

**FEDERAL MEDIATION AND CONCILIATION SERVICE
UNITED STATES GOVERNMENT
UPPER MIDWESTERN REGION**

VIKING DRILL & TOOL, INC.,

EMPLOYER,

-and-

GRIEVANCE ARBITRATION
FMCS Case No. 050324-54491-7
ARBITRATOR'S AWARD

TEAMSTERS LOCAL 120,

UNION.

ARBITRATOR:	Rolland C. Toenges
GRIEVANT:	Kathy Brisco
DATE OF HEARING:	August 19, 2005
RECEIPT OF POST HEARING BRIEFS:	October 10, 2005
CLOSE OF HEARING RECORD:	December 10, 2005
DATE OF AWARD:	February 28, 2006

ADVOCATES

FOR THE EMPLOYER:

Frederick W. Vogt, Attorney
Mackall, Crouse & Moore, PLC

FOR THE UNION:

Martin J. Costello, Attorney
Hughes & Costello

Russell J. Platzek, Attorney
Hughes & Costello

WITNESSES

Douglas Rutford, Safety Manager
Paula Schnarr, Shipping Lead
Mary Peterson, Human Resources Manager

Kathy Sue Brisco, Grievant
Betty Sears, Shipping Clerk

ALSO PRESENT

Jerry Pitra, Business Agent,
Bryan Rademacher, Business Rep.
Rosemary Vaught, Shipping Clerk

ISSUE

Did the Employer violate the Collective Bargaining Agreement by not allowing the Grievant to return to work following her absence due to a work related injury?

JURISDICTION

The matter at issue, regarding interpretation of terms and conditions of the Collective Bargaining Agreement (CBA) between the Parties, came on for hearing pursuant to the Grievance Procedure (Article 13) and Arbitration provisions (Article 14) contained in said Agreement. Article 13, establishes the conditions under which a grievance is to be filed.¹ Article 14, establishes agreement of the Parties regarding arbitration of grievances unresolved by the Parties.²

¹ Article 13, GRIEVANCE PROCEDURE. Section 1. "In the event a difference arises as to the interpretation or application of any of the provisions of this Agreement, the people affected shall handle it in accordance with the following procedure. All employees have the right to have a Union steward or other bargaining unit employee present at any disciplinary procedure.

Step 2. In the event of discharge or other disciplinary action, the grievant shall meet with the union to prepare a written grievance, which must be submitted, to the Employer with five (5) working days of the occurrence. Failure to appeal within five (5) working days from the date of disciplinary action shall cause the grievance to be barred and permanently waived.

WRITTEN GRIEVANCES: All written grievances must contain the following information:

- The specific Articles and Sections of the Agreement, which have been violated.
- A statement describing the incident and in what ways our Agreement has been violated.
- Describe the relief sought.
- Signature of the Grievant.

² Article 14, ARBITRATION.

In the event the grievance is not resolved in Step 4, either the Union or the Company within ten (10) days after the issuance of the Step 4 decision, may request the Federal Mediation and Conciliation Service to submit a panel of seven (7) Arbitrators from which a single Arbitrator shall be selected to hear the grievance. The union and the Company shall make the selection after

The Parties selected Rolland C. Toenges as the Impartial Arbitrator, from a list provided by the Federal Mediation and Conciliation Service, to hear and render a decision in the interest of resolving the disputed matter.

The arbitration hearing was conducted as provided by the terms and conditions of the CBA, the Federal Mediation and Conciliation Service and other relevant rules and regulations. The Parties were afforded full opportunity to present evidence, testimony and argument bearing the matter in dispute.

There was no request for a stenographic record of the hearing. All witnesses were sworn under oath. The Parties stipulated to an extension of the time limits set forth in the CBA for resolving the instant matter.

The hearing record was held open for sixty-days (60) following receipt of post hearing briefs in the event either Party wished to file a reply brief. Being none the hearing record was closed December 10, 2005.

BACKGROUND

Viking Drill and Tool, Inc. (Employer) produces drill bits, with principal offices and manufacturing facilities located at 355 State Street, St. Paul, Minnesota.

receipt of the panel either by agreement or by striking names with the Union striking the first name.

The loser of an arbitration case shall pay the cost of the Impartial Arbitrator's services and expenses and all other direct expense of the arbitration proceedings, but each party will be responsible for their own expenses which include, but are not limited to, witness expenses and legal expense. If it is a split decision, the Impartial Arbitrator shall make as part of his or her decision a ruling on how these costs shall be prorated.

Any grievance not appealed to the succeeding step within the time limits specified in this Article shall be deemed abandoned and not entitled to consideration. The time limits of the grievance procedure can be mutually extended by the parties. Request for such extensions must be in writing and approved with signatures of both parties. Grievances must be resolved with a period of one (1) calendar year from the date of the initial submission of the grievance. Grievances not resolved will be considered denied.

The provisions of this Article apply when the Company and the Union are unable to satisfactorily adjust a dispute in accordance with the Grievance Procedure provided in this Agreement. In deciding a case, it shall be the function of the Impartial Arbitrator to interpret this Agreement and all Supplemental Agreements thereto and to decide whether or not there has been a violation thereof. The Impartial Arbitrator shall have no right to change, add to, subtract from, or modify any of the terms of this Agreement or any Supplemental Agreements thereto or to establish or change any wage rates except for newly created Job Classifications.

Teamsters, Local 120 (Union), a Labor Union is affiliated with the International Brotherhood of Teamsters. The Union has principal offices located at 1635 West University Avenue, suite 120, St. Paul, Minnesota.

The Employer and Union are Parties to a CBA, in effect from January 1, 2001 through June 5, 2005, which is at all times relevant to the instant dispute. The CBA sets forth the terms and conditions of employment for Unionized employees of Viking Drill & Tool, Inc.

The Grievant became an employee of the Viking Drill and Tool, Inc. on May 17, 1993. The Grievant's first job was as a Shipping Clerk. She later advanced to Machine Setup C and then to Machine Setup B (Pointing).

The Grievant has a history of injuries and lost work time in conjunction with her employment at Viking Drill and Tool, Inc.

- The Grievant reported a back injury in early 1995, but returned to work without restrictions in late February 1995.
- The Grievant again reported a back injury plus a wrist injury in August of 1995, but was approved to return to work with out restrictions in mid August 1995.
- In January 1998, the Grievant reported an injury to her left knee and back pain. She was assigned a Qualified Rehabilitation Consultant (QRC) who continued to assist the Grievant until she reached maximum medical improvement (MMI) on her back as of September 1999. In September 2000, the Grievant had an Industrial Medical Evaluation (IME) and was released back to work with no restrictions.
- During the period 1998 to September 1999, the Grievant was under various physical limitations and was assigned light duty functions, which included shortened hours, no lifting over 10 and 30 pounds and a push/pull maximum of 25 pounds.
- In November 2000, the Grievant reported back pain and was absent from work until January 2001. The Grievant returned to work with restrictions in January 2001.
- The Grievant both missed work and worked under restrictions from January 2001 to June 2001. On June 12, 2001, the Employer conducted a job site analysis for packaging work and the Grievant underwent a functional capacities evaluation. The result of the evaluation was that the Grievant was restricted to 27 pounds lifting, 20 pounds lifting overhead or on stairs, a 20-pound push/pull limit and was to rotate jobs every four (4) hours. On June 25, the Grievant was approved by her physician to increase work hours from four (4) per day to eight (8) per day over a four (4) week period.

