

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN FEDERATION OF TEACHERS

and

WISCONSIN INDIANHEAD TECHNICAL COLLEGE

Case 67
No. 60311
MA-11575

(John Syck Grievance)

Appearances:

Mr. William Kalin, WFT Staff Representative, on behalf of the Union.

Weld, Riley, Prens & Ricci, S.C., by **Mr. Christopher R. Bloom**, on behalf of the College.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "College", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Rice Lake, Wisconsin, on December 19, 2001. The hearing was not transcribed and the parties there agreed that I should retain jurisdiction if the grievance is sustained. The parties subsequently filed briefs that were received by January 28, 2002.

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

ISSUE

Did the College violate Article IV, Section T, of the contract when it determined that grievant John Syck was a probationary employee and when it laid him off in June, 2001, and, if so, what is the appropriate remedy?

BACKGROUND

Grievant Syck was hired as an Electronics/Computer Instructor at the College's Superior, Wisconsin, campus on December 22, 1996, and he began working in January, 1997. He served as a full-time instructor for five full semesters, or two and a half years, until June, 1999, when he was laid-off. (Joint Exhibit 1). He was hired again via a July 5, 2000, letter (Joint Exhibit 3) to replace retiring teacher Tim Beecher. The letter also stated: "Your seniority date is effective on the date that you sign your contract." Syck at that time never expressed any objection to having his seniority calculated in that fashion. Syck subsequently worked as the only Electronics instructor from August, 2000, to June, 2001, when he again was laid-off because his program was cancelled due to low student enrollment (Joint Exhibit 4).

Instructor Mark Kearns, who has served as the Union's chief negotiator in contract negotiations with the College, testified that the parties' 1991-1992 collective bargaining agreement stated that seniority had to be "continuous" and that the word "continuous" was subsequently deleted in the negotiations for the 1996-1998 contract (Union Exhibit 3), thereby enabling the College to eliminate a Supplemental Agreement covering certain employees. He said that the word "continuous" was dropped to accommodate the College's need to better integrate certain instructors into the College's curriculum, and that "both parties were aware of the ramifications. . ." of dropping the word "continuous". He added that the College every year sends out a seniority list to four campuses; that he assumes each campus receives the lists; that it is "difficult to have much oversight" over whether all four lists are correct; and that it is up to the Union's vice-presidents at each campus to make sure the lists are accurate.

On cross-examination, Kearns acknowledged that the parties in the 1996 negotiations never expressly addressed dropping the word "continuous" for the non-supplemental instructors and that the "predominant focus" and "major intent" were on the parties' then-Supplemental Agreement.

Grievant Syck testified that he at the beginning of the 2000-2001 school year saw the October, 2000, seniority roster for the Superior campus which stated that he had a seniority date of July 1, 2000 (Joint Exhibit 7); that, "I didn't feel I needed to do anything about it" because "I wasn't terribly concerned"; and that he does not recall whether he then discussed it with a Union representative. On cross-examination, he said he was well aware by February, 2001, that his teaching program could be eliminated.

Perry Palin, Vice-President of Human Resources, testified that Syck was considered to be a new teacher when he was rehired in August, 2000; that Syck's prior employment was not considered because of the one-year break in his service, which is why his prior 203 hours of

unused sick leave were “left behind” (College Exhibit 1); that the College in October, 2000, sent a seniority list to the Union stating that Syck had a seniority date of July 1, 2000; and that while the Union challenged some other seniority dates at other campuses, it never told the College that Syck’s seniority date was wrong. He also said that Syck was notified of his layoff via an April 19, 2001, letter (Joint Exhibit 4); that Article IV, Section T, of the contract only refers to non-probationary instructors; that Article IV, Section E, of the contract differentiates between teachers who were hired before 1998 and those hired after that; and that Union Representative William Kalin told him that Syck had completed his probationary period. Palin also said that Syck was not more carefully evaluated during the 2000-2001 school year because he was still on probation and that, “We would have been much more attentive. . .” if Syck had only one more semester to serve in his probationary period.

On cross-examination, Palin testified that he does not know what happened before 1996 relating to the need for continuous service and that the College is not claiming Syck is not a good employee.

Jann E. Brill, the Superior Campus Administrator, testified that because of declining student enrollment, “There is no electronics program in Superior.” She denied ever telling Syck that he was promised two years of employment when he was rehired in 2000.

On cross-examination, Brill testified that Syck is a “good teacher”; that when he was hired again for the 2000-2001 school year, “all intentions” were that the electronics program would continue; and that as a part-time employee that year, Syck did not receive any benefits. She also said that she does not know whether the College gained more flexibility when the word “continuous” was dropped from the contract in the 1996 negotiations.

POSITIONS OF THE PARTIES

The Union claims that the College violated Article IV, Section T, of the contract because the contract does not require continuous service for the purpose of accumulating seniority; because the parties in their 1996 contract negotiations dropped the word “continuous” as it related to seniority; and that the “list of reasons for nullifying the seniority date is specific and does not include layoffs.” The Union also argues that the District laid-off Syck in June, 1999, rather than non-renewing him under Sec. 118.22, Wis. Stats., and that the College’s repeated “hires” of Syck show that he was a good teacher. As a remedy, the Union requests that Syck be accorded “those rights that would normally have been offered to a non-probationary employee when he received his layoff notice. . .” at the end of the 2000-2001 school year.

