitimate business reasons and shall give at least on (1) warning notice in writing to

¹¹ Employer Exhibit 4 and Union Exhibit 1.

the employee affected and the Union....

ARTICLE TEN:

Section 3:

All full-time Bargaining Unit Employees shall be covered under the Employer's Short Term Disability Program, at the Employer's expense. (For qualifications, refer to Article Thirteen, Section 4.)¹²

Section 4:

All full-time Bargaining Unit Employees shall be covered under the Employer's Long Term Disability Program, at the Employer's expense. Eligibility begins on the first of the month following six (6) months of full time employment.

Section 5:

All welfare benefits will be administered in accordance with official plan documents.

ARTICLE FOURTEEN: Management Rights

It is recognized that, except as expressly stated herein, the Employer shall retain whatever rights and authority are necessary for it to operate and direct the affairs of the University in all of its various aspects, including, but not limited to, the right to direct the working forces: to plan, direct and control all the operations and service of the University; to determine the methods, means, organization and number of personnel by which such operations and services are to be conducted; and to make and enforce reasonable rules and regulations.

Short Term Disability Plan provision:¹³

Positions for employees on an approved STD leave will be held for at least

¹² Testimony at the hearing indicated the portion of Article 10, Section 3 in parenthesis should have been deleted. It refers to a provision formerly in the CBA that was dropped from the current contract by mutual agreement.

¹³ Employer Exhibit 1, p. 6 Sec. 1.11. The University's Employee Handbook contains an almost identical provision. It only has minor wording differences which are irrelevant to the issues in this case. See Union Exhibit 1, Employee Handbook, Benefits, p.9.

12 weeks but no longer than 6 months. If an employee is not released to work before the end of this period, their position will be posted and filled. If an employee receives a medical release after this 6 month period, the employee is eligible to apply for any open position at the University for which they are qualified. The University cannot guarantee re-employment.

DISCUSSION

Resolution of this grievance entails the single most important function of a labor arbitrator, interpreting the parties' collective bargaining agreement. Undoubtedly the parties to the current CBA negotiated and entered into their contract willingly and in good faith. However, no negotiator, whether labor or management, is prescient enough to envision every situation or context to which contract language might be considered applicable. In this case the arbitrator is asked to determine the meaning of some portions of the collective bargaining agreement. While he may refer to sources other than the collective bargaining agreement for enlightenment as to the meaning of various provisions of the contract, the arbitrator's essential role is to interpret the language of the collective bargaining agreement with a view to determining what the parties intended when they bargained for the disputed provisions of the agreement. When reviewing

the contract, it must be read as a whole.¹⁴ Interpretation that tends to nullify or render part of the contract meaningless is to be avoided.¹⁵ Indeed, the validity of the award is dependent upon the arbitrator drawing its essence from the language of the agreement. It is not for the arbitrator to fashion his or her own brand of workplace justice nor to add to or delete language from the agreement.

The sentence principally at issue in this grievance is contained in the Seniority section of the CBA: *“Inability to work because of proven illness or injury shall not result in loss of seniority rights.”*¹⁶ The Grievant contends this provision is in conflict with and superior to Article Ten, Sections 3, 4, and 5. They, in essence, allow the employer to repost the job of an employee who has been on Short Term Disability for six months or more.¹⁷ The net effect of this action is to terminate the employee and strip his seniority. The Union contends the Employer actions violate the most basic protections of the CBA’s seniority clause. For a variety of reasons discussed below, I disagree.

Seniority is a negotiated right appropriately treasured by bargaining

¹⁴ Elkouri & Elkouri, *Supra.*, p.462

¹⁵ Elkouri & Elkouri, *Supra.*, p.464

¹⁶ Union Exhibit 1 and Employer Exhibit 4: Article Two, Section 7.

¹⁷ Union Exhibit 4 and Employer Exhibit 9.

unit members. It provides tenured workers job security and protection from preferential treatment of favored employees by the employer. It adds predictability to employee job assignments, promotions and layoffs. These factors result in a more stable workplace. All seniority systems are, to one degree or another, limits on managerial discretion. Work assignments which are normally management prerogatives can become problematic.

