STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES - LOCAL 18, AFL-CIO, Complainant,

vs.

WISN DIVISION OF HEARST-ARGYLE TELEVISION STATIONS, INC., Respondent.

Case 18
No. 63891
Ce-2237

Decision No. 31183-B

Appearances:

Mark A. Sweet, Attorney, Law Offices of Mark A. Sweet LLC, 705 East Silver Spring Drive, Milwaukee, Wisconsin 53217-5231, appearing on behalf of the International Alliance of Theatrical Stage Employees – Local 18, AFL-CIO.

Robert H. Duffy and **Steven A. Burk**, Attorneys at Law, Quarles & Brady, LLP, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4426, appearing on behalf of WISN Division of Hearst-Argyle Television Stations, Inc.

ORDER ON REVIEW OF EXAMINER'S DECISION

On March 22, 2005, Examiner Marshall L. Gratz issued Findings of Fact, Conclusions of Law, and Order in the captioned matter, concluding, in pertinent part, that the Respondent WISN Division of Hearst-Argyle Television Stations, Inc. (Company) had violated the terms of its collective bargaining agreement with the Complainant, International Alliance of Theatrical Stage Employees-Local 18, AFL-CIO (Union), and thus committed an unfair labor practice within the meaning of Sec. 111.06(1)(f), Stats., when the Company reduced the hours of a bargaining unit member from full-time to part-time effective November 3, 2003. The Examiner dismissed the remaining allegations in the complaint.

On April 7, 2005, pursuant to Sec. 111.07(5), Stats., the Company filed a timely petition seeking review of the Examiner's decision, followed by a brief in support of the petition filed on May 11, 2005. The Union filed a brief in support of the Examiner's decision on June 1, 2005, and the Company filed a reply brief on June 15, 2005. For the reasons set forth in the Memorandum, below, we affirm the Examiner's decision in all respects.[1]

[1] The Union has not sought review of those portions of the Examiner's decision that dismissed various allegations in the Union's complaint, nor do we find any reason to disturb the Examiner's conclusions in that regard.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following:

ORDER

The Examiner's Findings of Fact, Conclusions of Law, and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 6th day of July, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

WISN Division of Hearst-Argyle Television Stations, Inc.

MEMORANDUM ACCOMPANYING ORDER

Summary of the Facts

As indicated in our Order, we have affirmed all of the Examiner's findings of fact. Those most pertinent to the instant petition for review can be summarized as follows:

The Union for several years has represented a bargaining unit of Production Specialists employed by the Company. At material times the parties have maintained a collective bargaining agreement containing various provisions that are set forth in full in the Examiner's decision.

At various relevant times, the Company has simultaneously employed both full-time and part-time Production Specialists. W. H. (the Grievant) began his employment in 1989 as a part-time employee, at some point became full-time, was reduced by the Company to part-time in 1991, returned by the Company to full-time in approximately September 1992, and remained full-time until the events giving rise to this case. When the Company reduced the Grievant from full-time to part-time in or about 1991, no grievance was filed. The record does not establish whether the Company employed other part-time employees during that 1991-92 period.[2] The Grievant remained in the Company-subsidized health insurance plan during his

[2] Contrary to the Examiner's conclusion, the Company contends that the record does contain evidence from which "it could be concluded that the [Company] had historically retained part-time stagehands," including the 1991-92 period in which the Grievant had been reduced to part-time. The Company refers to page 54 of the transcript for evidence that it employed another stagehand in 1991. However, the testimony there related to the employment of another full-time stagehand in 1996, not 1991, and does not seem to refer to part-time employees at all. The Company also points to evidence suggesting that part-time employees possibly were employed in 1991 when the Grievant was reduced from full-time to part-time. We agree with the Examiner that these suggestions, while plausible, are insufficient to establish affirmatively that, prior to the instant situation, any full-time employee had been reduced to part-time while the Company continued to offer hours to other part-time employees. Contrary to the Company's characterization, the Examiner did not find as a fact that there were no other part-timers in the relevant 1991-92 time frame, but merely concluded that the record was insufficient to establish that there were such part-timers, a factual element of its defense where the Company would bear the burden of production. Nor does the Company cite any precedent for its suggestion that the record should be reopened in order to allow the Company an opportunity to meet that burden now. More importantly, even if the record supported the Company's assertion, that fact standing alone would not warrant a conclusion that the Union acquiesced in the Company's view of its rights under the agreement. A single failure to grieve does not establish a pattern and practice indicating Union waiver or consent, as the Union may have had reasons for choosing not to grieve quite apart from any putative concurrence in the Company's view of its contractual prerogatives. ELKOURI & ELKOURI, HOW ARBITRATION WORKS, (BNA, 6TH ED. 2003) AT 624. In short, the record on this point would not be persuasive even it were found, as the Company urges, that the Company employed part-timers during the period in 1991-92 when the Grievant had previously been reduced from full-time to part-time.

