BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DRIVERS, WAREHOUSE AND DAIRY EMPLOYEES, LOCAL 75

and

SUPERVALU, INC.

Case 7
No. 58553
A-5825

(Mark D. Athey Grievance)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Mr. Jonathan M. Conti,** on behalf of the Union.

Michael, Best and Freidrich, by **Mr. Jonathan O. Levine**, on behalf of the Company.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "Company", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Green Bay, Wisconsin, on April 19, 2000. The hearing was not transcribed and both parties presented oral arguments in lieu of filing briefs. Pursuant to their joint request, I there issued a bench decision which the Award augments.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUES

I have framed the issues as follows:

1. Is the grievance arbitrable?

2. If so, is the Company required to reimburse grievant Mark D. Athey for the $6,048 he must repay to the State of Wisconsin Division of Unemployment Insurance after Arbitrator William W. Petrie overturned grievant Athey's prior discharge and converted it to a two-week suspension and after Arbitrator Petrie then ruled that he was entitled to receive full back pay, less any interim earnings or unemployment compensation benefits he received after he was terminated.

BACKGROUND

The Company on May 18, 1997, terminated grievant Athey for allegedly engaging in horseplay (barking like a dog over the intercom system), and for insubordination (telling a supervisor he was a liar and poking him in the chest). Arbitrator Petrie on April 11, 1998, ruled that the Company lacked just cause to terminate Athey and converted his termination to a two-week suspension (Joint Exhibit 39). In doing so, he stated on p. 31 that Athey was to:

> "be retroactively reinstated to his prior position with full seniority and with back pay and benefits following the implementation of the above disciplinary suspensions, less interim earnings as defined and clarified in the accompanying decision. (Emphasis added).

Arbitrator Petrie earlier stated on p. 30 that the term "interim earnings" is intended "to refer to income which would not have been earned but for the disputed discharge, including any interim unemployment compensation." (Emphasis added). In issuing his decision, Arbitrator Petrie did not retain jurisdiction to resolve any questions arising over application of his Award.

The Company subsequently tried to have Arbitrator Petrie rule on several issues, but the Union objected to the Company's attempt to have Arbitrator Petrie reconsider the merits of his ruling and the Company's claim that Athey had not mitigated damages. Arbitrator Petrie by letters dated April 22, 1998, and May 7, 1998, informed the parties that since he did not retain jurisdiction, he could not under the doctrine of *functus officio* rule on any issues absent a joint agreement by the parties that he do so (Joint Exhibit 32).

Thereafter, the Company on July 22, 1998, issued Athey a backpay check in the amount of $13,412 which reflected a $6,048 deduction the Company had offset for the unemployment compensation benefits Athey had received. There was no indication by the Company at that time that it would not remit the $6,048 to the State of Wisconsin Division of Unemployment Insurance (herein "Division of Unemployment Insurance"), which learned in September, 1998, that Athey had been reinstated and that he had been awarded backpay. It therefore then demanded that Athey reimburse it for the $6,048 he had received in

unemployment compensation benefits. That marked the first time Athey was told he had to make such repayment. Athey disputed that he had to make payment, but the Division of Unemployment Insurance ruled on November 20, 1998, that he had to do so. It also ruled on December 28, 1998, that Athey's subsequent appeal was without merit and that Athey had to pay the money by January 11, 1999 (Joint Exhibit 40). Athey repaid $2,079 of this sum by forfeiting the unemployment compensation benefits that he was entitled to receive after he subsequently was laid off.

By letter dated January 5, 1999, Union Business Agent Danny L. McGowan for the first time informed Human Resources Manager Bernie McKinnon that the Company was required to reimburse the Division of Unemployment Insurance (Joint Exhibit 18). McKinnon by letter dated January 7, 1999, informed McGowan that the Company was not required to make that payment (Joint Exhibit 15). On January 7, 1999, Athey filed the instant grievance protesting the Company's refusal to reimburse him the $6,048 (Joint Exhibit 17). The Company denied the grievance and subsequently refused to proceed to arbitration on the grounds that the grievance was not procedurally or substantively arbitrable. The Union on May 11, 1999, filed a complaint in the United States District Court for the Eastern District of Wisconsin seeking to compel the Company to proceed to arbitration (Joint Exhibit 8). Finally, the parties in November-December, 1999, agreed to submit the grievance to arbitration (Joint Exhibit 2).

DISCUSSION

The first issue that must be resolved herein is whether there is merit to the Company's claim that the grievance was not timely filed under Article 14 of the contract, entitled "Grievance and Arbitration Procedure", which states in pertinent part:

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> In the event a dispute or grievance arises between the Company and an employee or the Union over the application of the terms of this Agreement, which cannot be resolved between the employee and the Supervisor, shall be a grievance, and to be timely, shall be submitted in writing by the aggrieved party within five (5) working days of the occurrence or five (5) working days of the aggrieved employee's knowledge of its occurrence. A grievance must be processed as defined herein, unless otherwise agreed to by the Employer and the Union.

