

IN THE MATTER OF THE ARBITRATION BETWEEN

UNITED AUTOMOBILE WORKERS	)	MINNESOTA BUREAU OF
OF AMERICA; LOCAL 867,	)	MEDIATION SERVICES
	)	CASE NO. 07-RA-0877
	)	
Union,	)	
	)	
and	)	
	)	
USEM, INC., DOING BUSINESS	)	
AS USEM CHEVROLET-OLDS-	)	
CADILLAC COMPANY,	)	DECISION AND AWARD
	)	OF
Employer.	)	ARBITRATOR

APPEARANCES

For the Union:

George Klingfus  
International Representative  
United Automobile Workers  
of America, Sub-Region 4  
3330 East Thirty-third Street  
Des Moines, IA 50317

For the Employer:

Thomas D. Sherman  
President  
Usem, Inc.  
703 Seventeenth Avenue N.W.  
Austin, MN 55912

On June 21, 2007, in Austin, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning two grievances brought by the Union against the Employer in behalf of the same grievant, Geoffrey A. Barth. One of the grievances, which is dated November 3, 2006, alleges that the Employer violated the labor agreement between the parties by failing to recall the grievant from layoff. The

other grievance, which is dated March 7, 2007, alleges that the Employer violated the labor agreement by discharging the grievant. The last of post-hearing briefs was received by the arbitrator on July 22, 2007.

#### FACTS

The Employer operates a retail automobile distributorship in Austin, Minnesota. The Union is the collective bargaining representative of the non-supervisory employees of the Employer who work in the Employer's Service Department, including those who hold such classifications as Mechanic, Machinist, Welder, Utility Man and Car Washer.

For many years, the Union and the Employer have been parties to a series of labor agreements, including the labor agreement in effect at the time of the initiation of the present grievances. That agreement is effective, by its terms, from July 25, 2006, through July 24, 2010 (the "current labor agreement").

The grievant was first hired by the Employer on January 12, 1985. For a short time, he worked as a Mechanic Second Class, but then moved to a lower paying classification, Utility Man, and continued in that classification for the rest of his employment by the Employer. The duties typically performed by a Utility Man include changing oil, greasing, undercoating, mounting tires, cleaning cars, checking cars in, running errands and similar unskilled tasks, as a supervisor may direct.

Though a Utility Man may be asked to wash cars, the Employer often employs others, who are designated as Car Washers,

to do that work. Car Washers receive a slightly lower pay rate than that of a Utility Man, but they may be asked to do some of the tasks of a Utility Man, and, when they do those tasks, they receive the pay rate of a Utility Man. Wayne F. Bonnes, President of the Union, testified that Car Washer is a bargaining unit classification, but that, typically, the Union does not sign Car Washers as Union members because they are usually short-term employees who "come and go."

The grievant was laid off in February of 2004, but he was recalled a short time later. He was laid off again in July of 2004, when, on July 21, 2004, Mark D. Olson, Service Manager, gave the grievant the following notice:

Due to lack of business conditions we are laying off Geoff Barth from his position as "Utility Man." The last day of work will be July 23, 2004.

The grievant has not worked for the Employer since July 23, 2004. Thomas D. Sherman, the Employer's President, testified that on July 18, 2005, he sent the grievant the following letter, addressed to the grievant's address as it appeared in the Employer's records:

Dear Geoff, This letter will serve as notification that Usem's will be releasing you from employment as of Monday the 18th of July.

The grievant testified that, before July 18, 2005, he had moved from the address to which this letter was addressed after he and his wife separated and divorced. He testified that he did not receive the letter and that his ex-wife told him she did not receive the letter in the mail. The grievant also testified

that he told the Employer's Office Manager that he had changed his address.

Bonnes testified that when he returned from vacation on the Monday after October 9, 2006, he saw Matthew Rice, who had been hired as a Car Washer on August 1, 2006, doing oil changes, which is work done by a Utility Man -- though it may also be done by a Car Washer -- but that Rice was still washing cars.