The College contends that the “grievant was separated from employment during his probationary period”; that it relied upon the grievant’s August, 2000 “initial date of employment as stated in the seniority list”; that neither Syck nor the Union at the time ever questioned Syck’s July, 2000, seniority date; and that “The proper forum for this dispute is the bargaining table.”

DISCUSSION

This case largely turns on the application of Article II, Section E, entitled “Seniority”, which states in pertinent part:

1. Effective July 1, 1996, seniority shall commence with the date of signing of the initial full-time contract or the date of initial “full time” employment, whichever occurs first. Employees employed prior to July 1, 1996, shall maintain their prior seniority date. Any break in continuous service due to resignation, failure to return to work from approved leave of absence, failure to return after the recall period for layoff, or from extended disability beyond three (3) years nullifies the initial date of seniority. (Emphasis added).
2. A list shall be maintained by the administration showing the seniority of each member of the bargaining unit by campus. Such lists shall be made available to the Union before October 15 of each year. Four copies of such list shall be sent to the Union. When the list is submitted to the Union, it shall have 30 days for acceptance or rejection. The Board shall not be held liable for any error in seniority.

The Union correctly points out that seniority under this language can only be broken via “resignation, failure to return to work from approved leave of absence, failure to return after the recall period for layoff, or from extended disability. . .” Noticeably absent in this proviso is any reference to losing seniority because of layoff. Hence, it must be concluded that seniority is not lost when an employee is laid off.

Article IV, Section T, of the contract, entitled “Staff Reduction”, states in pertinent part:

1. Whenever it becomes necessary to decrease the number of employed teachers who have completed a probationary period by reason of a decrease in pupil population within a specific campus, or any other reason, employees shall be laid off in the inverse order of seniority by program (i.e., machine shop, accounting, etc.), or major instructional area, and by campus. Notice of such layoff shall be sent prior to the July 1 preceding the school year in question by registered mail, return receipt requested, to the last known address of the employee.

A teacher who has the least seniority in the program or in a major instructional area to be reduced may transfer to another program or major instructional area in which they are certified and there is a less senior employee in that program or instructional area.

Such teachers who have completed the probationary period shall be reinstated in that campus in inverse order of their being laid off, if qualified to fill the vacancies.

...

Under this language, it is necessary to determine whether Syck was a probationary employee at the time of his 2001 layoff. If he was, the College did not violate this proviso. If he was not, the College did violate it.

As related above, the District did not follow the non-renewal procedures of Sec. 118.22., Wis. Stats., when it laid him off in 1999. Hence, Syck was never non-renewed.

Because of his prior layoff, however, Syck did not have "continuous" seniority when he was rehired at the beginning of the 2000-2001 school year. Contracts before 1996 stated that an employee needed "continuous" service for purposes of layoff and recall. But, the word "continuous" was dropped in the 1996 negotiations for a successor contract, which is why Article IV, Section T, does not contain that term. While the parties disagree over exactly what was agreed to in the 1996 contract negotiations, it suffices to say here that the contract must be interpreted as written and that, as a result, the word "continuous" cannot be read into it.

Syck therefore should not have been treated as a new employee when he was recalled to work in July, 2000, but rather, as an employee who had been recalled from layoff.

No grievance was then filed, however, even though both Syck and the Union saw the College's October, 2000, seniority list for the Superior campus (Joint Exhibit 7) which stated that he had a seniority date of July 1, 2000. Syck also either knew or should have known that

he was returning to work as a new employee since he was not allowed to carry over the 203 hours of accumulated sick leave he had at the time of his initial layoff at the end of the 1999 school year. Syck also was told via Palin's July 5, 2000, letter: "Your seniority date is effective on the date that you sign your contract." (Joint Exhibit 3). That was the clearest possible notice that the College was treating Syck as a new employee.

This case thus boils down to who is to bear the burden of mistakenly treating Syck as a new employee at the start of the 2000-2001 school year. Ordinarily, it would be the College because it erred in claiming that Syck did not have "continuous" service for the purposes of seniority and lay-off. But, Syck perpetuated that error by not immediately grieving the College's actions. Had he done so, the College may have reconsidered its position. By not doing so, he led the College into believing that all was well and that he did not object to the July 1, 2000, seniority date assigned to him.

In balancing these competing interests, I find that the equities favor the College because it acted in good faith and because Syck did not immediately inform the College that it was acting at its peril by assigning him the July, 2000, seniority date. In such circumstances, Article II, Section E, 2, of the contract governs this dispute by stating: "The Board will not be held liable for any error in seniority" if the Union does not object to the seniority list within thirty days.

In light of the above, it is my

AWARD

1. The College did not violate Article IV, Section T, of the contract when it determined that grievant John Syck was a probationary employee when it laid him off in June, 2001.

2. That the grievance is therefore denied.

Dated at Madison, Wisconsin this 15th day of February, 2002.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

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