part-time status in 1991-92. In 1996, one of the three full-time unit members was promoted and the Company did not fill the full-time position, while continuing to employ four part-time employees working in the aggregate in excess of 40 hours per week. No grievance was filed.

In 2003, the Company experienced certain changes in its business that led the Company to decide by the end of 2003 that it needed approximately 50 fewer hours of regular Production Specialist work per week. In October 2003, the Company employed two full-time unit members, of whom the Grievant was the least senior, and four part-timers. On October 20, 2003, the Company informed the Grievant that it was reducing his hours from 40 to 28 or 29 per week, effective November 3. At roughly the same time, the Company discontinued the employment of one of the part-timers, thereby reducing its staffing to 1 full-time and 4 part-time unit members. Thereafter, the Company assigned about 40 regular hours per week to the remaining full-time employee and 102 regular hours per week to part-timers, including the Grievant. The record does not establish that offering the Grievant an additional 11 or 12 hours of work per week, and taking those hours from one or more of the other three part-timers, would compel the Company to employ the Grievant when there was no work for him.

Consonant with the Company's general practice (although inconsistent with what had occurred in 1991-92), the Grievant was no longer entitled to inclusion in the Company subsidized health insurance plan after being reduced to part-time status in November 2003. He maintained coverage through COBRA by paying the full cost of his premiums, an entitlement that ended approximately March 31, 2005. Beginning shortly after his reduction to part-time status, the Grievant was diagnosed with a heart condition requiring treatment. However, he has received medical clearance to perform full-time work.

On November 7, 2003, the Union grieved W.H.'s reduction to part-time status and the Company in due course denied the grievance. In accordance with Section 9 of the contractual grievance procedure, the Union filed the instant unfair labor practice complaint.[3]

DISCUSSION

The central issue raised in the instant petition for review[4] is whether the Examiner erred in holding that the Company violated Agreement Section 12 (and thereby committed an unfair

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[3] As indicated in footnote 1, above, the Union's complaint initiating this case also alleged other violations of the collective bargaining agreement, as well as certain unfair labor practice charges, including an allegation that the Company reduced the Grievant's hours in November 2003 in retaliation for his union activity.

[4] In addition to countering the Company's substantive arguments about the meaning of "laid off," the Union has urged the Commission to apply a "certiorari-like" standard of review to the Examiner's decision, similar to the deferential review that is given to arbitration awards, because Article 9 of the agreement refers several times to the authority of the "arbitrator," including a statement that the decision "shall be final and binding upon the parties...." These references to an arbitrator are indeed confusing in light of the agreement's explicit reference to the Commission's unfair labor practice "charges" being the exclusive means of enforcing the agreement. In unfair labor practice proceedings, as the Union acknowledges, the Commission applies a de novo standard of review to an examiner's decision. Fortunately, the Commission need not decipher the meaning of this language, as in this case the Commission concurs in the Examiner's decision even after applying a de novo standard of review.

labor practice) by reducing the Grievant from full-time to part-time, for lack of work, while

continuing to assign enough regular work hours to part-time employees to have kept the Grievant in full-time status. The dispute boils down to whether the Examiner correctly interpreted the contractual term "laid off" to include the Grievant's involuntary reduction in hours.

