

IN RE ARBITRATION BETWEEN:

ARAMARK REFRESHMENT SERVICES

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 792

DECISION AND AWARD OF ARBITRATOR

FMCS CASE # 060123-01692-7

JEFFREY W. JACOBS

ARBITRATOR

May 22, 2006

IN RE ARBITRATION BETWEEN:

Aramark Refreshment Services, Inc.,

and

DECISION AND AWARD OF ARBITRATOR
FMCS Case # 060123-01692-7

IBT #792.

APPEARANCES:

FOR THE UNION:

Dan Boden, Business Representative
Cindy Marose, grievant

FOR THE EMPLOYER:

Darrell Steinberg, Labor Relations Director
Bill Budzyn, General Mgr.
Tim Murphy, Account Mgr./Supervisor

PRELIMINARY STATEMENT

The above matter came on for hearing on May 17, 2006 at 9:00 a.m. in the IBT #792 Union offices in Minneapolis, Minnesota. The parties presented testimony and documentary evidence at that time. The parties waived post-hearing Briefs and the record was considered closed on May 17, 2006.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from April 1, 2005 to March 31, 2008. Article 11 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service. The parties agreed that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUE PRESENTED

The parties stipulated to the issue as follows: Was the grievant offered recall to her job as a route driver?

PARTIES' POSITIONS

UNION'S POSITION:

The Union argued that the grievant was not offered a recall to her position with the Employer after she was laid off in August of 2005 and that she is entitled to bump back into her route driver position as a more senior employee to those who were recalled. In support of this position the Union made the following contentions:

1. The grievant was employed as a route driver for the Employer with a date of hire on December 13, 2004. She is by all accounts a very hard worker and was well liked by the Employer and co-workers alike.

2. Aramark purchased Viking Food service, which is also represented by IBT #792. The seniority lists were merged at some point and in August of 2005, the grievant was given a lay off based on her seniority.

3. She applied for and received unemployment compensation benefits as the result of this. She was offered a non-Union position of the coffee service division, also known as OCS, at reduced wages. This is a commissioned job and is in a different location from where the grievant had been used to working.

4. The grievant's fiancé also works for the Employer and on or about November 8, 2005 the grievant's supervisor called for her fiancé at home and the grievant picked up the phone. She stated to her supervisor that she had been informed that other drivers with less seniority had been offered a recall and had been placed back to work at Aramark. The grievant alleged that her supervisor told her that was a mistake and that he would look into it. She denied having been offered her old job back or any words to that effect.

5. The Union points to Article 5 (e) which provides that “If a temporarily laid off employee fails to notify the Employer of his/her intention to return to work within 48 hours after receipt of notice to return to work from the Employer, and return to his/her re-employment within five calendar days after it is offered to him/her, his/her seniority shall be broken, and he/she shall be assumed to have voluntarily quit his/her employment.” The Union argued that there was no “receipt of notice to return” here since none was ever given.

6. She accepted the OCS job because had she refused it she would have potentially lost her unemployment compensation benefits. Refusal of a valid job offer is grounds for the denial of those benefits and the grievant did not want to risk that.

7. She did however file a grievance in December 2005 alleging that junior drivers had been recalled to their positions and that her contractual rights had been violated because of this. She alleges that she has always wanted her Union job back and that had she been offered her old job back she would have taken it right away.

8. The essence of the Union’s claim is that it is admitted by the Employer that junior employees had been placed back on their route jobs in violation of the contract and that the grievant was never offered re-employment or recall with Aramark. She took the OCS job to avoid loss of her unemployment but has always wanted her Union job back.

The Union seeks an award reinstating the grievant to her position as a route driver with full back pay and contractual benefits.

EMPLOYER’S POSITION

The Employer’s position is that the grievant was offered recall from lay off in a conversation with her supervisor on or about November 8, 2005 and that she refused that job. She is therefore not entitled to bump back into her route driver position. In support of this position the Employer made the following contentions:

1. The Employer acknowledged that the grievant is a very good employee and that her work record was quite good. The Employer further acknowledged that there was a purchase of Viking and that the seniority lists of the two companies were merged and that the grievant was laid off as a result.

2. The Employer however asserted quite adamantly, that the grievant refused an offer of re-employment when it was offered in the phone call with her supervisor in November of 2005.

3. The Employer in fact asserted that logic dictates that even though this is a “he said – she said” situation, the grievant was offered her old job but refused it in order to take the OCS job. The Employer argued that Mr. Budzyn gave her a glowing reference there and he was quite certain she would have gotten that job, which she eventually did.

4. The Employer also points to the provisions of Article 5 (e) and argues that she refused a recall offer and as such had voluntarily quit and had also lost her seniority. The Employer noted that there is no requirement of a written job offer contained in that provision, similar to what is in other contracts with IBT #792. Here all that is required is that an offer is made and that the employee receives notice of recall from the Employer. Here the Employer alleges that she received that on November 8, 2005 but neither gave her intention to return within 48 hours nor did she return to work within 5 days as required.

5. The Employer acknowledged that it is unfortunate that this must come out this way but that it would set a dangerous precedent if the grievant were to be allowed to return after having been offered a job and refused it given the clear provisions of the contract language. The Employer remained adamant that an offer was made and that the grievant for whatever reason refused it. The Employer offered that it was perhaps the excitement of a new position with a different form of remuneration that caused her to refuse the job or perhaps something else.

6. In any event, the Employer argued that a person is not entitled under the clear provisions of the contract to give a “tentative” or a “provisional” refusal of the job in order to try a different one to see if they like it or not. Things apparently did not work out as the grievant had planned with the OCS job and she cannot now return to her old job under these circumstances.