Administration of seniority rights can be a time consuming, complex process for the employer. These competing union-management interests are usually balanced at the bargaining table. Pure seniority clauses, where longevity is the sole determinant, are extremely rare. Most collective bargaining agreements contain modified seniority provisions which attempt to meet the needs of both union and employer. When each party makes some concessions, a reasonable balance of employee job security and management operational efficiency can result.

In this instance, the Union relies on the premise that specific provisions in a contract prevail over general provisions. Consequently, they argue, Grievant's job must be held open and his seniority retained so long as he is out with "proven illness or injury."¹⁸ They contend the specific

¹⁸ Workplace injuries covered by Workers' Compensation laws are not at issue here. They are covered by state statutes, not the CBA, and involve different considerations. This grievance deals only with situations

language of Article Two, Section 7 overrides the general inclusion of a contrary provision only alluded to in Article Ten, Sections 3, 4, and 5. The latter incorporate the Employer's disability plans into the CBA by reference. The actual plan provisions are not spelled out within the contract. However, incorporation by reference is a common contract drafting device. It promotes efficiency by avoiding repetition of massive amounts of information already available to the parties in other documents. There is no evidence the parties did not understand his concept when agreeing to Article Ten.

The chief fallacy in the Union's argument lies in taking the Section 7 phrase completely out of context. An arbitrator cannot ignore clear contract language or legislate new contract interpretations.¹⁹ When an arbitrator can ascertain the principal purpose of a contract provision, that purpose must be given greater weight in interpreting the words of the provision.²⁰ The language upon which they rely, "*Inability to work because of proven illness or injury shall not result in loss of seniority rights,*" is contained in Article Two, Section 7 of the CBA. Article Two outlines seniority rights. Section 7

where the employee is out due to non-work related illness or injury.

¹⁹ Elkouri & Elkouri, *Supra.*, Chapter 9.2.A.

²⁰ Elkouri & Elkouri, *Supra.*, Ch. 9.3.A.vii.

deals specifically with seniority rights where an employee has requested and received a leave of absence. Section 7 leaves of absence and STD leaves entail two different procedures in this CBA. The former can be granted for any numbers of reasons, including “proven illness or injury,” while the latter results solely from physical disability. The former is customarily unpaid, while the latter is specifically design to provide employee income. Read in that context, the plain meaning of the phrase is that an employee doesn’t lose seniority while on an approved Section 7 leave of absence due “to proven illness or injury” -- no more, no less. Section 7 does not limit leaves of absence to reasons of disability. Leaves could be granted for reasons unrelated to physical disabilities such as education, travel, or family care. In fact, there are no CBA limitations on reasons for leaves of absence so long as the employee complies with the provision of Section 7. Adoption of the Union’s view of Section 7 would render Article Ten, Section 5 meaningless. In order to give effect to both provisions, the Section 7 language must be limited to leaves of absence due to “proven illness or injury” specifically granted under that section.

The Union disregard for context is demonstrated by the lack of compliance with other provisions in Section 7. There is no evidence Grievant even attempted to comply with requirements contained in Section

7. There is no evidence he secured written permission for a leave of absence from the Employer or registered the same with the Union. He neither requested a simple 90 day leave nor sought a written agreement between Employer and Union to extend a leave to one year. In fact, Section 7 specifically provides that, *“Failure to comply with this provision shall result in a complete loss of seniority rights of the employee involved.”*

On the other hand, both the Short and Long Term Disability plans are purposely designed to financially aid employees who cannot physically perform their jobs. The Employer has applied the provisions of Article Ten to physically disabled workers on several prior occasions. Physical problems qualified Grievant for both short and then long term disability, an entirely separate process from leaves of absence. Grievant has willingly received the benefits of both plans. Based on the evidence, it appears he automatically received the plan benefits upon proof of his ongoing disability. No Union registration or agreement was required.

