BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BIG BUCK BUILDING CENTER

and

TEAMSTERS LOCAL NO. 43

Case 1
No. 55005
A-5570

(R. J. Termination)

Appearances:

Ms. Anne Shindell, Shindell & Shindell, Attorneys at Law, 158 North Broadway, Milwaukee, Wisconsin 53202, appeared on behalf of the Company.

Mr. John J. Brennan, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appeared on behalf of the Union.

ARBITRATION AWARD

On March 17, 1997, Big Buck Building Center and Teamsters Local Union No. 43 jointly petitioned the Wisconsin Employment Relations Commission for a panel of arbitrators. On October 16, 1997, the parties notified the Commission that they had selected William C. Houlihan, a member of the Commission's staff, as arbitrator to hear and decide the captioned dispute. A hearing was conducted on January 14, 1998 in Racine, Wisconsin. The proceedings were not transcribed. Post-hearing briefs were submitted and exchanged by February 26, 1998.

This arbitration addresses the termination of employe R.J.

BACKGROUND AND FACTS

R.J. had been employed by Big Buck Building Center for approximately 19 years. At the time of his termination, he was employed as a Driver/Loader. During his tenure with the

Company, he had worked at other jobs including sales counter, outside work, estimater, and had helped with kitchens.

In October of 1993, the grievant was injured when shingles fell off a trailer and hit him in the back of the head. He suffered a series of work limitations that lasted at least through October of 1995. It was his testimony that some of his injuries and corresponding work restrictions from those injuries were permanent.

In February, 1996, the grievant developed serious back problems which he believed to be a consequence of his truck driving. Though there is no dispute that the grievant was injured, the worker's compensation insurance carrier and grievant have disputed whether or not the injuries were work-related. It was the grievant's testimony, confirmed by letter, that on February 7, 1996 his back became sore while he was driving a straight truck to Union Grove, Wisconsin. The next day, while driving, he felt a sharp pain in his lower back, radiating into his legs, such that he had difficulty lifting his left leg sufficiently to engage the clutch. He stopped, exited his truck due to the pain, and attempted to walk off his pain for approximately 15 to 20 minutes. He thereafter drove to the job site, despite the fact that he could not sit up straight in the seat. Upon his arrival at the job site, the grievant got out of the truck and could not stand up straight.

The grievant went to see a doctor and on September 10, 1996, provided the Company with the following note: "No driving truck. Return to work recommendations to be determined by Dr. Jayaprakash (attending physician)." During this period of disability, the Company had provided R.J. with work at a counter sales job, a light duty position.

On October 31, 1996, the grievant brought the following medical note from his attending physician: "Reassess. . .work-hardening today. Hold work till I can define permanent limitations." It was the testimony of Paul Miller, R.J.'s supervisor, that on October 31, the grievant was in the break room taking a break from his work at the counter. According to Miller, he came in to see how the grievant was doing. The grievant indicated, "I can't do this anymore." The grievant acknowledges making that comment, but he indicates that the context of his comment was that the doctor wanted him to hold off until a reevaluation, and that the parties would take it from there.

On November 6, 1996, the grievant brought an updated medical evaluation to the Company. That evaluation contained the following summary: "Client appeared limited in the majority of tasks due to an increase in low back pain. This was also found during the musculo-skeletal assessment as spasms were noted in the paraspinals. The following are recommendations based upon Mr. J's performance with the functional tasks.

Recommendations:

1. Limit carrying up to 40 pounds on an occasional basis, up to 20 pounds on a frequent basis, and up to 10 pounds on a continuous basis.

2. Limit lifting up to 50 pounds on an occasional basis, up to 25 pounds on a frequent basis, and up to 12.5 pounds on a continuous basis.

3. Limit pushing/pulling up to 40 hfp on an occasional basis, up to 20 hfp on a frequent basis, and up to 10 hfp on a continuous basis.

4. Limit sitting up to two hours at one time with a 10-15 minute break before resuming sitting.

5. No limitations with standing.

6. Limit forward bending to an occasional basis.

7. Limit walking up to 30 minutes at one time with no more than 4-5 hours per shift.

8. Client to continue with home exercise program (stretching and strengthening) as instructed in work-hardening program.

This letter, written by the grievant's therapists, had Dr. Jayaprakash's written concurrence which provided: "Will place him on permanent limitations with the functional capacity evaluation." This was the first indication the Company had that the injury/disability might be permanent.