Article 12 of the agreement provides in pertinent part:

> Section 12. PART-TIME EMPLOYEES
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> The Employer reserves the right to engage the services of employees to work part time. Part-time employees will not be used as a means of replacing regular full-time employees, and no regular full-time employees will be laid off for lack of work unless he or she has been given the opportunity to accept any hours (up to forty [40]) which are currently made available to part-time employees.
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> * * *
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> Applications of the provision with respect to seniority, severance pay, and discharges for part-time employees shall be in the sole discretion of the Company. All other terms and conditions of this Agreement shall apply to any such part-time employee.
>
> If a part-time employee becomes a full-time employee, he or she shall be credited with seniority on the basis of one (1) week credit for each forty (40) hours worked from the date of the initial employment. The Employer will endeavor to assign all part-time employees to work hours on an equitable basis. However, it is understood that Management retains the right to assign all hours to part-time employees on the basis of the employee's experience, expertise, and the needs of the specific assignment and department. Part-time Production Specialists will not be called in for less than four (4) hours of work.
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> * * *

The Company challenges the Examiner's application of the foregoing language in four respects: (1) the conventional labor relations meaning of "laid off" is a complete separation from employment; (2) the term "layoff" as it is used in several places in the collective bargaining agreement clearly implies a complete separation from employment; (3) the Examiner's interpretation restrains the Company from exercising its contractually protected right to employ and utilize the work force as it sees fit; and (4) the Examiner improperly relied upon "dicta" in another arbitration award to support his conclusion about the meaning of the term "laid off." [5]

[5] The Company's contention that the Examiner erred in concluding that that past practice supported the Company's view of the agreement has been addressed in footnote 2, above.

As to the first point, the Examiner conceded he was departing from the conventional meaning of the term "laid off" for lack of work when he concluded that the term could encompass a reduction in hours under the circumstances present here. However, when doing so, the Examiner followed the well-established arbitral convention that contract language should be interpreted in tune with its evident purpose and common sense and consistent with the contract as a whole. ELKOURI & ELKOURI, HOW ARBITRATION WORKS (BNA, 6TH ED. 2003) at 461, 470-71 (numerous citations omitted). The Examiner concluded that the term "laid off" must apply to the Grievant's reduction to part-time status because to do otherwise would leave the Grievant with fewer rights to return to full-time status than he would have had if he had been completely laid off and with no more right to a future full-time opening than someone hired right "off the street." We find the following reasoning by the Examiner to be correct:

> The Examiner concludes that interpreting "laid off" in Sec. 12 consistent with conventional labor relations parlance would be contrary to common sense, inconsistent with the evident purpose of the Sec. 12 limit on lack of work layoffs of full-time employees, and, on balance, inconsistent with the Agreement read as a whole.
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> Under the Company's interpretation, the Company is relieved of what would otherwise be its Sec. 12 obligation to offer Grievant any hours up to 40 which are currently available to part-time employees because it offered him 29 hours of part-time work. Far from being supported by common sense, that result seems contrary to it.
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> The Company's interpretation is also inconsistent with the purpose of the recall language in Sec. 24 which reads, "[i]f a vacancy occurs in the Production Specialist's staff, those persons laid off in the previous six (6) months shall be given preference in filling the vacancy in order of their seniority, providing they are still capable of performing their prescribed duties." If, as the Company argues, Grievant was not laid off for any purpose under the Agreement, then he would not be entitled to a Sec. 24 seniority-based preference if a full-time vacancy were to occur during the six months following his loss of full-time status, and the Company could fill such a vacancy with anyone. That outcome is inconsistent with the purpose of the Sec. 24 recall language to provide qualified Production Specialists who have been displaced from their former employment status with the Company an opportunity to regain that status if a vacancy occurs within six months of the employee's loss of status.
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> Furthermore, as a result of being reduced to part-time status, Grievant became subject to the language in the fourth paragraph of Sec. 12 providing that "[a]pplications of the provision with respect to seniority, severance pay, and discharges for part-time employees shall be in the sole discretion of the