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Time limits set forth above may be extended by mutual agreement. However, both parties hereto recognize the desirability of settling all grievances as expeditiously as possible and each agrees to cooperate to expedite all settlements, whether by arbitration or otherwise.

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Either party may decline to discuss any grievances unless the outlined procedure has been followed.

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The Company asserts that the grievance was untimely because Athey knew by September, 1998, that the Company had deducted $6,048 from his backpay check and that the Division of Unemployment Insurance then wanted him to pay that money back. The Company also argues that Athey's January 7, 1999, grievance was filed more than five days after the Division of Unemployment Insurance ruled on November 20, 1998, and December 28, 1998, that Athey had to repay $6,048.

It certainly is true that the Company deducted the $6,048 from the backpay check it issued Athey on July 22, 1998. However, the Division of Unemployment Insurance did not notify Athey that he was liable for that money until September, 1998, after he had received his backpay check from the Company. But, Athey was not required to make such repayment until after he appealed that initial determination. Hence, Athey was not legally obligated to repay that money until January 11, 1999, after his appeal had been dismissed.

Athey's January 7, 1999, grievance complains over that final determination by stating that the "Unemployment Compensation Division has decided that a total of $6,048 in U.C. benefits be repaid. . . I am requesting that Supervalu pay me the $6,048 back due to me." His grievance therefore was filed within five days before he was legally required to make such payment and was timely on that basis.

In addition, Union Business Agent McGowan's January 5, 1999, letter to Human Services Manager McKinnon put the Company on notice about this issue because it requested "that Supervalu pay Mr. Athey the $6,048 that has been determined as overpayment of U.C. benefits." The Company contends that McGowan's letter cannot be considered a grievance because grievances in the past have always been written on certain grievance forms and that

McGowan's letter can lead to confusion over whether such a letter by a Union official constitutes a formal grievance. Upon further reflection, I find there is some merit to this claim, which is why McGowan's letter may not constitute a formal grievance. Nevertheless, McGowan's letter marked the first time that the Union and/or grievant Athey ever specifically asked the Company to reimburse Athey and/or the Division of Unemployment Insurance the $6,048 that the Company originally deducted from Athey's backpay check. McKinnon thereafter informed McGowan by letter dated January 7, 1999, that the Company would not make that reimbursement. Hence, Athey's January 7, 1999, grievance was timely filed within five days of McKinnon's denial under this alternature theory of when the grievance was due.

The Company also asserts that the grievance is not substantively arbitrable because Athey's January 7, 1999, grievance does not allege any specific contract violation. That does not render his grievance unarbitrable, however, since it claims that the Company did not adhere to the terms of the Petrie Award which found that the Company had violated Article 4 of the contract when it improperly terminated him. Hence, the grievance in essence asserts that Athey's job rights under Article 4 were violated when the Company failed to restore him to the *status quo ante* ordered by Arbitrator Petrie. That is why the grievance is substantively arbitrable.

Turning now to the substantive merits of the grievance, it is clear that the proceeding before me should never have occurred, as the parties could have avoided the need for another arbitration if they only had asked Arbitrator Petrie in the prior arbitration proceeding to retain his jurisdiction to resolve any questions that might arise over application of his award. Such retention of jurisdiction does not run afoul of the *functus officio* doctrine because it does not go to the merits of the grievance, but rather only to remedial questions.

Professor John E. Dunsford makes this very point in his seminal article entitled "The Case For Retention Of Remedial Jurisdiction In Labor Arbitration Awards", *Georgia Law Review*, Vol. 31:201 (1996). There, he explains why arbitrators should retain jurisdiction in all cases and why it is proper –- indeed necessary – to do so by stating:

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> Too many contingencies surround the presentation of a case in arbitration for the parties to concentrate on the calculation of the exact amount in dispute, or to anticipate the pitfalls to be avoided in the implementation of a remedy. With its eyes focused on the merits of the case, each side tends to be blind to some of the collateral facts which might be relevant if an award were to go against them. Tactically, a party at the hearing may choose to downplay some

> of the remedial questions that could arise for fear of conveying to the arbitrator an expectation that the merits will go against it. For their part, arbitrators faced with a spotty record as far as remedial issues are concerned – gaps not recognized or appreciated until the finishing touches are being put on an award – may be forced to utilize generalizations in the awards in an effort to bridge the gap between a confident finding of a contract violation and a nervous apprehension of the impact of a remedy. Unfortunately, in litigation a phrase like "make-whole" may become prey to legal canons of interpretation which twist and devour the intended meaning. A phrase like "compensatory time," tossed around by the parties at the hearing with reassuring familiarity, turns out to have multiple meanings when embodied in a remedy. In short, words which seem perfectly intelligible to the arbitrator as they are carefully framed in an award become, under the critical and inspired scrutiny of an exigent advocate, a quagmire of uncertainty. Id., at pp. 221-222.