On December 6, 1996, Paul Miller called the grievant to a meeting. At the time, the grievant had been on light duty for several months. The Company felt it had no work he could do. The Company's version of the December 6 conversation is reflected in its December 11 letter to the grievant. Excerpts of that letter include the following:

> "During our meeting on 12/6/96, we discussed the permanent physical limitations placed on you by Dr. Jayaprakash. In light of those limitations, I asked if there were any positions at Big Buck which you thought you could perform. You said that you did not really think so. On 12/2/96, Big Buck received a letter (which you said you had not seen) dated 11/27/96 from United Heartland Insurance Company indicating the medical opinion that the injury to

> your lower back was not work-related, but due to other factors. . . (Letter cites Article 31 of the contract).
>
> As a result of your permanent physical limitations (per Dr. Jayaprakash) and your inability to satisfactorily perform services required in your category of employment, under the current contract you shall no longer be an employe of Big Buck Building Centers, Inc. Your last day of work was October 30, 1996, and as we discussed under the provisions of family medical leave, your health insurance will continue. . ."

It was Miller's testimony that the grievant did not claim there were existing jobs which he could perform, nor did the grievant ask for a different job.

The grievant offers a different version of the December 12 exchange. It was his testimony that he was asked if he could drive a truck. To this question he replied "no". He was subsequently asked if he could drive a forklift, and replied that he could not drive one on gravel. He was asked if he could lift shingles and load customers, and replied that his new restriction was forty pounds. He then indicated that Miller asked "Is there anything out there you can do?", to which he then replied, "I don't think so." He testified that Miller then indicated, "I have no other option than to terminate you at Big Buck." The grievant indicated that he was shocked, and in response to Miller's offer of help including a letter of recommendation, replied that he ought just mail it to him and left. The context of the conversation, according to the grievant, related entirely to outside work.

It was the grievant's testimony that at some point he came into the store to see about a foreman who he heard had been hurt. While in the store, he saw Miller who indicated that he would rather the grievant not come around unless he was there to make a purchase.

A grievance was filed on January 2, 1997. The grievance seeks reinstatement and full back pay.

A grievance hearing was held on February 6, 1997. It was the testimony of Miller that during the course of that hearing the Union abandoned that portion of its grievance that alleged unjust termination, and which sought reinstatement. The Union official present at that meeting, Ray DeHahn, is no longer with the Union, and did not testify. Mr. J., the grievant, was physically present and denies that any part of the grievance was withdrawn. On February 10, 1997, Miller sent DeHahn, then-Teamsters Local 43 president, a letter which included the following:

"In response to grievance hearing for R.J., February 6, 1997:

1. Per our discussion at the hearing the issues as identified in the grievance (attached) filed January 2, 1997, have been withdrawn by the Union and are not contested.

2. I now understand that what you would like to accomplish for R. is that he remain on the Union seniority list for a period of 24 months under Article 31. If an employe becomes permanently disabled (so that he cannot satisfactorily perform services required of his category of employment) or disabled for 24 months or more, he shall no longer be an employe hereunder.'. . ."

On January 31, 1997, the grievant filed a claim for worker's compensation alleging, among other things, a minimum of five percent permanent partial disability, and "temporary total disability for February 7 – August 1, 1996 and November 1, 1996 and continuing."

Subsequent to the grievant's discharge, the Company filled a number of vacant positions. Evidence conflicts as to whether he was capable of performing those positions. There is also a question as to whether certain positions are in the bargaining unit. The most notable of the positions is a counter position that the Company advertised in the newspaper. Miller testified that the position is not in the bargaining unit. J. testified that he believed he could do the job, that he believed he had a good rapport with contractors, and a good knowledge of building materials.

ISSUES

The parties were unable to stipulate the issue to be decided, and advanced the following. The Union believes the issues to be:

1. Is the discharge of the grievant justifiable?

2. If so, was the Employer still required to place the grievant into any other vacancy, then available, or which later opened up?

