BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 150, SERVICE AND HOSPITAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO	Case 51 No. 48161 A-4990
and	
MERITER HOSPITAL, INC.	

Appearances:

Mr. Todd Anderson, Business Agent, appearing on behalf of Local 150, SEIU.

Axley & Brynelson, Attorneys at Law, by Mr. Michael J. Westcott, appearing on behalf of the Employer.

ARBITRATION AWARD

Local 150, Service and Hospital Employees International Union, AFL-CIO, hereinafter referred to as the Union, and Meriter Hospital, Inc., hereinafter referred to as the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the Employer, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Madison, Wisconsin on December 8, 1992. The hearing was not transcribed and the Union made an oral summation of its arguments at the hearing and the Employer submitted a written brief which was received on January 8, 1993.

BACKGROUND

The basic facts underlying the grievance are not in dispute. The grievant began his employment with the Employer on September 19, 1979. In 1990, the Employer had four classes of Mechanics: I, II, III and IV. The grievant held the position of Mechanic III. The grievant injured his back at work on May 18 or 20, 1991. The grievant filed a request for a leave of absence due to this injury commencing on July 5, 1991 and ending on August 26, 1991. The grievant required surgery for his injury and requested a leave of absence from September 9, 1991 to June 30, 1992. On November 15, 1991, the Employer notified the grievant that because he would be out six to nine months, it was necessary to fill his job of Mechanic III and it did so. The grievant had surgery on December 10, 1991. On March 2, 1992, the grievant's doctor indicated the grievant was totally incapacitated at that time and would be reevaluated on June 1, 1992. On March 19, 1992, the grievant's doctor indicated the grievant could return to work on March 30, 1992, for no more than four hours per day as a locksmith with lifting restricted to a maximum weight of 25 pounds. The grievant returned to work on March 30, 1992, and did lock work for a maximum of four hours per day. On April 14, 1992, the grievant was offered a Mechanic I position which had become vacant and he accepted it and began performing Mechanic I duties with some restrictions on bending and twisting as well as the 25 pound weight limit on lifting. On June 1, 1992, the grievant's doctor continued these restrictions and on December 2, 1992, increased the weight limit on lifting to 75 pounds but continued the no bending or twisting restriction permanently.

On April 20, 1992, the grievant filed the instant grievance alleging a violation of Article VI, Sec. 2.B. and asking that he be red-circled at his Mechanic III rate. The grievance was denied and appealed to the instant arbitration.

ISSUE:

The parties stipulated to the following:

> Whether the Employer violated Article VI, Section 2.B. of the current collective bargaining agreement when it did not red-circle the grievant's pay when he was hired for the Mechanic I position. If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE VI. EMPLOYMENT STATUS

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SECTION 2. Promotions and Transfers Within The Bargaining Unit.

. . .

B. Transfers to Lower Classifications

> An employee who, at his/her request, transfers to a lower job classification will receive the applicable wages of the new classification providing there is a position available and the employee can do the job. In the case of bona fide physical or health limitations which render an employee unable to perform any essential functions of his/her job, the Hospital will, when an employee has ten (10) or more years' service, effect such a transfer without a corresponding reduction in pay, by "red circling" such rate.
>
> An employee who is transferred to a lower job classification due to inability to perform the job will normally receive a reduction in pay to the starting rate of the lower job classification or to the rate he/she held just prior to the promotion, assuming an opening is available. Any exceptions to a reduction to the starting rate will be a the discretion of the Hospital, and will be discussed with the Union prior to implementation. Should an appropriate opening not be available, the employee will be laid off but shall have priority for reinstatement when an opening occurs.

The preceding contract contained the following language for Article VI, Section 2.B.

ARTICLE VI. EMPLOYMENT STATUS

. . .

Section 2. Promotions and Transfers Within The Bargaining Unit

B. Transfers to Lower Classifications

An employee who, at his/her request or because of bona fide physical or health limitations, transfers to a lower job classification will receive the applicable wages of the new classification. In the case of bona fide physical or health limitations directly affecting job performance, the Hospital will, when an employee has ten (10) or more years' service, effect such a transfer without a corresponding reduction in pay, by "red circling" such rate until such time that the actual job rate has caught up with the "red circled" rate.

. . .

ARTICLE XVIII. LEAVES OF ABSENCE

Section 5. Disability Leave or Absence (Medical)

. . .

C. Employees on medical leave of absences that return to work in three months or less will be reinstated to their former job unless by reason of their seniority they would have been placed on layoff or their position modified during the period of their medical leave due to economic conditions, emergencies or reorganizations resulting in a reduction of jobs. Any employee who is unable to remain at work for at least five consecutive scheduled working days will not restart another three-month period for purposes of job rights.

UNION'S POSITION

The Union contends that it has proven its case that the grievance should be upheld. It submits that the grievant had a condition which rendered him incapable of performing any job and the grievant's transfer to a Mechanic I position was effected by the Employer. It argues that Exhibits 17 and 25 demonstrate that the transfer from Mechanic III to Mechanic I was effected by the Employer. The Union points out that the grievant signed the leave of absence request at the time the prior contract was in effect, so the provisions of Article VI in the old contract apply and the grievant is entitled to be red-circled as provided in the old contract. The Union insists that the contractual language is clear and that an employe who is transfered with ten or more years seniority will have his wage rate frozen when a medical restriction caused the transfer. It notes that the grievant has more than ten years seniority and his transfer was caused by his medical restrictions, and thus, he should be red-circled at the Mechanic III rate. It asks that the grievance be granted and the grievant be red-circled and made whole.