Sherman testified 1) that, on November 1, 2 or 3, 2006, he had a conversation with Bonnes in which 1) he informed Bonnes that he would be filling the Utility position with Rice, 2) that he asked if that "would be an issue," and 3) that Bonnes said it would not. Olson also testified that, in early November of 2006, 1) he informed Bonnes that Rice was being promoted to the Utility position, 2) he asked Bonnes if there would be "a problem with that," and 3) Bonnes answered that there would not. Sherman testified that, since the grievant's layoff in July of 2004, he had expressed no interest in being re-employed.

On November 3, 2006, the Union brought a grievance alleging that the Employer had violated Article IV of the labor agreement by failing to recall the grievant from layoff to the Utility Man's position. Hereafter, I may refer to the grievance of November 3, 2006, as the "Recall Grievance."

On November 17, 2006, Bonnes and George Klingfus, an International Representative for the Union, met with Sherman to discuss the Recall grievance. Bonnes gave the following testimony about that meeting. Sherman said that he was not required to recall the grievant because he had terminated his

employment. Bonnes asked when he had done so and said that "this is the first I've heard anything about discharge." Sherman said, "I believe it happened in 2005." Bonnes said, "I want a copy of the termination."

Bonnes testified that he did not receive a copy of a termination notice until February 23, 2007. On that date, he and Klingfus received a letter, dated the previous day, from Steven T. Rizzi, Jr., an attorney representing the Employer. Rizzi's letter enclosed a copy of the letter of July 18, 2005, from Sherman to the grievant "releasing [the grievant] from employment," which I have reproduced above. The February 22, 2007, letter from Rizzi to Bonnes and Klingfus is set out below;

— The undersigned represents [the Employer]. I have visited with Usem President Tom Sherman as to the employment status of former employee Geoff Barth. Mr. Sherman advises me that on or about November 17, 2006 the two of you talked to Mr. Sherman about Barth's employment status with Usem. Previously Barth had been laid off as the result of a lack of work. The most recent layoff of Barth took place on July 23, 2004. Ultimately by letter dated July 18, 2005 Sherman advised Barth that he was no longer an employee of Usem. A copy of this letter is enclosed for your reference.

I understand that the two of you approached Mr. Sherman about Barth's rights to recall to a position of "utility man" which Barth held with Usem prior to July 23, 2004. It was at this time in November of 2006 that you were advised that Barth was not entitled to any position and that Barth was no longer an employee of Usem.

The purpose of this letter is to confirm that in fact these conversations took place and that pursuant to Article III of the 2006-2010 Agreement, the time has lapsed for the filing of a grievance of this matter.

On March 7, 2007, the Union brought a second grievance against the Employer in behalf of the grievant. This grievance, which hereafter I may refer to as the "Discharge Grievance,"

alleges that the Employer violated Article VI of the parties' labor agreement by discharging the grievant, and it states the following "reasons for the grievance":

The Union received written notice of discharge on Feb. 23, 2007. Geoff Barth was on layoff with recall rights. This is an unjust discharge.

The following provisions of the parties' labor agreement

~~are relevant to a resolution of the grievances:~~

#### Article IV - Seniority

Section 1. The Employer agrees to recognize the principle of seniority, giving preference of employment, jobs and advancement to employees on the basis of length of service. In the case of a layoff for lack of work, the youngest in point of service shall be the first laid off. When the force is increased, those formerly laid off shall be rehired before others are employed. They shall be rehired in the order of their seniority -- the oldest first, etc. (As vacancies occur, notice of the same shall be posted, giving employees the opportunity on the basis of seniority to fill the vacant job.) An employee shall have the right to waive his or her seniority claim to any job. (This article shall not be construed in such a way as to give anyone a claim to a job -- the duties of which he or she is clearly unable to perform.)

Section 2. In laying off and in rehiring, proper consideration shall be given to the needs of the Employer; that is, he shall not be required to rehire workmen of different classifications [from] the work to be done, not to lay off a skilled workman who is necessary to his business. Employees laid off shall be notified by the Employer when jobs are open; they shall be allowed five (5) days to report for work. The exceptions to seniority as provided in this paragraph shall be when the employee possesses the skill and ability to perform the work. Any employee being laid off shall be given five (5) working days notice, if possible, however, not less than three (3) working days before layoff.