Based on the above restrictions, the Grievant was unable to perform the essential functions of her "Pointing" position, either with or without accommodation. The Employer then created a new job assignment for the Grievant as Shipping Clerk. This position included rotations through the job duties of the areas "sets," "tubing," and "manual packaging."

- In September 2001, about three months after beginning her Shipping Clerk position, the Grievant reported re-aggravating her back injury and was placed on a 10-pound lifting restriction and no repetitive lifting. The Employer was unable to accommodate the Grievant's restrictions at that time and she was taken off work until February of 2002, when her lifting restriction was adjusted to 36 pounds.
- The Grievant continued to work with restrictions off and on in her Shipping Clerk position until August 2003. Her restrictions included 10-pound maximum lifting, sit/stand as needed, no overhead lifting, sitting jobs only, and no pushing. In August the Grievant's physician established permanent restrictions for her back at 10-pounds lifting, 25 pounds push/pull, no repetitive bending and frequent position changes.
- In September 2003, the Grievant reported suffering from Carpel Tunnel Syndrome (CTS) on her right arm. There was to be no repetitive use of the right hand and a five-pound maximum lifting.
- In December 2003 the Grievant received corrective surgery for the CTS and returned to work in April 2004 with restrictions. A QRC was assigned to her case on March 15, 2004. The Grievant was to work out four hours per day for one week and then add an hour each week until reaching a full eight hours per day for five weeks. However subsequently, the Grievant never worked more than six hours and was not able to perform the essential functions of the Shipping Clerk job, either with or without accommodation.
- Despite the Grievant's inability to perform the essential requirements of the Shipping Clerk job, the Employer continued to provide light duty tasks that were within her restrictions. This was done by having other employees perform those tasks that the Grievant was unable to perform. The essential functions the Grievant was unable to perform included lifting or moving up to 40 pounds, working a full time schedule on a consistent basis, setting up stocks of caps and tubes, making labels and operating a label machine, moving carts to inventory control clerks, setting up stocks of drills and indexes to build sets, packaging products, rotating through certain other shipping positions and operating a skin packaging machine.
- In May 2004, the Grievant's physician placed her on a 5-pound lift/carry restrictions with no more than 10 times per hour and limited grip/pinch motions.

Other employees continued to perform the tasks the Grievant was unable to perform in addition to the tasks required of their jobs.

- On August 19, 2004 and again on September 2, 2004, the Grievant's physician treating her back problems restricted her to 5 pounds lifting, 10 pounds push/pull and no repetitive bending or twisting.
- On August 2, 2004 and again on September 7, 2004, the Grievant's physicians treating her CPS restricted her to 6 hours per day, a 5-pound lifting limit and grip/pinch to 20 times per hour.
- The Grievant was placed into a Vocational Rehabilitation Program on October 20, 2004 and is currently receiving Workers Compensation Benefits and Vocational Rehabilitation services.

On October 20, 2004, the Employer informed the Grievant that she was being placed on Temporary Total Disability, while the Employer's Workers Compensation Insurer conducts a Job Search Program to find a suitable position for her. The Employer further informed the Grievant that a QRC will assist her in the Vocational Rehabilitation Process and that the Grievant may request the QRC who had formerly assisted her.

The Grievant filed a grievance, dated October 29, 2004, claiming all lost time and benefits starting on October 20, 2004 when the Employer would not allow her to continue to work under her existing limitations. The remedy requested was to be returned to the Shipping Clerk position that she held prior to October 20, 2004. CBA violations cited were Article 16 (Seniority), 19 (Posted Jobs), 27 (Injured Employees) and any/all other applicable articles and/or pertinent information.

The Employer denied the grievance, which brings the matter to the instant arbitration proceeding.

EXHIBITS

EMPLOYER EXHIBITS:

E-1. History of Grievant's reported injuries, injury status, absences and discipline (16 pages).

E-2. Photos depicting functions associated with Grievant's job – identifying those Grievant could perform and those Grievant could not perform (10 pages).

E-3. Workability Reports for Kathy Brisco (6 pages).

E-4. Job Site Analysis Report - "Tubing" dated 11/17/2003 (4 pages).

- E-5. Job Site Analysis Report – “Sets” dated 11/17/2003.
- E-6. Job Description, “Shipping-Tubing (Labor Grade “A-1”)
- E-7. Letter placing Grievant on “Temporary Total Disability,” dated 10/20/2004.
- E-8. Grievance #03 – 2357, dated 10/29/2004.
- E-9. Collective Bargaining Agreement – Viking Drill & Tool, Inc. and Teamsters Local 120, effective January 1, 2001 through June 5, 2005.
- E-10. Schematic of plant layout showing location of various workstations.
- E-11. Statement by Paula Schnarr, taken on 11/30/2004.
- E-12a. Letter offering Grievant “Shipping Clerk” position, dated 06/22/2001.
- E-12b. Letter to Grievant regarding “Shipping clerk” position, dated 05/11/2001.
- E-12c. Letter to Dr. Boxall, regarding assessment of Kathy Brisco’s ability to perform “Shipping Clerk” position, dated 05/11/2001.
- E-12d. Fax Transmission to Orthopedic Specialists, P.A., transmitting job descriptions for “Tubing,
- E-12e. Job Description, “Shipping Department – Tubing,” dated 03/02/1998.
- E-12f. Job Description, “Shipping Department – Packaging,” dated 03/02/1998.
- E-12g. Job Description, “Shipping Department – Sets,” dated 03/01/1998.
- E-13. Statement of Stephanie Meline, dated 11/23/2004 (accepted as argument only).
- E-14. Job Description, “Inventory Control Clerk.” Dated 07/01/2002.
- E-15. Statement of Diane Dornseif, dated 11/29/2004.
- E-16. Letter, dated 02/07/2002, to Kathy Brisco from Viking Drill and Tool, Inc., regarding authorization to return to work as “Shipping Clerk” effective 02/11/2002.

UNION EXHIBITS:

- U-1. Collective Bargaining Agreement between Viking Drill & Tool, Inc. and Teamsters Local 120, effective January 1, 2001 through June 5, 2005.