The Employer advances the following three issues:

1. Is the issue of whether the Employer violated the collective bargaining agreement when it terminated the grievant's employment before this arbitrator?

2. If the arbitrator determines the issue of whether the Employer violated the agreement in terminating the grievant's employment is before him, did the Employer violate the terms of the agreement?

3. Under the circumstances of his termination, was the grievant entitled to remain on the Employer's seniority list for 24 months after his discharge pursuant to Article 17 of the agreement?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 4. JURISDICTION

It is agreed between the parties hereto that the terms and conditions of this Agreement shall apply to all yard salesmen, truck drivers, helpers, yardmen and warehousemen in the employ of the Employers whose place of business is situated in Racine & Kenosha Counties, and provided further. . .

. . .

ARTICLE 10. SCALE OF WAGES

The Employer agrees that he will pay the following minimum scale of wages for regular yard salesmen, truck drivers, helpers, yardmen and warehousemen:

. . .

ARTICLE 15. MAINTENANCE OF STANDARDS

The Employer agrees that all conditions of employment relating to wages, overtime differentials and working conditions shall be maintained at not less than the minimum standards in effect at the time of the signing of the Agreement, and the conditions of employment shall be improved whenever specific provisions for improvement are made elsewhere in this Agreement.

ARTICLE 17. QUITS, DISMISSAL AND LAY-OFFS

It is hereby agreed between the parties that the last employee laid off by any of the Employers may be rehired on a part-time basis at full Union scale pay upon mutual consent of the Employer, employee and Union. If a full-time employee is laid off, and offered part-time employment under Article 22, he may choose to

reject such part-time employment without losing seniority rights. His status on the seniority list shall continue in effect for two (2) years from the lay-off date. It is agreed that the Employer will notify the Union of all contemplated discharge of employees at least forty-eight (48) hours before the discharge occurs, provided, however, that discharge for proven dishonesty or intoxication by alcohol, drugs or other substances shall not require the forty-eight (48) hours' notice.

Employees under Article 22 are not subject to the provisions of this contract with respect to notice. A separate seniority list for part-time employees, however, shall be maintained. If an employee quits, he shall be immediately removed from the seniority list.

ARTICLE 22. OUTSIDE TRUCKS, CASUAL EMPLOYEES, SEASONAL NON-DRIVER HELPERS, YARD SALESMEN

(A) The Employer agrees that drivers of all hired or outside trucks shall receive the same rate of pay and will be under the same working conditions as the Company's regular drivers. All regular Company drivers must be working before any hired truckers shall be used by the Employer.

(B) Incidental or casual employee limited to yard work only may be employed for purpose of loading or unloading incoming merchandise from box cars or trucks to designated storage facility during peak periods. This may be done while all regular employees are engaged in regular employment and shall not be used to displace any regular part-time employee presently employed or laid off. The pay for the incidental or casual employee shall be as agreed by and between the Employer and said employee.

(C) Employers may hire seasonal non-driver employees during summer and peak periods. Such employees shall not become a seniority employee where the Union has been notified of such employment. No seasonal employee may be hired if regular employees are available for work and not working. Seasonal employees are not eligible for any benefits. A seasonal employee may be engaged for no more than one hundred eighty (180) work days in any calendar year. The pay for such seasonal employees shall be as agreed by and between the Employer and said employee.

(D) Employer may employ part-time sales employees for the purpose of servicing customers. Part-time employees shall make no deliveries or use power equipment except to make cuts or more material for delivery. No part-time

employees may work if full-time regular employees are laid off except as provided in Article 17.

(E) Part-time employees covered in (D) above hired after July 1, 1993, shall be paid minimum of the Federal minimum wage rate. All employees covered by Article 22 are subject to discretionary discharge which may not be discriminatory.

ARTICLE 28. ARBITRATION

Should any controversy arise between the parties hereto governing the interpretation of this Agreement, or any part thereof, which cannot be settled to the satisfaction of both parties, then such controversy shall be referred to a new Joint Union-Company grievance committee; two from the Union and two for the Company, with Union and Company as co-chairmen. Majority decision to be final and binding. If no majority decision, then arbitration within ten days. When appealed to arbitration, the parties jointly notify the arbitrator from the Wisconsin Employment Relations Commission.