> Company." For that reason, the change in Grievant's status from full-time to part-time involved much more than a reduction of hours and a consequent reduction of fringe benefits. In none of the cases cited by the Company regarding the meaning of the term "layoff" did the agreement involved make application of basic job security protections such as seniority, severance pay or discharge subject to sole employer discretion as a result of the reduction of employee hours or other employer action involved. …
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> [I]f, as the Company argues, the Grievant was not "laid off" within the meaning of Sec. 12, then he could theoretically be changed from full-time to part-time as he was in this case, and then laid off from part-time employment or discharged at the sole discretion of the Company. To avoid an interpretation that would so seriously undercut full-time employees' rights under the Agreement's discharge, seniority and severance pay provisions, the Examiner concludes that the first paragraph of Sec. 12 must mean that full-time employees are protected from being "laid off" from full-time employment "until he or she has been given the opportunity to accept any hours (up to forty [40]) which are currently made available to part-time employees."

Examiner's Decision at 25-27.

In challenging the Examiner's departure from the conventional parlance as to the meaning of "laid off", the Company disputes the Examiner's above-stated view of the purpose of the Section 24 recall language. According to the Company, "the purpose for this section is not to allow an existing employee to regain employment status, but to allow a former employee to regain employment." (Co. Br. at 19). On the contrary, however, the Company's view is not compelled by the language itself, as that language does not distinguish between "existing" and "former" employees. Moreover, the Company's articulation of Section 24's purpose can be reconciled with that of the Examiner, in that the Grievant could be described as a "former" full-time employee seeking to "regain employment" as a full-time employee. In construing this provision it is also important to recognize, as the Examiner did, that part-time employees have no seniority rights for layoff or recall purposes under Section 12. Since only full-time status is thus protected under Section 12 and/or Section 24, the Examiner's interpretation, focusing on losing and regaining full-time status, clearly comports with the contract language. Nor has the Company offered any persuasive support for its interpretation that could subordinate the Grievant, a formerly full-time employee, not only to employees who were hired as part-timers, but to anyone "off the street," in terms of access to available work.[6]

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[6] The contractual priority given full-time employees is emphasized by the language in Section 12 that forbids the Company from using part-time employees to replace full-time employees.

The Company's second argument is that the term "layoff" or "laid off" are used elsewhere in the contract to mean a complete separation from employment, and hence that is what the parties must have intended by using those terms in Sections 12 and 24.[7] The Company points out that contract Section 19 (Promotions) states that employees who are laid off shall not accumulate seniority during such layoff. The Company contends that, if the Grievant had been "laid off" when his hours were reduced for lack of work, then he would not accumulate seniority under the literal language of Section 19, which, according to the Company, would be inconsistent with Section 12. To the contrary, however, the two provisions are easily reconciled in this respect, as Section 12 does not on its face provide seniority to part-timers, such as the Grievant now is, until if and when they acquire full-time status.

In support of its second argument, the Company also points to Section 24 (Layoffs), where references are made to laid off employees being "re-employed" and requiring them to "report for duty," Section 25 (Disciplinary Action), where the parties refer to "disciplinary layoffs" as an alternative to discharge, and Section 28 (Leave of Absence), where the parties provide that employees on "extended leave … will be re-employed from layoff status." As to Section 25, the Company contends that "disciplinary layoff" plainly must mean "getting sent home." (Co. Br. at 20). However, the language appears more ambiguous than the Company claims, as the term "disciplinary layoff" reasonably could be construed to encompass a reduction in hours if such were imposed for disciplinary purposes. As to the references to "re-employment" in Sections 24 and 28, the Examiner acknowledged that, "Those usages are both consistent with the notion that to be "laid off' means to cease active employment altogether." The Examiner went on, however, to note that, "[I]t would not defeat the purposes of either of those provisions if 'laid off' were interpreted to include both laid off from full-time employment as well as laid off from all employment with the Company." Examiner's Decision at 25. In other words, as the Union has argued, the term "laid off" can refer to complete separation from employment where doing so serves the objectives of a particular contractual provision, while at the same time having a broader meaning in a provision that carries a different contractual objective. Since it would defeat the purpose of Sections 12 and 24 to limit "layoff" to complete separation, but it would not defeat the purpose of Sections 24, 25, and 28 to construe "layoff" to include reductions in hours, the Examiner properly chose the construction that would give effect to all provisions of the contract. ELKOURI & ELKOURI, SUPRA, at 463, and awards cited therein.