Applying the sentence in Section 7 to the Short Term Disability Plan would create ambiguity and conflict where none need exist. While the operable language at issue makes perfect sense in the leave of absence context, it stretches credulity to also hold it applicable to the STD provision with an entirely different process that appears eight articles later in the

contract. More importantly, the Article Ten contains no exceptions to the Union's full acceptance of the plan. Adoption of the Union position would materially alter a significant managerial right, the right to terminate an employee who is physically unable to perform his job for six months or more. If that was the intent of the parties, it should have been spelled out in the appropriate contract section, Article Ten, Section 3. The Union has not presented any evidence that the parties intended, or even contemplated, this interpretation. The Union presented no evidence indicating they intended this interpretation whenever Article Two, Section 7 was negotiated. A party cannot use arbitration to obtain a benefit that could not be won at the bargaining table.

Article Ten (Welfare Benefits), Section 3 of the CBA is also an integral part of the parties' contract.

All full-time Bargaining Unit Employees shall be covered under the Employer's Short Term Disability program, at the Employer's expense.

As is Article 10, Section 5:

All welfare benefits will be administered in accordance with the official plan documents.

As previously indicated, the Employer's STD plan gives them the right to repost and fill a worker's job if he is still disabled after six months.

Although the Employer testified they had not formally terminated Grievant, he has, in fact, lost his job and his seniority. His only remaining right is to reapply for work at the University if he is medically released to do so. Even then reinstatement is not guaranteed. This provision appears unchanged in CBA's dating back to at least 2002.²¹ It contains no language which in any way limits the STD plan's application to bargaining unit employees. There is no evidence that the Union has ever proposed a different plan. Neither side presented any evidence of bargaining discussions relating to the provision. On the face of the contract, the Union has agreed to adopt the Employer's STD plan in its entirety. Article Ten, Section 5 makes the disability plans integral parts of the CBA, just as though they were spelled out in the contract.

In summary, when the contract is read as a whole, Article Two sets out and preserves seniority rights in great detail. However, it is irrational to believe the parties agreed that an employee retains seniority forever, irrespective of his long term ability to do his job. Management's right to terminate a worker who cannot perform his job for an extended period is preserved in Article Ten. They have an equally compelling interest in

²¹ Employer Exhibit 5.

maintaining a modicum of efficiency and continuity in their operations. In my view, Articles Two and Ten, as they are written, strike a reasonable balance between competing union-management interests.

The Union also contends the Employer has terminated Grievant in violation of the CBA's Article Three, Discipline and Discharge. For reasons set out below, I disagree. First, grievant was never disciplined. His de facto termination resulted from application of an entirely different section of the CBA. Article Ten, Sections 3, 4, and 5 are also part of the CBA agreed to by both parties. They are no less important than Article Three, Discipline and Discharge. In short, this CBA provides for more than one path to employee termination. The worker may be dismissed for conduct covered by Article Three or as a result of being on Short Term Disability for more than six months as provided in Article Ten. While Grievant has certainly been terminated, the Employer never stigmatize his separation as resulting from disciplinary action.

Second, even if the Discipline and Discharge section applied to this Grievant, the Employer would still have the right to terminate him. In most CBA's the Employer may only discharge for "just cause." Uniquely, this CBA states, "The Employer shall have the ability to discharge an employee for "legitimate business reasons." (Emphasis added.) While no authority

can be found distinguishing between “just cause” and “legitimate business reasons,” experience informs us that the former is almost always applied in the context of some employee misconduct such as dishonesty, fighting, drunkenness on the job, excessive absences, etc. However, “legitimate business reasons” appears to be a far broader standard, not necessarily involving employee culpability. “Legitimate business reasons” could include terminations related to declining finances, efficiency, or necessary program changes. Absent a contract provision to the contrary, I find it to be a legitimate business reason for the Employer to terminate an employee who is unable to work for over 6 months. The right to terminate a worker who is physically unfit to perform his job has repeatedly been affirmed.²²

AWARD

The grievance is DENIED.

Dated: 2/9/10

/s/ Richard A. Beens
Richard A. Beens
FMCS Arbitrator #3937

²² See citations in How Arbitration Works, Elkouri & Elkouri, Sixth Edition, p. 814. It should also be noted that this is not a case coming within the purview of the Americans With Disabilities Act. Grievant never requested accommodation under the ACT. This grievant appears currently unable to perform the work under any circumstances.