During such time as the matter is pending, there shall be no strike or lockout. The decision of a majority of members of such arbitration committee shall be binding upon both parties to the dispute.

The Employer agrees that should the arbitration committee decide that a discharge or lay off is unjustifiable, the affected employee shall be reinstated with full back pay.

It is further agreed between the parties hereto that the matter of membership in the Union shall in no case be subject to arbitration.

The filing fee required by the Wisconsin Employment Relations Commission for arbitration shall be split equally between the Union and the Employer.

ARTICLE 31. RETIREMENT

An employee may continue his employment under this Agreement as long as he is both physically and mentally able to satisfactorily perform the services required in his category of employment under this Agreement for the normal operation of the business. If an employee becomes permanently disabled (so that he cannot satisfactorily perform services required in his category of

employment), or disabled for 24 months or more, he shall no longer be an employee hereunder.

POSITIONS OF THE PARTIES

The Company recites the facts underlying this dispute, including testimony and evidence that the Union withdrew the unjust termination and request for reinstatement portions of the grievance during the February 6, 1997 joint committee meeting. The Company contends the only issue remaining is whether the grievant is entitled to remain on the seniority list for 24 months under Article 17. The Company further notes that on February 16, 1997, the Company advertised for an inside sales counter position to which the grievant had been assigned at the time asserting that he could no longer continue to perform that work. The Company notes that the grievant did not apply for the position nor did he request reinstatement.

The Company argues that the issue of whether it properly discharged the grievant is not before the arbitrator since it was withdrawn by the Union and the joint committee agreed to the withdrawal. Article 28 of the Agreement states that any resolution reached by a majority of the joint committee is binding. No step was ever taken to give new life to these issues following the committee decision. Therefore, argues the Company, the arbitrator is not free to override that decision and decide issues not before him.

The Company contends that should I determine that the issue of whether the Company violated the Agreement when it terminated the grievant is before me, I must find that the Agreement has not been violated. The Company points to Article 31 and contends that it is absolutely clear under that language, that the grievant was no longer employed under the Agreement pursuant to its stated terms when he advised the Company of his permanent disability disqualifying him for all work it had available under the Agreement. Relying upon the testimony of Miller, the Company contends that the grievant indicated there was no work that he could perform, and in fact the counter sales position was a light duty job that the grievant was unable to perform in October of 1996.

The Company notes that it accommodated each of the grievant's requests, including light duty assignment, since his initial injury in October of 1993. The restrictions disqualifying him for all available work came from his own treating physician, and not a Company-secured physician or outside third party evaluation.

The Company contends that the grievant is not subject to Article 17 of the Agreement at the time of his termination. The Company contends that Article 17 is applicable only to individuals subject to periodic layoff, and not to an individual who has been terminated.

The Union recites the facts underlying this dispute. It contends that Article 28 of the labor agreement requires that all discharges be justifiable. The Union refers to Articles 17 and 31, which entitle a disabled employe to retain their employe status for a period of 24 months.

The Union contends that the language of the Agreement entitles a disabled employe to retain his employe status for 24 months unless he is unable to satisfactorily perform services required in his "category of employment", and notes that the grievant held jobs ranging from counter person to estimator to warehouseman to driver. The Union notes that the Employer advertised for some of these same jobs within weeks of the time the grievant was terminated, and contends that the grievant's category of employment appeared to be wherever the Employer needed him. As an example, the Union notes that the grievant worked as a counter person. The Employer needed a counter person and the grievant should have been deemed available for a period of 24 months under either Article 31 or Article 17 and should have been recalled to work when the advertised vacancies were being filled.

The Union points to testimony relative to employe Bob Noll who it characterized as having been in a situation virtually identical to the grievant's and who was allowed to stay on the seniority list for 24 months. The Union points to Article 15 of the labor agreement and contends that the Maintenance of Standards clause requires that that working condition be maintained.

The Union contends that the grievant was capable of performing work that he had performed in the past. His only limitations were as to outside heavy labor or warehouse work.

DISCUSSION

The grievant was terminated on December 6, 1996, because the Company believed he was no longer capable of performing any work that it had available. The work limitations he experienced in December of 1996 arose from a back injury incurred on or about February 7, 1996. There was a dispute as to whether the injuries were compensable under worker's compensation. There was no dispute that the grievant was injured.