- U-2. Seniority List, dated 10/09/2004.
- U-3. Teammate Appraisal Form for Grievant, dated 04/05/2002.
- U-4. Shipping Department Daily Production Reports:
- A. Summary.
 - B. Reports for Grievant.
 - C. Reports for Tina Castellou.
 - D. Reports for Kim M. Con.
 - E. Reports for Betty Sears.
 - F. Reports for Jamie Yang.
- U-5. Job Site Analysis Report for “Sets” Department, dated 11/17/2003.
- U-6. Medical Documentation for Grievant:
- A. Progress Note, dated 08/02/2004.
 - B. Report of Workability, dated 07/31/2003.
 - C. Report of Workability, dated 08/19/2004.
 - D. Report of Workability, dated 09/02/2004.
 - E. Report of Workability, dated 09/07/2004.
 - F. Report of Workability, dated 09/24/2004.
 - G. Report of Workability, dated 10/12/2004.
 - H. Report of Workability, dated 10/12/2004.
 - I. Report of Workability, dated 11/12/2004.
 - J. Report of Workability, dated 11/16/2004.
 - K. Report of Workability, dated 12/16/2004.
 - L. Occupational Therapy Evaluation Summary, dated 01/26/2005.
- U-7. Letter, dated 10/20/2004 to Kathy Brisco from Viking Drill & Tool, Inc., informing her that she is being placed on “Temporary Total Disability,” effective 10/20/2004.
- U-8. Grievance, dated 10/19/2004, challenging Employer’s decision to not allow Grievant to return to work with her existing restrictions.
- U-9. Letter, dated 12/16/2004, to Viking Drill & Tool, Inc. from Teamsters Local 120, requesting a response to grievance dated 10/19/2004.
- U-10. Letter, dated 12/29/2004, from Viking Drill & Tool, Inc. to Teamsters Local 120 denying grievance with explanation.
- U-11. Letter, dated 01/19/2005, from Teamsters Local 120 to Viking Drill & Tool, Inc, regarding movement of grievances to the Joint Committee level.
- U-12. Letter, dated 3/24/2004, from Teamsters Local 120 to Viking Drill & Tool, Inc. regarding skipping the Joint Committee Hearing and movement of the grievance to the arbitration step.

U-13. Memorandum dated 04/28/2005, notification to Arbitrator Toenges of his selection as arbitrator and requesting dates for a hearing.

U-14. Teammate Appraisal Form for Kathy Brisco, dated 04/24/2001 (4 pages).

JOINT STIPULATIONS

The Parties jointly stipulated to the following exhibits: U-1, U-9, U-10, U-11, U-12, U-13

POSITION OF THE PARTIES

THE EMPLOYER SUPPORTS ITS POSITION WITH THE FOLLOWING:

1. The issue before the Arbitrator is whether placing the Grievant into Workers' Compensation Vocational Rehabilitation constitutes a violation of the CBA.
2. This is not a discipline or discharge case.
3. The Employer had legitimate, well-grounded and well-documented reasons for its actions, which were fully in compliance with the CBA.
4. The Union has failed to prove that the Employer violated any provision of the CBA, thus failing to establish any basis for an arbitral remedy.
5. The Union's shifting position, first claiming that the Employer's action is in effect discipline or discharge and then charging violation of Article 27, is apparently a tactic to impose a greater burden of proof on the Employer rather than meeting its true burden of proving a CBA violation.
6. Both sides have agreed that this is not a discipline or discharge case. The Employer need not prove that the Grievant did anything wrong. The Grievant was not disciplined in any way and is still employed. She is actively receiving Workers Compensation benefits and is in training to help rehabilitate her back into the workforce.
7. The Employer fully complied with and went beyond the relevant provision of the CBA that states, "if an injured employee is unable to perform her regular duties, the Company will attempt to provide an alternative Job Assignment that (1) is available; (2) the employee is able to perform; and (3) the employee has the necessary seniority to hold.
8. The CBA neither requires nor permits the remedy sought by the Union.

9. The Union's requested remedy violates the Employer's management rights, is contrary to the unambiguous language of the CBA, is not supported by the evidence, exceeds the authority of the Arbitrator and is inconsistent with both public policy and established law.
10. The instant case involves the legitimate exercise of the Employer's management right to direct its workforce in the context of whether the Grievant can perform the essential functions of her Job Assignment.
11. The Employer has made every effort to provide the Grievant with light duty work under various restrictions.
12. The Employer has worked closely with its Workers Compensation carriers and the Grievant's Qualified Rehabilitation Counselor (QRC) to provide duties within her restrictions, in an effort to rehabilitate and return her to work.
13. Due to greater restrictions and the disruption of other employees who had to leave their own duties to perform work the Grievant could not perform, it became increasingly difficult to find any work for the Grievant.
14. The Employer having determined that, based on business necessity, it could not continue to have several other employees performing essential job functions of the Grievant's position, that she was not able to perform, in September 2004 moved her to the production floor and provided a variety of light duty tasks consistent with her restrictions.
15. In October 2004, there was no improvement in the restrictions placed on the Grievant by her treating physicians and she was placed into Vocational Rehabilitation.
16. The Grievant was placed on Temporary Total Disability to train for a new job based on:
 - a. A determination that she would never be able to return to her previous position held in 1998 prior to her back injury,
 - b. A determination that she could not perform, with or without reasonable accommodation, the essential functions of any job at Viking matching her qualifications and experience, and
 - c. The increasing difficulty in finding any appropriate light duty work within the Grievant's restrictions, based on staffing needs, production levels, her functional capabilities and various job function analyses.
1. The Grievant's own doctor's certifications, the Employer and its Workers Compensation carrier together determined that the Grievant was not able to

perform her Job Assignment, nor would she be able to in the foreseeable future.

17. Although the Grievant alleged at the hearing that she believed she could perform the duties in the “Sets” area – only a portion of her job assignment – she failed to provide no evidence to support this.
18. The Grievant suggested at the hearing that she had recently received a report from medical authorities lifting or greatly reducing her back restrictions, but failed to produce any evidenced in support of this suggestion.
19. The most recent document the Union placed into evidence was an occupational therapy summary. This summary was offered without foundation and was not prepared by a medical doctor. It identified some improvement on her back, but not sufficient to meet essential functions of her job and did not address her hand restrictions.
20. The entire documentary evidenced in the record establishes that the Grievant’s physical restrictions continue to render her unable to perform the essential functions of her Shipping Clerk Job Assignment.
21. The “Daily Production Reports” placed in evidence by the Union are meaningless. They do not indicate whether the job duties are comparable; whether the reports were prepared in a consistent and accurate manner; whether the employees compared worked part time or full time and the fact that Grievant was only performing a portion of her duties.
22. Although the Union alleged three provisions of the CBA had been violated, it acknowledged at the hearing that it was claiming violation of only one provision, Article 27, Section 2.
23. The only witness testifying to the meaning and interpretation of CBA language was the Employer’s Human Resources Manager, Mary Peterson.
24. Ms. Peterson clarified that the Job Assignment held by the Grievant was that of Shipping Clerk and the duties include “Tubing,” Sets,” and “Manual Packaging.”
25. Ms. Peterson’s unchallenged testimony was that the interpretation and application of Article 27, Section 2, does not require the creation of a new Job Assignment to accommodate an injured employee, providing the injured employee with busy work or individual tasks that are only a portion of one or more Job Assignments.
26. Ms. Peterson’s unchallenged testimony was that the CBA merely requires that, where an injured employee cannot perform her own Job Assignment, the

Employer should (1) attempt to identify an existing job where the injured employee can perform the essential functions and, if so, (2) provide the injured employee this job, if the injured employee has sufficient seniority.