The Company next argues that, by compelling the Company to keep one full-time stagehand and three part-timers, rather than four part-timers as the Company would prefer, the Examiner's decision "improperly restrained the expansive rights that the parties intended for

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[7] The Company's first sub-argument on this point refers to Section 12 as noting that "following a layoff" an employee who is rehired within three months of his/her "termination'" is entitled to retain seniority for pay scale purposes. Co. Br. at 16. However, the quoted portion of Section 12 does not use the term "layoff" at all and certainly does not use it interchangeably with "termination."

the [Company] to retain" by virtue of various contract provisions, including Section 33, the Management rights clause.[8] As the Company acknowledges, the Examiner interpreted these provisions, taken as a whole, to "reserve to the Company the absolute right not to employ bargaining unit personnel when there is no work to be performed. They also reserve to the Company the right to be the sole judge of the work to be done, the number of individuals to be employed or retained in employment, and the number of employees assigned to any work." Examiner's Decision at 24. However, it is also true, as Section 33 recognizes, that the contract itself can expressly limit these managerial prerogatives. In Section 12 the Company agreed to restrain its managerial prerogatives and preferences to protect its full-time employees' 40-hours of work, as long as there were 40 hours of work available. Nothing in the Examiner's decision tells the Company how much stagehand work the Company must assign, how many stagehands they should assign to any particular job, nor how large its stagehand staff should be in terms of "full time equivalents" or FTE's. Whether or not the Grievant maintained a 40-hour schedule, the Company could still have reduced its complement of stagehands by approximately 50 hours per week. While the Company argues that the Examiner's decision has cost the Company flexibility in terms of the number of individuals available for various (potentially simultaneous) assignments, this argument is speculative on this record. The record does not suggest that providing an additional 12 hours to the Grievant, and thus an average of four fewer hours per week to each of the three part-timers, would impair the Company's ability to meet its needs in any discernible way. In any event, by agreeing in Section 12 not to replace full-timers with part-timers and not to lay off full-timers while simultaneously giving work to part-timers, the Company has agreed to limit its flexibility to this extent. The Examiner correctly interpreted the contract in this regard.

Lastly the Company objects in somewhat conclusory fashion to the Examiner's "reliance" on "dicta in ATHENS SCHOOL DISTRICT, WERC MA-12056 (EMERY, 10/9/03)" to support his interpretation of the term "laid off" in the instant contract. (Co. Br. at 23). As the Union points out, however, the Examiner's discussion of the ATHENS award was in response to the Company having cited that decision in support of the Company argument in the instant case. The Examiner actually distinguished the award in ATHENS (which had followed the conventional notion of layoff as a complete separation from employment), by citing what the Examiner properly viewed as a more analogous award in SUPERIOR MEMORIAL HOSPITAL, DEC. NO. A-5165 (SHAW, 9/94), where the arbitrator had held that the term layoff encompassed a reduction in hours based partly upon the fact that the contract subordinated the rights of part-timers to full-timers. Examiner's Decision at 26.

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[8] Section 33 provides, "Except as expressly limited by this Agreement, the management of the affairs of the Employer is vested exclusively in the Employer ... . Nothing in this Agreement shall be construed to obligate the Employer to employ Production Specialists when there is no work to be performed and the Employer at all times shall be the sole judge of the work to be done and the number of individuals to be employed or retained in employment."

For the foregoing reasons, the Examiner correctly held that the Company violated Sections 12 and 24 of the Agreement by reducing the Grievant's hours for lack of work, while at the same time assigning work to part-time employees and that the Company thereby committed an unfair labor practice within the meaning of Sec. 111.06(1)(f), Stats. The Examiner's Findings, Conclusions, and Order are affirmed.

Dated at Madison, Wisconsin, this 6th day of July, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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