7. The essence then of the Employer’s argument is that the grievant was given notice of recall and refused it. Under the clear contract provision she is not entitled now to go back on that.

Employer seeks an award denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

Both parties acknowledge that this is a “he-said she-said” situation. There were no witnesses to either side of the conversation. No one recorded it and no one even took contemporaneous notes about it. The grievant took some notes some time later but these were only after consultation with her Union. This is of course a very difficult situation since both sides were quite sincere in their positions and there was no evidence whatsoever that either side was lying or fabricating their stories in order to gain an advantage in this matter.

Several facts are clear and do serve to aid in the decision. The evidence showed that the grievant was a very good employee who had no problems of any kind and was known to be honest and hardworking on all her endeavors on behalf of the Company. She was laid off as the result of the merger of the seniority list between Aramark and Viking in August of 2005 and that the lay off occurred sometime in mid October of 2005.

The evidence also showed that as the result of this she began receiving unemployment compensation and that she was offered a job with OCS. OCS is a non-Union position that apparently pays on the basis of commissioned sales, although there was little direct evidence of this.

The grievant testified credibly that she accepted this position reluctantly since it was a non-Union position and she has been a staunch Union supporter and wanted a Union job. She took it in order to avoid losing her unemployment benefits. She apparently had not actually started the OCS job as of November 8th but it was quite certain she would get it given the favorable reference Mr. Budzyn gave her. She did in fact take the OCS job in mid-November. Significantly, she had not yet interviewed for OCS as of the November 8th phone call however.

The evidence also showed that the Employer had made an error in recalling junior driver to their route positions and that the grievant knew of this prior to the phone call on November 8, 2005. The evidence showed too that the grievant's fiancé lives with her and that he too is a route driver for the Employer.

The facts surrounding the phone call were of some significance as well. It is clear that the supervisor called for the grievant's fiancée, not her and that she simply picked up the phone. Both sides agree that there was a discussion about a mistake being made and that junior drivers had been recalled in front of the grievant. Mr. Murphy testified that he said he would look into that. He also testified that he believed he had said during this conversation "do you want your job back" or something to that effect and that the grievant indicated that she did not. He testified that this was the sum total of the conversation and that they simply exchanged pleasantries after that.

The evidence showed that the grievant then accepted the OCS job and worked for about a month here. She soon discovered that the job was not for her and that was putting in long hours with very little pay. Later, when it was discovered that indeed there had been a mistake and that junior drivers had been recalled in front of her she filed the grievance on December 6, 2005. She denied ever having been offered her old job and that if she had she would have taken it immediately and would never have started the OCS job.

These facts are quite at odds with each other and such a case is never easy to resolve. However, several things mitigate on favor of the grievant's version. First, both sides agree that she mentioned the problem with junior drivers being placed on recall in front of her. Both sides argue that logic compels a decision in their respective favor. Here however, logic mitigates in favor of the grievant. There is little reason for her to have brought this up unless she did in fact want her job back. There is also little if any reason for her to have declined an offer of recall had one clear been made or that she had clearly heard and understood it. Simply stated, the greater weight of the evidence supports the claim that the grievant would not have even brought this up unless she had an intention to return to work as a route driver.

Second, while there was considerable dispute about the offer, there was no dispute that Mr. Murphy told her that he would "look into" the situation she was complaining about, i.e. that junior drivers had been placed on recall before her. There was no clear acknowledgement at that time that a mistake had been made. The context of this phone call is rife with potential for miscommunication and misunderstanding. Both parties agreed that the call was relatively short. Mr. Murphy's version of this was that he made the comment almost offhand and then moved on to other things. The chances that the grievant either didn't hear it, didn't understand it or simply misheard it during a conversation about something else is simply too great to ignore.

This brings us to the contract language itself. The Employer is correct in its assertion that there is no requirement of a written job offer nor is there any requirement of a certified letter having to be sent to the recalled employee. The lack of such a requirement of course leads to the very kind of dispute that has arisen here. It is not for this arbitrator to question the wisdom of such a provision however the parties may well do so now. The clear provisions of this language place the burden on the Employer as a practical matter if nothing else to establish that the employee has indeed received notice to return from the Employer.

Here at best this is a case where both parties may well be telling the truth. The Employer has simply failed to establish by a preponderance of the evidence that the grievant “received notice,” to use the words of the contract itself, to return from the Employer.

The provisions of the contract are quite sound and had the evidence showed that the grievant receive such notice but refused to return to work she would clearly have suffered the loss called for in the language. Here though the evidence simply does not show that factually and importantly, the record established that junior drivers were placed on recall ahead of the grievant based on the incorrect assumption that she had refused a job offer to return to work. It is clear on this record that a clear contract violation occurred even though it may have been unintentional. Accordingly, the grievant must therefore be reinstated to her former position with the Employer.

The remedy is therefore that the grievant shall be immediately reinstated to her position with the Employer with full back pay, accrued seniority and benefits. Any back pay award shall be reduced by any unemployment or other government benefits paid during the period at issue in this matter as well as any wages or salary paid to her during this time.

AWARD

The grievance is SUSTAINED. The grievant shall be immediately reinstated to her position as route driver with full back pay, accrued seniority and benefits. Back pay shall be reduced by any unemployment or other governmental benefits paid as well as any wages or salary paid to the grievant during the relevant time period herein. The parties shall bear the costs of the arbitrator’s fee equally as set forth in statement attached to this Award.

Dated: May 22, 2006

Jeffrey W. Jacobs, arbitrator