27. All the Employer's witnesses testified that the Grievant was unable to perform her duties as "Shipping Clerk" and that other employees were performing many of the Grievant's job duties and were experiencing personal difficulty in doing so.
28. The record shows that the Grievant was unable to work a full-time work schedule, put stock caps and tubes together, make labels and operate a label machine, move carts to the inventory control clerk, lift or move up to 40 pounds, verify correct drill bit sizes, put packaged products on carts, operate the skin packaging and labeling machines, sep up necessary drill bit stock and indexes, build sets and package products according to specifications.
29. The Grievant admitted that she could perform some of the duties in the "Sets" area, only if she has assistance from other employees.
30. The Employer and its Worker's Compensation carrier properly relied on the available medical evidence in determining that the Grievant could not perform the essential functions of her job – medical evidence supplied by her own doctors.
31. Employer witnesses, Mary Peterson and Doug Rutford, clearly testified that there is no existing Job Assignment – available or not – with work duties or functions that the Grievant is qualified to perform, based on her restrictions.
32. The reason the Employer accommodated the Grievant, by allowing her to perform only a portion of her Job Assignment, was to cooperate with her Worker's Compensation vocational hardening program.
33. Nothing in the CBA or law requires breaking up a standard Job Assignment or having other employees perform a substantial portion of the Grievant's work duties.
34. The Grievant's "Job Assignment," as used in Article 27 of the CBA refers to her position as a "Shipping Clerk." This position has three functions: "Sets," "Tubing" and "Hand Packaging."
35. The Union has offered no evidence whatsoever to suggest that the term "Job Assignment" means anything other than as defined and applied by the Employer.

36. The Employer has the absolute right to set parameters of a “Job Assignment” and establish legitimate job descriptions and requirements, unless specifically limited by the CBA. No such limitation exists.
37. The Arbitrator’s authority as set forth in Article 14, limits the Arbitrator to interpret the Agreement and to decide if there has been a violation. The Arbitrator is without authority to change, add to, subtract from, or modify any of the terms of the CBA or to establish any wage rates except for newly created Job Classifications.
38. All rights of the Employer, not specifically limited or abridged by the CBA, including the right to direct the working force; to hire; suspend; discharge and transfer; to lay off employees for lack of work or other legitimate reasons; . . are reserved to the Employer so long as exercise of these rights does not violate the terms of the CBA.
39. The Union’s requested remedy is inconsistent with established law. Under the “Americans with Disabilities Act (ADA), an employer has an obligation to provide reasonable accommodation to an employee with a known disability in order to assist that employee in performing the essential functions of his or her job.
40. In the instant case, no reasonable accommodation exists that would permit the Grievant to perform the essential functions of her previous Job Assignment.
41. It is well established that an employer is not obligated under the ADA to create a new position or reallocate essential functions in order to accommodate an employee’s physical impairments nor is it obligated to require other employees to perform essential functions of an injured employee’s job as an accommodation.
42. The Employer accommodated the Grievant beyond its legal or contractual obligations, as a voluntary work hardening effort to assist her in getting back to work.
43. Even though there is no ADA requirement to do so, the Employer did assist the Grievant in her rehabilitation by adding an additional Shipping Clerk position and offered her this permanent position in an attempt to facilitate her rehabilitation. The Employer then arranged for other employees to assist the Grievant in addition to performing the duties of their own jobs.
44. Legal precedent provides that an Employer who “bends over backwards to accommodate a disabled worker – goes further than the law requires . . . must not be punished for its generosity by being deemed to have conceded the reasonableness of so far reaching an accommodation.”

45. The only way the Grievant can possibly be returned to work would be if her Job Assignment – Shipping Clerk – is either altered to encompass different duties, a new Job Assignment is created, she is provided a mélange of busy work and discreet tasks are drawn from several different Job Assignments. Each of these steps would require the Arbitrator to modify the terms of the CBA, which is expressly beyond the Arbitrator's authority under the CBA.
46. The Union's requested remedy violates public policy. In addition to being inconsistent with the law, the Union's requested remedy leads to absurd results. Thus it is inconsistent with general contract interpretation principles.
47. The Union is essentially asking the Arbitrator to forcefully impose lifetime employment at an artificial wage rate not encompassed by the CBA, with no relation to the actual value or need of the Employer. Such violates every basic principle of the Employer's inherent managerial right to govern its workforce and run its business and is contrary to logic, public policy, and the law.
48. Based on the foregoing, the Employer respectfully requests that the Arbitrator render a decision in favor of the Employer and dismiss the instant grievance.

THE UNION SUPPORTS ITS POSITION WITH THE FOLLOWING:

1. No just cause existed for removal of the Grievant from her position.
2. The Employer elected the most extreme reaction to the Grievant's perceived physical limitation.
3. In doing so, the Employer has taken away the Grievant's hard-earned seniority rights under the CBA as a long-term employee.
4. The Grievant has been permanently removed from her employment, the functional equivalent of termination, even though the Employer claims she was not terminated and that she remains on the seniority list and receives disability benefits.
5. Having been permanently removed from employment, the Grievant cannot exercise her seniority or any other right attendant to her former employment.
6. The Employer's action must be judged against the standard of just cause, and so evaluated, the Employer's action cannot be upheld.
7. The Employer has failed to prove that the Grievant is unable to perform her work.
8. The evidence shows that the Grievant can, in fact, perform the work.

9. The Employer failed in its duty to thoroughly and fairly investigate this matter, leading to its incorrect conclusions about the Grievant, and the Grievant's ultimate removal from work.
10. The Employer is not entitled to terminate or remove an employee merely because a physical disability exists.
11. The Employer has attempted to avoid the provisions of Article 16, Section 2 of the CBA by keeping the Grievant on the Seniority list; however, the Grievant is unable to exercise any seniority right as a result of the Employer's action.
12. The Employer's decision must be justified by one of the criteria in Article 16, Section 2.³
13. The Employer can only rely on Article 16, Section (b), just cause for removal to justify its decision to terminate the Grievant. The other criteria of Article 16, Section 2, do not apply, as the Grievant was present at the workplace and performing her job up to the time of her removal.
14. Just as if the Employer had removed the Grievant for misconduct, the Employer bears the burden to prove just cause for termination.
15. Since enactment of the Americans with Disabilities Act (ADA), moreover, it has been recognized that compliance with the ADA can be deemed a component of the just cause determination.
16. Article 16, Section 2, of the CBA requires just cause to discharge an employee.

³ Article 16, Section 2. An employee's seniority and his or her employment relationship with the Company will be terminated when the employee:

- (1) Quits, retires or dies.
- (2) Is discharged for just cause.
- (3) Fails to reapply for an additional year's seniority protection, as outlined in Article 18, Section 2 (a).
- (4) Exceeds the additional years' seniority protection.
- (5) Is absent from work for three (3) consecutive workdays without notifying the Company, unless a reasonable excuse is rendered and proof, if requested by the Company, is given.
- (6) Fails to return to work at the expiration of an authorized leave of absence or vacation period, unless a reasonable excuse is rendered and proof, if requested by the Company, is given.
- (7) Exceeds medical leave of absence as outlined in Article 21, Section 4 (a).
- (8) Declines recall according to Article 18, Section 1(a)[3], 1(b)[3] or 2(c).

17. It is clear that, because this case involves the constructive discharge of the Grievant, the Employer must show just cause for its decision.
18. Irrespective of whether an employee's discharge is discipline or non-discipline related the results are the same, the employee has been discharged.
19. The Employer has not complied with the widely accepted standard for determining whether just cause exists for discharge; namely, sufficient proof, investigation and fair investigation; therefore, the Grievant must be returned to her former position.
20. The Employer has not provided sufficient proof of the Grievant's inability to perform her work.
21. The Employer's termination notice to the Grievant does not relate to the job the Grievant actually held on October 20, 2004, when the Employer issued it and cannot be considered when determining whether the Grievant can perform her proper job duties.⁴
22. The termination notice refers to the position the Grievant held in the pointing department, prior to her position in the shipping department, notwithstanding the requirement under the CBA that an injured or disabled employee be accommodated in his or her work assignment.⁵
23. An Employer, making an allegation of inability to perform work due to a disability as a reason for termination, bears a substantial duty to that employee before it can simply remove him or her from the position.
24. In the instant case, the Employer must show; (1) that the Grievant was unable to perform her duties, as she had done successfully in the past; (2) that the tasks alleged to be out of the Grievant's capabilities are essential functions of her position: and (3) no reasonable accommodation existed in her job duties that would allow the Employer to preserve the Grievant's position.