EMPLOYER'S POSITION

The Employer contends that there is no evidence or allegation that the grievant cannot perform the essential functions of the Mechanic III position. It submits that the language of Article VI, Section 2.B. was modified in negotiations for clarification and to assist the Employer to comply with the Americans with Disabilities Act. It claims that in negotiations the Employer

told the Union that "essential functions" were the "core" components of the position and not ancillary tasks. It maintains that the contract provision discussed at the bargaining table meant that if a 10-plus year employe's physical condition deteriorated to the point where the employe could no longer perform the essential functions of the job and was transferred as a result of this inability, the employe's pay would be red-circled. The Employer submits that the grievant can perform the essential functions of the Mechanic III position as he acknowledged that a Mechanic III position is more "knowledgeable" than a Mechanic I and the grievant had been performing as a Mechanic I since April, 1992. The Employer submits that the grievant can perform all the essential functions of Mechanic III and the limitations of bending and twisting from the waist do not preclude the ability to pick up items from the floor by bending the knees or to twist by moving the feet, and thus, the evidence establishes that the grievant can perform all the duties of the job.

The Employer further contends that Article VI, Section 2.B. does not apply as the grievant did not transfer to a Mechanic I position because he was unable to perform the Mechanic III position. It points out that the Mechanic III position was filled because the grievant was on a leave of absence for more than 90 days and there was a vacancy in Mechanic I which the grievant filled and as soon as a Mechanic III position opens, the grievant will be transferred to it.

The Employer asserts that the remaining arguments by the Union are without merit. It submits that the permanent restrictions placed on the grievant by his doctor do not prevent him from performing the Mechanic III job and he is performing the Mechanic I job. It asserts that the argument that the grievant could not perform any duties was at the time when he was on leave of absence and at that time he did not have the right to transfer to any job. It insists that when the grievant was able to perform as a Mechanic I, he was also able to perform as a Mechanic III, so this argument must be rejected.

The Employer labels the Union's assertion that the old contract must be applied as an "act of apparent desperation" because the stipulated issue refers to the "current" contract and the alleged failure to red circle occurred in April 1992, when the new contract was in effect. It submits that other arguments raised by the Union were unintelligible.

The Employer argues that the contract is clear and unambiguous and is not applicable to the grievant because he did not transfer to a Mechanic I position because he was unable to perform the essential functions of the position, but rather, because his Mechanic III position was filled pursuant to Article XVIII. It submits that the evidence establishes that the grievant can perform the essential functions of the Mechanic III position as the physical requirements of this position are the same as the Mechanic I position which the grievant now performs. It requests that the grievance be denied.

DISCUSSION

Article VI, Section 2.B. of the agreement provides, in part, that:

> In the case of bona fide physical or health limitations which render an employee unable to perform any essential functions of his/her job, the Hospital will, when an employee has ten (10) or more years' service, effect such a transfer without a corresponding reduction in pay, by "red circling" such rate until such time that the actual job rate has caught up with the "red circled" rate.

The grievant is alleging that the Employer is violating this provision by not "red-circling" his Mechanic III rate while he is occupying a Mechanic I position. The problem with the grievant's argument is that the evidence establishes that the language quoted above does not apply to the grievant. The uncontroverted testimony at the hearing established that the intent of Article VI, Section 2.B. is to allow the Employer to remove an employe from a position and to transfer him/her to a lower paying position where the employe's health has deteriorated such that he/she can no longer perform at the the higher rated position and under these circumstances the employe's pay rate would be "red-circled". The grievant's situation does not come within this factual scenario. The grievant's back was not deteriorating such that he could no longer perform at the Mechanic III level. Instead, the grievant suffered an injury to his back and could not perform his job, or for that matter any job, for quite some time. Article XVIII, Section 5.C. allows the Employer to fill the grievant's position after his failure to return to work within three (3) months. There is no dispute that the Employer followed Article XVIII, Section 5.C. and filled the Mechanic III position after the grievant was not able to return to it within three months. Because the grievant was not entitled to his old position on his return to work, he has asserted a claim to be red-circled. The evidence supports a conclusion that once the grievant was able to return to work as a Mechanic I, he was also physically able to perform the duties of the Mechanic III position. The grievant's situation would be no different than if the grievant had taken a leave of absence to go to Europe for six months and his position was filled during his leave. As there was no vacancy in his old position after the leave ended, the acceptance or assignment to a lower classified job does not require red-circling. Although the grievant's leave was caused by his injury, he was transferred on his return to the Mechanic I position because there was no vacancy in the Mechanic III position. The grievant was not transferred to the lower rated job because of deteriorating health problems. There is no physical or health limitation on the grievant's ability to perform at the Mechanic III level, and therefore, the evidence establishes that Article VI, Section 2.B. does not apply. This conclusion is true whether the old or new collective bargaining agreement applies. Therefore, the grievance must be denied.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The Employer did not violate Article VI, Section 2.B. of the parties collective bargaining agreement when it did not red-circle the grievant's pay when he was transferred to the Mechanic I position, and therefore, the grievance is denied.

Dated at Madison, Wisconsin this 21st day of January, 1993.

By _____
Lionel L. Crowley, Arbitrator