There is a factual dispute as to precisely what was said during the December 6 meeting. However, the meeting ended with the Company terminating the grievant. The Company confirmed its understanding of the content of that conversation in its December 11 letter where it indicated that it understood the grievant to say that he did not believe there were any positions he could perform. A grievance was filed, contesting the Employer's action. That grievance, while seeking reinstatement, does not claim that there is work that the grievant is capable of performing. There was no challenge, at least no written challenge, of the Company's December 11 version of its conversation with the grievant.

The grievant's January 31 worker's compensation claim contends an ongoing temporary total disability. The Company's February 16, 1997 posting of a counter position was not grieved. Under all the circumstances, I believe the Company was warranted in concluding that the grievant was unable to perform any work at its facility. The record does not support a finding that either the Union or the grievant did anything to meaningfully dispute the Company's view in that regard.

The Union contends that Article 28 establishes an unjustifiable standard against which an arbitrator can measure the Company's decision to terminate. I agree that such a standard exists. However, I credit the Company's testimony relative to the February 6, 1997 grievance meeting. I believe that meeting was the grievance committee meeting referred to by Article 28 of the labor agreement. Miller testified that the termination and/or reinstatement elements of the grievance were dropped. The grievant denies that. However, Miller sent DeHahn a detailed letter both indicating that to be the case, and going on at length to discuss and explore the consequences of leaving the grievant on the seniority list for a period of 24 months. That letter was never rebutted. I find it difficult to believe that the Union would not have made some response, had it come out of that meeting believing that the termination and/or reinstatement components of its grievance were still viable. The context in which this meeting occurred included the fact that the grievant was suffering disabilities arising from a year-old work-related incident, and had submitted a worker's compensation claim contending that there was ongoing temporary total disability.

Assuming the lack of response is explained by the turnover in Union leadership, and does not reflect agreement that the heart of the grievance was dropped, I believe the Employer's right to terminate the grievant is controlled by Article 31 of the Agreement. I do not believe that Article 17 applies in this dispute. I agree with the Company's analysis that the seniority list status of two years created by Article 17 is a benefit available to an employe who is laid off. That is not the fact in this dispute.

I do believe that Article 31 is applicable. That Article addresses the circumstances of an employe who is unable to perform his job. Article 31 assures continued employment for an employe physically and mentally able to satisfactorily perform the services required in his category of employment. The Union correctly notes that key to an analysis of this provision is a determination as to what constituted the grievant's category of employment. When he was injured, the grievant worked as a loader/driver. It was clear he was unable to perform such work. The Union claims that given his history of performing virtually every job in the operation, the grievant's category of employment should be considered "all jobs of the Employer" or at least all jobs which the grievant has previously performed. However, such a construction would render the words "category of employment" meaningless. I do not believe that the words ". . .his category of employment under this Agreement. . ." can be construed to mean any and all jobs of the Employer, or any and all jobs held by the grievant at any point

in time. Given its most expansive reading, the words are limited by the scope of the bargaining unit. Article 4 and Article 10 apply this agreement to ". . .all yard salesmen, truck drivers, helpers, yardmen and warehousemen in the employ of. . ." Miller testified that the indoor counter position is not a bargaining unit position. There is nothing in the record to suggest that the grievant is capable of performing any of the work described in the jurisdictional paragraph of the collective bargaining agreement.

Article 31 also refers to "disabled for 24 months or more." The sentence appears to terminate employe status after 24 months of disability. At the hearing (conducted 23 months after the February, 1996 onset of the disabling condition) there was no indication the grievant was capable of performing work described by Article 4.

I do not believe the Noll incident to be relevant to this proceeding. The record is unclear as to whether or not Mr. Noll was permanently or temporarily disabled. Similarly, other facts relative to Mr. Noll's condition were not made a part of this record. I am not prepared to conclude that the Maintenance of Standards clause makes this rather uncertain case dispositive of this dispute.

AWARD

The grievance is denied.

Dated at the City of Madison, Wisconsin this 2nd day of July, 1998.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

WCH/gjc
5701.WRD