⁴ "We have come to the conclusion that you will not be able to return to the job position you held on January 13, 1998 (pointing department) . . . It is becoming more difficult to find suitable work for you within your restrictions due to your back injury."

⁵ Article 27, Section 2.

Para. 3. In the event the employee's disabilities, when he or she returns to work, prevent him or her from performing his or her regular duties, the Company will attempt to provide said employee with work that he or she is able to perform, provided that such work is available, and provided further that such disabled employee has the necessary seniority to hold the available Job Assignment. In the event the doctor schedules consecutive appointments, only one form will be required for this period.

25. When the Employer's rationale for terminating the Grievant is examined, in light of the Union's evidence, it is clear that removal of the Grievant from her position was without just cause.
26. The Employer failed to produce any reliable medical or rehabilitation evidence that the Grievant is disqualified.
27. The Employer failed to produce any expert medical opinion that the Grievant cannot perform the essential functions of her job.
28. The Employer also failed to present a QRC, that had examined the Grievant at her place of work and assessed her ability to perform the physical demands of her job, but instead simply relied on the hearsay complaints of other workers.
29. Some of the other workers, who testified that the Grievant could not perform all the requirements of her job, are junior to the Grievant and stand to gain in seniority from the Grievant's termination or are agents of management.
30. Of four individuals, whose supposed observations were relied on by the Employer, only co-employee Schnarr admitted under cross-examination that she did not supervise the Grievant and had limited knowledge of her performance. The other individuals, whose observations were relied on by the Employer, were not available at the hearing to stand examination and cross-examination.⁶
31. The Arbitrator should draw an adverse inference from the Employer's failure to produce these witnesses and subject their alleged statements to cross-examination. The Arbitrator should conclude that the opinions of these witnesses, as asserted by the Employer, would not have been supported by direct testimony and cross-examination.⁷
32. The Employer did not interview the Grievant about these allegations and did not interview similarly situated co-workers, such as Sears, to determine their

⁶ One of the four employees that provided information upon which the Employer relied had died prior to the hearing.

⁷ As summarized in a leading treatise:

The failure of a party to use a person as a witness who should be in a position to contribute informed testimony may create some sort of inference against the party or at least cause the arbitrator to wonder why the person was not called to testify.

Also, a party's failure to use witnesses who should be knowledgeable creates an inference against that party . . . Also, an arbitrator may note the 'well established' rule that the failure to call a witness who is available to a party gives rise to a presumption that the witness's testimony would be adverse to the position of the party having the ability to call the witness.

opinions and observations of the Grievant's work. Had the Employer done so, it would have learned of the modifications made by the Grievant to adapt her limitations to performance of the work, and cooperative efforts by similarly physically limited workers to assist one another in performance of their work.

33. The Employer should have initially interviewed the aforementioned employees and most importantly the Grievant herself.
34. The Employer should have investigated the Grievant's condition through the use of a qualified health specialist, who could have observed the Grievant at work and could have provided a professional analysis of the demands and possible accommodations of the Grievant's position.
35. Had the Employer even taken the basic essential steps identified above, it is inconceivable that the Grievant would have been terminated. The Employer would have recognized the adaptations made by the Grievant to perform her work and would have recognized the prospect of further improvement in the Grievant's condition.
36. The Employer's conclusions about the Grievant resulted from a lack of awareness of shipping area practice and were skewed and inappropriate.
37. The testimony from employees who actually work in the shipping area shows that the day-to-day practice departs from the Employer's written guidelines.
38. Employees in shipping do not always rotate between tubing, sets and packaging as the Employer asserted and often become "pigeon-holed" in one department. Similarly although it is not in Supervisor Moline's job description to set up stations, in practice she does it routinely.
39. When the matter was fully examined in the hearing, it became clear that the Grievant developed her own accommodations to enable her to continue to perform her work. Moreover, she has continued to improve over time.
40. The Employer's own chart⁸ notes that the Grievant had not achieved maximum medical improvement and chose to ignore this, or failed to discover it in the course of its investigation into the Grievant's condition.
41. Had the Employer properly investigated the Grievant's condition it would have easily discovered that its conclusion, that the Grievant was permanently unable to perform her duties, was simply incorrect. This puts lie to the Employer's assertion that the Grievant has not been terminated.

⁸ Employer Exhibit #1.

42. The Employer's failure to properly investigate resulted in an incorrect and faulty diagnosis and analysis. Had the Employer properly investigated, it would have learned that the Grievant has continued to improve physically and has adapted to her limitations to the point that removal from her position was not warranted.
43. Any investigation into allegations that may result in termination must be timely and thorough, giving the employee a fair chance to tell his or her side and producing relevant and sufficient evidence.
44. Failure to give the employee an opportunity to tell his or her side of the story is a procedural violation of the just cause standard and can be a basis, in and of itself, to invalidate termination.
45. Perhaps the most important purpose of this arbitration is to help the Employer, Union and Grievant to reach a harmonious accord as stated by Arbitrator Bowles.⁹
46. The Grievant should be returned to her former position under the circumstances implemented in 2001 and proven workable since.
47. Justice to the Grievant, the future relationship between the Union and the Employer, and the long-term welfare of everyone involved require that this Grievant be returned to work with full seniority, back pay, and all other contract rights.

DISCUSSION

The threshold issue in the instant matter is whether the Grievant continues to be an employee in Disability Rehabilitation status as the Employer asserts, or whether the Grievant has been constructively discharged¹⁰ as the Union asserts.

⁹ Arbitrator Bowles in General Telephone Company.

“The Arbitrator, therefore, is concerned not only with factors of individual justice which have a preeminent value both in our law and generally in labor relations jurisprudence, but also the effect of any Award or Awards on the future relationship between the parties and the long-term welfare of both the employees represented by the Union and the Company in pursuit of its important business enterprise.”

¹⁰ Black's Law Dictionary, Second Pocket Edition, Copyright 2001 by West Group defines “Constructive Discharge” as follows:

“A discharge that is made in retaliation for the employee's conduct (such as reporting unlawful activity by the employer to the government) and that clearly violates public policy.”

The record¹¹ shows that the Grievant was placed on what the Employer describes as “Temporary Total Disability” effective October 20, 2004. This action was based on the Employer’s conclusion that the Grievant would not be able to return to the position she held as of January 13, 1998¹².