#### Article VI - Discipline and Discharge

An employee may be discharged immediately for the following reasons:

1. Voluntary quitting.
2. Dishonesty.

3. Gross insubordination.
4. Use of illegal, mind-altering drugs while on duty.
5. Drinking of intoxicating liquors and/or drunkenness on the job.
6. Just cause.

Any other offense which will violate the Employer's established posted shop rules shall be grounds for discharge and/or suspension after at least one warning notice of such offense has been issued to the employee with a copy to the Union. Such warning notice shall remain in effect twelve (12) months from the date of the infraction. Discharge and/or suspension must be by proper written notice to the employee and Union affected. Any employee may request an investigation as to his warning notice, suspension and/or discharge. Appeal from the warning notice, suspension and/or discharge must be taken within ten (10) days of the date of such notice or incident by written notice and a decision reached within fifteen (15) days from the date of the warning notice, discharge or suspension. If no decision has been rendered within fifteen (15) days, the case then shall be taken up as provided for in the arbitration procedure of this Agreement.

### Article III

#### Representation and Grievance Procedure

Section 7. A grievance must be presented in writing to the Employer by the Union within thirty (30) days (excluding Saturdays, Sundays and holidays) after it arises in order to be considered; however, grievances submitted after such time shall be considered if circumstances beyond the control of the employee prevented the employee's knowledge of the act originating the grievance, and such grievance is presented within thirty (30) days after the employee gains knowledge of the act originating the grievance.

Section 9. An employee discharged or penalized for any reason where the aggrieved or the Union feels that the penalty is too severe or unjust, shall have recourse under the entire grievance procedure.

### DECISION

The Union makes the following arguments. The grievant, at the time of his layoff on July 23, 2004, had more than eighteen years of seniority and a corresponding amount of experience as a Utility Man. In October of 2006, when the Employer decided to fill the position of Utility Man, which had

been vacant since the grievant's layoff, the grievant had a seniority right to be recalled to the position in preference to Rice, who was first hired by the Employer on August 1, 2006, as a Car Washer and had no experience as a Utility Man. The grievant's right to be recalled is clearly established by Article IV, Sections 1 and 2, of the current labor agreement. The Union brought a timely grievance on November 3, 2006, challenging the failure of the Employer to recall the grievant.

The Union makes the following additional arguments relating to the Employer's response to the Recall Grievance -- that the Employer was not required to recall the grievant because his employment had been terminated on July 18, 2005. The Union argues 1) that the Employer did not give any notice to the grievant that it was terminating his employment (as required by Article VI), 2) that, until February 22, 2007, the Employer did not give written notice to the Union that it terminated the grievant's employment on July 18, 2005 (as required by Article VI), 3) that, when, on February 22, 2007, the Union did receive a copy of the old notice of termination, the Union brought a timely grievance on March 7, 2007, challenging the grievant's discharge, and 4) that the Employer had no valid basis to discharge the grievant -- neither just cause nor any of the other five grounds listed in Article VI. The grievant had only two minor reprimands during his eighteen years of employment, and there is no evidence that his job performance as the Utility Man was unsatisfactory.

The Employer makes the following arguments. Article IV of the labor agreement has no stated time limit on the right of

a laid-off employee to be recalled. For that reason, the Employer has adopted the practice of sending a letter to those who have been laid off, informing them that their employment has been terminated. Thus, the Employer sent the grievant such a letter on July 18, 2005, about a year after his layoff. The Employer presented a similar letter, dated May 29, 2006, addressed to Dave Frank, an employee on medical leave, in which Sherman notified Frank that the Employer "will be releasing you from employment on Monday, May 29, 2006."