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Arbitrator Peter Seitz is quoted in the article for having pointed out:

> It is established and accepted beyond peradventure that the arbitrator can "fashion" a remedy; but at the hearing, not only the arbitrator but, also, the advocates haven't the foggiest notion of what difficulties and problems may be encountered and what prescribing a remedy, at hearing's end, may entail. Several days may be spent in the presentation of the substantive issue of whether, indeed, in fact and law, the contract provisions had been violated.
>
> Should the parties at the hearings address themselves to such matters as the calculation of damages or a canvass of all of the things necessary to make a damaged grievant whole (such as the ascertainment of relative seniority rights to a job, the completion of therapy for a disabled alcoholic or otherwise incapacitated employee, the exertion of efforts by the employer and the union to identify a substitute job in which a long-standing employee can function, etc.), several more days of hearing would be required. It is not the arbitrator but the *parties*, who, either expressly or implicitly, recognize the fact that this would be an utter waste of time because, if the award should sustain the employer's position, there would be no occasion at all to confront or deal with these matters. Id., at pp. 207-208.

Professor Dunsford explains:

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> Under those circumstances the parties, if they do not mutually agree to go back to the arbitrator, will be forced to resort to the courts, the very forum they initially sought to avoid when they agreed to arbitrate. Of course, the parties could (and normally will) agree to return the matter to the arbitrator, but by that time one of them may have perceived a tactical advantage in not cooperating in remanding the matter to the arbitrator, thus forcing the other to the expense of litigation. Furthermore, one side may have concluded that the arbitrator is obstinately wrong in the decision, making the prospect of a return visit to learn the details less than inviting. One court has noted the "danger of allowing a party to arbitration to play the litigation card only when things are going badly before the arbitrator." (Footnote citations omitted). Id., at p. 203.

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There is a particular need for arbitrators to retain jurisdiction in the geographic area covered by the United States Court of Appeals for the Seventh Circuit –- i.e., Wisconsin, Illinois, and Indiana -– as the Seventh Circuit ruled in AUTOMOBILE MECHANICS LOCAL 701 V. JOE MITCHELL BUICK, INC., 930 F.2d. 576 (7th Cir., 1991, *per curiam*), that the employer could not seek to offset either the grievants' alleged failure to mitigate damages or the amount of money the grievants received in unemployment compensation benefits because the arbitration award was silent on those questions. Professor Dunsford correctly points out:

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> If taken at face value, MITCHELL BUICK appears to stand for the proposition that when an arbitrator employs the make-whole remedy without elaboration, he or she will be taken to mean that no offsets are permitted in determining the amount of lost wages and benefits owed to the grievant. Such an approach would essentially be the opposite of what most arbitrators assume they are doing when they use the term to define the remedy for lost wages and benefits. (Footnote citations omitted). Id., at p. 214.

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Under MITCHELL BUICK, unwitting employers thus may be sandbagged if they are unable to offset unemployment compensation benefits or raise other legitimate mitigation issues if an arbitration award does not expressly refer to them and/or if an arbitrator does not retain jurisdiction to resolve such questions at the remedial stage of an arbitration proceeding.

Here, Arbitrator Petrie did refer to them when he ruled that Athey was to be made whole "less interim earnings as defined and clarified in the accompanying decision" which he earlier defined to include "any interim unemployment compensation." Petrie Award, at p. 31. Arbitrator Petrie therefore made it clear that while Athey was to be made whole for the entire period outside the two-week suspension that he imposed, he was not entitled to receive a windfall in the form of back pay and the unemployment compensation benefits he had earlier received. Hence, Athey under the Petrie Award was to suffer only one economic penalty: he would not be paid for the period of his two-week suspension.

By deducting the unemployment benefits from Athey's backpay check, and by then insisting that Athey reimburse the Division of Unemployment Insurance out of his own depleted pocket, the Company in effect is imposing an additional $6,048 penalty on Athey over and above the unpaid two week suspension ordered by Arbitrator Petrie. That, it cannot do.

To effectuate the terms of the Petrie Award, and in order bring this matter to a final resolution, I conclude that:

1. Athey on May 3, 2000, shall present the Company with a personal check made out in the amount of $3,969, payable to the Division of Unemployment Insurance or other appropriate legal entity, as that represents the amount of money he still owes the Division of Unemployment Insurance (the remaining $2,079 already has been repaid). The Company that same day then shall mail that check to the Division of Unemployment Insurance to guarantee payment.

2. The Company at that time shall immediately give Athey a check made out to him for $6,048 which represents his total repayment to the Division of Unemployment Insurance.

3. If Athey on May 3, 2000, does not present a check for $3,969, the Company will be relieved of any obligation to issue him the $6,048 check.

4. To resolve any questions that may arise over application of this Award, I shall retain my jurisdiction until at least May 10, 2000.

5. That because of the highly unique facts of this case, it shall not serve as a precedent in any other cases between the parties.

Based on the above, it is my

AWARD

1. That the grievance is arbitrable.

2. That the Company on May 3, 2000, is required to reimburse grievant Mark D. Athey $6,048 in the manner described above after he on May 3, 2000, presents the Company with a check for $3,969, which is to be made out to the Division of Unemployment Insurance or other appropriate legal entity and which is to be mailed that day.

3. That I shall retain my jurisdiction until at least May 10, 2000.

Dated at Madison, Wisconsin this 26th day of April, 2000.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

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