The record (Exhibit #7) implies that, not only does the Employer believe that the Grievant will be unable to return to the position she held on January 13, 1998, but also no other position as it has become more difficult to find any suitable work for her.¹³

The Employer’s decision to place the Grievant on “Temporary Total Disability” for the purpose of conducting a “Vocational Rehabilitation” process, implies that the intent of so doing was to prepare the Grievant for a new occupation, different than any the Grievant had performed while employed by the Employer. The Arbitrator draws this conclusion from the previously referenced comment in page 6 of the Employer’s Post Hearing Brief and the following statement in Exhibit #7:

“Beginning today, October 20, 2004, you are being placed on Temporary Total Disability while CNA Insurance begins a Job Search program to find a suitable position for you. Lisa Falk will be your claims contact at CNA. Her phone is (952) 285-3354. Lisa will be coordinating with Lisa Albrecht at General Casualty in your Job Search. A QRC will be assigned to assist you in the Vocational

¹¹ Union Exhibit #7. Employer Exhibit #7.

¹² The position held by the Grievant on January 13, 1998 was “Pointing.” The Grievant was initially employed May 17, 1993 and was assigned to “Shipping” but later advanced to Machine setup “B” (“Pointing”). Due to work related injuries the Employer, in an effort to accommodate the Grievant’s injury related physical limitations, assigned her back to “Shipping” in 2001. Later, due to additional work related injuries the Employer, in an effort to find work compatible with the Grievant’s physical limitations, assigned the Grievant to operate a laser device, but this was only for a short time because the Grievant complained that this work exceeded her work restrictions.” The Grievant was returned to the “Shipping” department and was so assigned as of October 20, 2004.

¹³ Employer’s Post Hearing Brief at page at page 6:

“Ms. Brisco was placed on Temporary Total disability and was to train for a new job based on:

1. The determination that she would never be able to return to her previous position held in 1998 before her first back injury;
2. Ms. Brisco could not perform, with or without reasonable accommodation, the essential functions of any job at Viking Dri9ll matching her qualifications and experience; and
3. It was becoming increasingly difficult to find any appropriate light duty work within her restrictions, based on staffing needs, production levels, her functional capabilities, and various job function analyses.” [Emphasis Added]

Rehabilitation process. You may request Heather Steffen, who is working with you on your right wrist recovery if you would like. Any further questions should be addressed to Lisa Falk at CNA Insurance.”

If indeed the purpose of placing the Grievant on “Temporary Total Disability” was to provide Vocational Rehabilitation, the implication is that the intent was to prepare her for a new career that will be more compatible with her physical capability and limitations.¹⁴

This conclusion is bolstered by the Grievant’s work history with the Employer. It is clear from the record¹⁵ that the Grievant had a chronic disposition to incur work injuries. The record shows that she suffered multiple and recurring injuries in the various jobs she performed, and these injuries become more frequent the longer she performed them. A fair conclusion that can be drawn is that the Grievant’s physical capability is not compatible with the physical requirements of these jobs. Further, based on the record, it is reasonable to believe that the Grievant would continue to suffer physical injuries if she were to continue to perform the work at Viking, likely with increasing frequency.

Based on the foregoing the Arbitrator finds, in the instant case, that placing the Grievant on Total Temporary Disability, for the purpose of Vocational Rehabilitation, was in effect terminating her employment. From the record, and the Employer’s comments, there appears to be little, if any, chance that the Grievant will again be able to safely perform work for the Employer, even with reasonable accommodation.¹⁶

Having concluded that the Grievant was, in effect terminated, the inquiry then shifts to the issue of whether the termination met reasonable standards of due process. Further, is there either a CBA requirement or an implied requirement that the termination be based on a “just cause” standard?

The Union asserts that the termination was in effect a “Constructive Discharge.” Black’s Law Dictionary, Second Pocket Edition, defines “Constructive Discharge” as follows:

¹⁴ Webster’s Collegiate Dictionary, Tenth Edition, defines “rehabilitation,” b. to restore or bring to a condition of health or useful and constructive activity.

¹⁵ Employer Exhibit #1.

¹⁶ On cross-examination, Employer Witness, Douglas Rutford, testified that “the Grievant would be taken back, only if she could do the whole job – don’t want to have to keep creating positions for her.”

Employer Witness, Mary Peterson, Human Resources Manager, testified on both direct and cross-examination that she “knows of no job that Grievant can perform with her restrictions and there is no work at Viking that could be assembled to create a job Grievant can do.”

In its Post Hearing Brief, the Employer argues that “no reasonable accommodation exists that would permit the Grievant to perform the essential functions of her previous Job Assignments.”

“Constructive Discharge. A termination of employment brought about by making the employee’s working conditions so intolerable that the employee feels compelled to leave.”

The Arbitrator does not find sufficient evidence in the record to support the Union’s assertion. There is no evidence that the Employer created circumstances that had the effect of causing the Grievant to feel she could no longer tolerate them and would have to quit. In fact, the record shows the opposite – the Grievant wants to return to work for the Employer.

The only reference the Arbitrator finds in the CBA to a “just Cause” standard for discharge is in Article 16, Seniority. This provision reads as follows:

“Article 16, Section 2. An employee’s seniority and his or her employment relationship with the Company will be terminated when the employee:

(b) Is discharged for just cause.”

Although this provision appears in the Article titled “Seniority,” the language of Section 2, references to both “seniority” and the employees “employment relationship with the Company.” Based on this language, the Arbitrator finds that, under the terms and conditions of the CBA, termination of covered employees is subject to a “just cause” standard. [Emphasis Added]

The Union, in its post hearing brief, asserts what the elements of a “just cause” standard should be. The Union cites the “Seven Tests” first articulated by Arbitrator Carroll R. Daugherty in 1966:

1. Notice,
2. Reasonable rule or order,
3. Investigation,
4. Fair Investigation
5. Proof,
6. Equal treatment,
7. Penalty.

The Union asserts that if any of these tests are not satisfied, there is no just cause for discipline. More specifically, the Union asserts that the tests of (5) sufficient proof, (3) investigation, and (4) fair investigation, have not been satisfied in the instant case and; therefore, the Grievant must be returned to her former position.

The Arbitrator finds overwhelming proof in the record that the Grievant’s physical limitations prevented her from performing essential functions of her job assignments. Employer Exhibit #2, and the testimony of Employer Witness, Douglas Rutford, Safety Manager, Mary Peterson, Human Resources Manager and Paula Knarr, Shipping Lead, provided extensive evidence regarding the work functions of the Grievant’s job

assignment and those she could and could not perform. This is bolstered by the many medical documentation reports entered as exhibits that clearly set forth the Grievant's physical limitations.

The record shows that Witness, Rutford, has a very extensive knowledge of the Grievant's history, both in terms of her limitations and the requirements of her job assignments. The record shows that Rutford has closely monitored the Grievant for some five (5) years and has worked closely with her and her supervisors in attempting to find suitable work and make reasonable accommodations. Rutford compiled and introduced (Employer Exhibit #1) an extensive record of the Grievant's work record, including her history of injuries, limitations and the Workers Compensation (rehabilitation) record.

The record contains many documents (Workability Reports, Job Site Analysis Reports, Job Descriptions, Medical Evaluations, etc.) all addressing the Grievant's limitations and her ability to perform the essential requirements of her job assignments.

The Arbitrator finds ample proof in the record that the Grievant was not performing essential functions of her job assignment and the Employer made a reasonable effort to accommodate her limitations.

The Arbitrator finds that there was, in effect, an ongoing investigation of the Grievant's work performance and it was reasonably thorough. As previously mentioned, the record contains extensive documenting of the Grievant's employment history, and it is apparent that much of this information has been gathered over a considerable period of time and maintained on an ongoing basis.