In addition, the Employer argues as follows. It has no record of the grievant's having given notice that he had moved to a new address, as he testified. Therefore, he should be charged with receipt of the letter of July 18, 2005. The practice of terminating a laid off employee after a reasonable time on layoff is a reasonable one that is designed to prevent the possibility of unending potential liabilities. The grievant never expressed an interest in being re-employed until the Union brought the Recall Grievance on November 3, 2006. When Bonnes was asked in early November of 2006 if the Union "would have a problem" with Rice's promotion to the Utility Man's position, Bonnes said that the Union would not, thus confirming the grievant's apparent lack of interest in the job.

The Employer argues that, since his layoff on July 23, 2004, the grievant has not taken any training courses as required by a "Shop Policy" the Employer presented in evidence and by Article XI, Section 11, of the labor agreement, which provides:

Article XI, Section 11. It is understood that employees shall attend, on request of the Employer, not to exceed one service meeting per month for additional instruction conducted by the Employer or factory representative without pay or overtime for a period not to exceed three (3) hours. Such meetings shall be held at a time to no way interfere with the employee's regular paid shift.

It is understood and agreed that in the atmosphere of rapid technological change the occasion will arise when more than one service meeting per month will be necessary to properly equip the service department employees with training which will enable all personnel to service the product in a more competent manner. In that event, the involved employees, upon proper notification, agree to be cooperative in manner and to attend said training sessions in accordance with the provisions outlined herein.

Olson testified that during the time the grievant was employed by the Employer, he was given directives -- as are all employees -- to take training courses in accord with the Shop Policy. The grievant has not had such training since his layoff on July 23, 2004.

First, with respect to the Discharge Grievance, I make the following rulings. Article VI of the labor agreement sets forth six grounds for an involuntary termination of employment. Five of them are specific -- voluntary quitting, dishonesty, gross insubordination, use of illegal, mind-altering drugs while on duty, drinking intoxicating liquors or drunkenness on the job -- and one is general -- just cause. There is no evidence in the record that shows that the grievant voluntarily quit or engaged in any of the specific kinds of misconduct listed, nor is there evidence that the grievant's work performance was poor or that he had a disciplinary record that would support discharge for "just cause."

As I interpret the labor agreement, the Employer has agreed not to terminate the employment of a bargaining unit

employee unless it has one of the grounds for termination that are listed in Article VI. I rule, therefore, that, because the grievant had not acted to create any of the grounds for termination listed in Article VI, the letter of July 18, 2005, was ineffective as notice of termination of his employment.

In addition, because the Employer did not inform the Union of the letter of July 18, 2005, until February 22, 2007, that effort to terminate the grievant's employment was still subject to the grievance procedure, which, under Article III of the labor agreement permits a challenge by grievance within thirty days after the grievance arises. I rule that it was not until February 22, 2007, when the Union first had written notice of the alleged termination of July 18, 2005, that the grievance first arose. Accordingly, the Discharge Grievance, of March 7, 2007, was brought within the thirty-day time limit established by Article III.

Second. With respect to the Recall Grievance, I make the following rulings. As the Union argues and as the Employer acknowledges in its arguments, neither Article IV nor any other provision of the labor agreement expressly states a limit on the time during which a laid off employee retains the right to be recalled. Many of the Employer's arguments urge that, for practical considerations, an implied limit to recall rights should be recognized, notwithstanding the failure of the labor agreement to state one expressly. Thus, the Employer argues that the grievant never expressed an interest in returning to work, that he did not continue with the training specified in

the labor agreement and in the Shop Rules and that the letter of July 18, 2005, should be interpreted as an effective termination of his recall rights, made valid by practice.

I rule that none of these arguments is sufficient to establish an implied time limit to the right of the grievant to be recalled, as that right is fixed by the express provisions of Article IV. Though the Employer argues that the grievant's recall rights should be treated as limited in time because he did not inform the Employer that he had an interest in returning to work, the labor agreement does not make the right of recall dependent on notice from the laid off employee that he has such an interest. Indeed, the second sentence of Article IV, Section 2, expressly places the duty of notice on the Employer, thus:

Employees laid off shall be notified by the Employer when jobs are open; they shall be allowed five (5) days to report for work.