The issue of "fairness" of the investigation brings into question the Employer's investigative technique and the veracity of witnesses. The Union challenges the "fairness" of the investigation based on its assertion that the Employer did not interview the Grievant and produce certain witnesses to stand cross-examination on their written statements.

The Employer introduced evidence and testimony to the effect that there were complaints and concerns from other employees who had to perform tasks for the Grievant that she could not perform. The employees who performed tasks for the Grievant, that she could not perform herself, did so in addition to performing the full requirements of their own job.

Employer Witness, Paula Schnarr, Shipping Lead, testified that she worked in Shipping with the Grievant for about four or five years. Schnarr testified that there was always some accommodation necessary when the Grievant worked with her and that her restrictions created scheduling, production and morale problems among other employees.

Schnarr described tasks the Grievant could perform and those she could not. Schnarr testified that she had to "find someone else to come in and finish the Grievant's jobs."

Schnarr testified that she generally wasn't able to help the Grievant, but found other employees to help her.

Schnarr testified that she did not give the Grievant work inconsistent with her restrictions and told the Grievant to let her know when she needed help. Schnarr testified that she gave the Grievant the lightest jobs available. Schnarr testified that at times she had to let work sit if she couldn't find another employee to do help Grievant. Schnarr testified that among the workers she observed doing the Grievant's work were Stephanie Meline, Diane Dornseif and Rob Jones.

Schnarr testified that she worked closely with Douglas Rutford, Safety Manager and Mary Peterson, Human Resources Manager, in an effort to accommodate the Grievant. Schnarr testified that [shortly before the Grievant was placed on Temporary Total Disability] she asked Rutford if there was anything else the Grievant could do, as there was nothing in shipping they could use her for. Schnarr testified that Rutford then took the Grievant out to the production floor in an effort to find something there that she could do.

Employer Witness, Mary Peterson, Human Resources Manager, testified that she has been with the Employer since mid 2001, maintains employee records and is familiar with the Grievant and her work history. Peterson testified that she is also familiar with administration of the CBA and provided her interpretation of its terms and conditions.

Peterson testified that she is familiar with the concerns of employees, including Stephanie Meline and Diane Dornseif, who were required to help the Grievant's perform her job duties. Peterson explained that Meline has supervisory responsibility over the "Sets" department, but would help the Grievant from time to time as necessary.

Peterson testified that she interprets the CBA to not require returning an employee to work if the employee cannot perform all of the essential functions of the job assignment. Peterson explained that "Shipping Clerk" was the Grievant's Job Assignment and it comes under the Job Classification of Machine Operator "C."

Peterson testified that there is no available Job Assignment at Viking today where the Grievant can perform the essential functions.

The Grievant testified concerning her history with the Employer and described work injuries she had experienced. The Grievant described how she performed work tasks to overcome her limitations and noted that she disagreed with the Employer's description of her performance. The Grievant testified that she is "first position" on the Shipping Clerk seniority list and referenced her "Teammate Appraisal Form from 2002"¹⁷ when she was rated as "exceeds expectations and was "above average."

The Grievant referenced work injuries she incurred at Viking, resulting physical limitations and her work assignments. The Grievant explained production reports (Union

¹⁷ Union Exhibit #3.

Exhibit #4) and how she was able to increase her production as she gained experience using one hand. The Grievant testified she was told that the packing boxes were to be supplied by Stephanie, unless you need more.

The Grievant testified that employees help each other out. If she couldn't lift something, she and Betty Sears would do it together or scoop drills out by hand so don't have to lift the whole bucket. The Grievant testified regarding her production record¹⁸ - that, due to her ability to use only one hand, her production was low earlier, but went up as she became more experienced using one hand.

The Grievant referenced the "Job Site Analysis Report"¹⁹ and noted her disagreement with the Employer's description of her performance.

The Grievant testified that she was referred for an Occupational Evaluation January 26, 2005 by Dr. Richner, but had to go through Blue Cross because the Workers Insurance Compensation carrier would not approve. The Grievant described her condition as having improved since her termination in October 2004.

The Grievant testified that when Schnarr wanted her out of "Sets," she was moved to the production floor where her job was to end drills (face them all one way), but she felt the pushing and pulling of pans drills, oversize drill blanks and repetitiveness exceeded her restrictions.

The Grievant testified she was called to a meeting with Mary Peterson and Douglas Rutherford, with her Union Steward present, on October 2004, where she was informed that she was being placed on Temporary Total Disability for the purpose of Vocational Rehabilitation.²⁰ The Grievant testified that her response was that she could do the work and that there had been no complaints.

The Grievant testified that thereafter, on October 29, 2004, she filed a grievance claiming all lost time and benefits and to be returned to her Shipping Clerk position.²¹ The Grievant also testified that she thinks she can go back work as a Machine Operator "B" (Pointing) or Machine Operator "C," (Shipping Clerk) with a refresher course.

On cross-examination, the Grievant acknowledged numerous limitations on her physical ability to perform her Job Assignments, both in terms of what she could do and how long she could do it.²²

¹⁸ Union Exhibits #4.

¹⁹ Union Exhibit #5

²⁰ Union Exhibit #7

²¹ Union Exhibit #8

²² Employer Exhibit #2

Union Exhibit #4

Union Exhibit #5

Union Exhibit #6

On re-direct, the Grievant testified that, when she returned to work in April 2004, she was limited to one-handed work in “Sets” and injured her back again in mid August. The Grievant testified that since placed on Temporary Total Disability, she has received assistance for job placement and unemployment benefits, but has not found suitable work. A QRC has been assigned to assist her and has accompanied her on doctor visits.

Union Witness, Betty Sears, Testified that she has been an employee for ten years, working mostly in Shipping. Sears testified that she worked with the Grievant until the Grievant went out on the production floor, just before being placed on Temporary Total Disability.

Sears testified that she observed the Grievant do “Sets” work, but due to her restrictions had to do it differently – she had others do things for her, i.e. Stephanie would handle boxes and Diane would handle carts and load up for her. Sears testified that she and the Grievant assisted each other and she never heard any complaints about other employees having to helping the Grievant or herself. Sears testified that she worked in Shipping about ten years without rotating because her hand locked up due to repetitive motion.

On cross-examination, Sears testified that she has physical restrictions on her back and hands. Sears acknowledged that she doesn’t know if there were complaints [from other employees] made to someone besides her. Sears also acknowledged that in 2003-2004 Shipping started rotating employees between two areas, Sets and Packaging and that she had done Tubing some time ago.

Rebuttal Witness, Paula Schnarr, testified that when the Grievant returned to work in April 2004, she was assigned to the laser machine for a short time – the laser machine was in the Shipping are, was not designated for a specific worker, and was in the same Labor Grade as Shipping Clerk. Schnarr testified that they decided to put the Grievant on the laser where she would be able to work more independently, but it was necessary for she [Schnarr] and Diane to go over and assist the Grievant every few minutes.

Schnarr testified that the Grievant was then assigned to “end” drills on the production floor but the Grievant claimed she could not do the work as she felt it exceeded her restrictions. Schnarr testified that she observed Stephanie in the morning setting up the Grievant’s area with indexes and carts.

On cross-examination, Schnarr testified that the laser machine is assigned to employees on an ad hoc basis depending on workflow – different employees would work on it. Schnarr testified that they didn’t have problems when other employees worked the laser.

Rebuttal Witness, Douglas Rutford, testified that he is familiar with the [ending] job the Grievant was assigned on the production floor and that the tasks were within the Grievant’s restrictions set by medical authorities. Rutford testified that the Grievant did not complain to him that this work exceeded her restrictions.

Rutford testified that the job referenced by the Grievant in her testimony, that she could now do with “refresher training” [“Machine Operator “B” - Pointing], involves lifting a grinding wheel weighing 55 to 70 pounds that requires removing, balancing and reinstalling the wheel in three steps; carry up, reaching out and placing the wheel on a shaft. Rutford testified that the Grievant had previously worked in “Pointing” prior to 1998. Rutford testified that before June 2001, Grievant’s lifting restriction was a maximum of 27 pounds and he had no doubt that the Pointing job exceeds this limitations.

Rutford testified that his understanding of Stephanie doing set up was to help the Grievant.

On cross-examination, Rutford acknowledged that he relied on his judgment when placing Grievant on the “ending” job [on production floor], as there is no written description for the floor work assigned Grievant. Rutford testified that the Pointing job, involves handling a grinding wheel of 55 to 70 pounds and is a one-person job.

On cross-examination, Rutford acknowledged that the Grievant’s performance appraisal, when on the Pointer job, was satisfactory and above average and this was the Grievant’s last appraisal before assigned to Shipping. Rutford also acknowledged that weight restrictions existed for the Grievant before 1991.

On re-direct, Rutford testified that, as Safety Director, making judgments on safe working conditions is a part of his job. Rutford testified that he can’t exactly determine when the Grievant last worked on the Pointing job, but the formal change in assignment to Shipping was June of 2001.

Rebuttal Witness, Kathy Brisco, testified that, when she did Pointing, handling the grinding wheel was a two-person job.

The Arbitrator does not find sufficient evidence in the record to support the Union’s assertion that the investigation leading to the Grievant’s termination lacked fairness. The record shows considerable and ongoing open communication between the Grievant and management throughout her employment as is evidenced by a majority of the exhibits. It is difficult for the Arbitrator to imagine what more would be derived from an interview with the Grievant beyond what was not already known by the Employer, via the extensive documentation contained in her employment history and the close monitoring of her work by the Safety Manager, the Human Resources Manager and her Supervisors.

On October 20, 2004, when the meeting took place for the purpose of communicating the Employer’s decision to place her on Temporary Total Disability, there was an opportunity for the Grievant to express herself, which, according to her testimony, she did. A Union Steward was also present and could have assisted her with whatever additional information she wished to express.

The record does contain some discrepancies between the testimony of the Employer's witnesses and testimony of the Grievant and Union Witness Betty Sears. Principal among these is the Grievant's "Teammate Appraisal Form," Union Exhibit #3. This appraisal does not comport with description of the Grievant performance as presented by the Employer's Witnesses; however, it is recognized that this appraisal took place some two years before the Grievant's termination and the record shows a deteriorating trend in the Grievant's physical capability during this time.

Another area of seeming inconsistency is the Employer's description of the Grievant's production when compared to other workers, Union Exhibit #4. Of the five employees compared in this Exhibit, the Grievant's average production is shown at 5.2 sets per hour compared to an average for the five employees of 6.4 sets per hour.

At face value, Union Exhibit #4 indicates that the Grievant's production is within the range of other workers; however, the Employer counters that this is misleading because other workers were helping the Grievant, which had the effect of increasing her production and lowering theirs. The Employer further challenges whether the job duties are comparable, whether the data was prepared in a consistent and accurate manner and whether the employees compared worked part time or full time and the fact that the Grievant was only performing a portion of her duties. Another consideration is the testimony of the Grievant's Supervisor, Schnarr, that the Grievant was assigned the "lightest" work.

On balance the Arbitrator finds these discrepancies are not sufficiently material to alter a finding that the Employer's termination of the Grievant is in compliance with a reasonable standard of due process and just cause.

The Grievance alleges a violation of Article 27, of the CBA, INJURED EMPLOYEES. This Article in Section 2, third paragraph, reads as follows:

"In the event the employee's disabilities, when he or she returns to work, prevent him or her from performing his or her regular duties, the Company will attempt to provide said employee with work that he or she is able to perform, provided that such work is available, and provided further that such disabled employee has the necessary seniority to hold the available Job Assignment." [Emphasis Added]

The Arbitrator does not find a violation of this CBA provision. The key phrase in this provision that applies to the instant case is "able to perform. . . work available." The Arbitrator finds sufficient evidence in the record to support a conclusion that the Grievant is not able to perform work available

The Grievance alleges a violation of Article 19, of the CBA, POSTED JOBS. This Article in Section 1, reads as follows:

“All permanent Job Assignment openings in Labor Grade A through G will be posted on the Plant Bulletin Board for a period of two (2) work days if the opening cannot be filled by:

1. Shift Preference as outlined in Article 20.
2. Senior qualified employees on layoff as outlined in Article 18, Section 1.

During this period any employee may apply for the position by signing the posting. The posting shall be consecutively numbered and contain general information such as Labor Grade, Job classification, Job Assignment, rate of pay, shift, time, and date of posting.

Section 2. In considering an applicant for the Job Assignment seniority will govern. In addition, when the posting comes down as set forth in Section 1, the employee must possess:

1. Ability to perform the duties of the Job Assignment,
2. Physical capabilities to meet the job requirements,
3. Attendance record with less than three warnings in the last 12 months,
4. Work record with less than three written warnings or suspensions, including attendance warnings, in the last 12 months.” [Emphasis Added]

The Arbitrator does not find a violation of this Article. The Grievant has been placed on Temporary Total Disability due to the Employer’s lack of any available Job Assignment where the Grievant can perform essential functions. The Grievant does not have the ability to perform the duties of any Job Assignment and does not have the physical capabilities to meet the job requirements.

It is noted in the Employer’s Post Hearing Brief that the Employer appears to believe that the Union is in agreement that the instant matter is not a discipline or discharge case. There is some basis for this belief for the record shows that the Union made the following statement at the hearing:

“It is not a discharge case or discipline case, but is closely analogous.”

However the Union’s Post Hearing Brief makes the following statements:

“. . . Involuntarily removing her from her position at Viking, . . . “

“No just cause existed for the removal of the Grievant from her position: . . .”

“The Employer claims the Grievant was not terminated, . . . but admits that the Grievant has been permanently removed from her employment, the functional equivalent of termination.”

“The Employer’s action must be judged against the standard of just cause, and so evaluated.”

“Just as if the Employer had removed the Grievant for misconduct, the Employer bears the burden to prove just cause for termination.”

“. . . compliance with the ADA can be deemed a component of the just cause determination.”

“Irrespective of whether an employee’s discharge is discipline or non-discipline related the results are the same, the employee has been discharged.”

AWARD

The Grievance is denied.

The Arbitrator finds that the Grievant was terminated for just cause following a reasonable standard of due process.

CONCLUSION

The Parties are commended on the professional and thorough manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issued the 28th day of February 2006 at Edina, Minnesota.

ROLLAND C. TOENGES, ARBITRATOR