Further, I rule that the grievant was a third-party beneficiary of the labor agreement, whose right to be recalled under the provisions of Article IV could not be waived by Bonnes, as the Employer asserts he did in early November of 2006, without the grievant's consent.

The Employer argues that the grievant should not be considered eligible for recall because he did not continue with training during the time that he was on layoff. As I interpret the Shop Rules and Article XI, Section 11, of the labor agreement, the obligation to maintain training applies to active employees and not to those on layoff. There is no evidence that

laid off employees are notified of scheduled training classes or are expected to attend them while on layoff. Article IV of the labor agreement requires that employees seeking recall have the skills needed for the job to which they seek recall, but nothing in the evidence indicates that the grievant could not perform the tasks of a Utility Man -- unskilled tasks that he performed without complaint for many years.

The Employer argues that, even if the letter of July 18, 2005, is determined not to have validly terminated the grievant's employment, it should, nevertheless, be interpreted as an effective termination of his recall rights, through a method made valid by practice. For several reasons, the evidence is not sufficient to establish such a binding practice, i.e., one that the Union has accepted, thus implying a de facto amendment of the labor agreement permitting the Employer to limit the duration of recall rights by notice. The evidence includes only one other notice similar to the notice addressed to the grievant on July 18, 2005, and, as the Union asserts, that notice, given to David Frank who was on medical leave, is not directly relevant in the present case, in which the Employer argues for a practice permitting it to give notice ending the right of recall from layoff.

In addition, there is no evidence that the Union has ever had knowledge that the Employer has previously used such a notice in an effort to limit the duration of recall rights -- knowledge that is clearly a prerequisite to the establishment of a bargain, implied in practice, to amend the labor agreement.

I conclude, therefore, that, when the Employer filled the Utility Man's position by assigning Rice to it in the fall of 2006, the grievant's seniority gave him a preferential right to be recalled to the position -- a right established by Article IV of the labor agreement -- and that the Employer violated the labor agreement by failing to recall him.

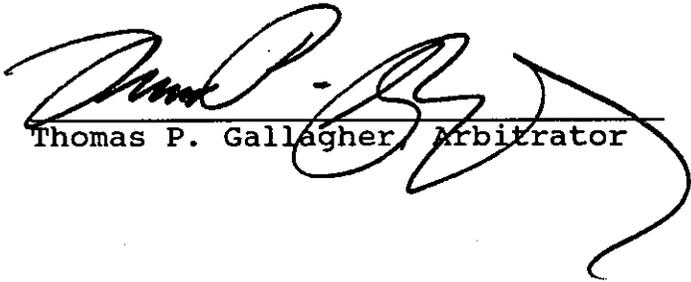
Third. The award directs the Employer to recall the grievant to the Utility Man's position, if the Employer still uses an employee junior to the grievant in that classification. This proviso is intended to make clear that I have no authority to require that the Employer continue to fill the Utility Man's position. The Employer retains its management right to decide what staffing it will use, but, if it decides to employ a Utility Man, the grievant retains the right to be recalled to the position, if, as it appears, he is the senior employee qualified to hold it.

The Union also asks for a monetary award of back pay to the grievant, and it presented some evidence relevant to such a remedy. Though I do award the grievant back pay, that part of the award must be indefinite as to amount, 1) because the record does not show whether the Utility Man's position remained filled after the time that Rice was assigned to it, and 2) because the record is incomplete with respect to the grievant's efforts to seek other employment in satisfaction of his duty to mitigate damages. I urge the parties to settle any dispute about back pay, but, against the possibility that they are unable to do so, I retain jurisdiction to decide the amount of back pay upon the presentation of additional relevant evidence.

AWARD

The grievances are sustained. The Employer shall recall the grievant to the position of Utility Man, if it is still being filled by an employee junior to the grievant. The Employer shall pay the grievant back pay in an amount to be determined, which accords with legal principles for the assessment of damages. I retain jurisdiction to decide the amount of back pay upon the presentation of additional relevant evidence -- in the event that the parties are unable to agree about the amount.

September 14, 2007



Thomas P. Gallagher, Arbitrator