BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION NO. 579

and

GREEN COUNTY

Case 157
No. 63757
MA-12705

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by **Attorney Nathan D. Eisenberg**, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

Attorney William E. Morgan, Corporation Counsel, Green County, 1016 16th Avenue, Monroe, Wisconsin 53566, appearing on behalf of the County.

ARBITRATION AWARD

Pursuant to a request by Teamsters Local Union No. 579, herein "Union," and the subsequent concurrence by Green County, herein "County" or "Employer", the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on July 12, 2004, pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on September 2, 2004. The hearing was not transcribed. The parties completed their briefing schedule on October 22, 2004.

After considering the entire record, I issue the following decision and Award.

STIPULATED ISSUES

1. Did the County violate the terms of the collective bargaining agreement when it refused to extend benefits to the grievant, Jeff Moen, when he was laid off due to losing his Commercial Driver's License ("CDL")?

2. If so, what is the remedy?

DISCUSSION

The Grievant is an employee of the County Highway Department, working as a mechanic. In early October 2003, the Grievant was picked up by law enforcement personnel and charged with operating a motor vehicle while intoxicated. He returned to work and worked through approximately October 31, 2003, when he received an administrative suspension of his driving privileges, including his CDL. The maintenance of a CDL is a requirement of the Grievant's position. Consequently, the Grievant contacted Dallas Cecil, the County Highway Commissioner, and requested that he be placed on layoff status pursuant to Article 36, Section 2. The Grievant remained unavailable for work until February 25, 2004, when his driver's license was reinstated. The instant grievance was filed after the County determined that the Grievant was not eligible to accrue benefits while laid off pursuant to Article 4.

At issue is whether the County violated the terms of the collective bargaining agreement when it refused to extend benefits to the Grievant when he was laid off due to losing his CDL. The Union argues that the County violated the agreement by its actions while the County takes the opposite position.

The Union correctly points out the language of the contract is clear and unambiguous that employees who lose their CDL's are placed on layoff, and that employees placed on layoff accrue benefits. **Article 4 – Seniority** under **Layoff Procedures – Workforce Reductions** provides for "employees who are laid off, all benefits (except health insurance) will accrue as if the employee is at work for a period of up to sixty (60) days." It adds: at the end of the sixty (60) day period, if the employee has not returned to work, "the accrual of these benefits will be tolled." **Article 36 – Commercial Driver's License** states: "Employees that lose their CDL shall be placed on immediate lay-off if there is no vacant position in the bargaining unit which the employee is qualified to perform."

Arbitrators consistently and regularly hold that clear and unambiguous contract language must be strictly enforced. "[T]here is no more fundamental principle in arbitration than that which requires the plain meaning of clear and unambiguous contract language to be enforced and upheld." SEALY MATTRESS CO., 99 LA 1020, 1024 (Heakin, 1994). An

arbitrator cannot 'ignore clear-cut contractual language,' and 'may not legislate new language, since to do so would usurp the role of the labor organization and employer.' Elkouri and Elkouri, *How Arbitration Works*, (BNA, 5th Ed., 1997), p. 482 (citing Arbitrator Witney in CLEAN COVERALL SUPPLY CO., 47 LA 272, 277 (1966)).

The County argues, however, that Article 4 only applies to those situations involving an employer-driven layoff. The County cites bargaining history to support this contention.

Because the contract language is clear in this case, the Union opines that the County's reliance on extrinsic evidence in the form of bargaining history is inappropriate. This is the so-called "plain meaning rule," which states that if the words are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used. Elkouri and Elkouri, *How Arbitration Works*, (BNA, 6th Ed., 2003), p. 434. However, the "plain meaning rule," although still dominant, has been criticized in recent years. Elkouri and Elkouri, supra, p. 436. The *Restatement (Second) of Contracts*, although respecting the importance of the words chosen by the parties to express their agreement, puts the matter this way: "It is sometime said that extrinsic evidence cannot change the plain meaning of the writing, but meaning can almost never be plain except in a context. . . ." Elkouri and Elkouri, supra, p. 437. A contract is not what a third party – the arbitrator – thinks it is, but what the parties meant, and determining that might require going beyond the language of the contract. Alan Miles Ruben, editor-in-chief of Elkouri and Elkouri, supra, 173 LRR 342, 343 (2003)

Based on the foregoing, the Arbitrator finds it appropriate to examine bargaining history. Bargaining history, however, does not support the County's case.

Article 4 underwent significant reworking in the latest round of bargaining. The County contends that the reworking dealt solely and exclusively with the establishment of layoff procedures in situations where the employer, for its own reasons, required a workforce reduction. The County adds that to this end, in drafting the language, the parties agreed to enumerate several similar types of layoffs in which the workforce reduction procedures were to apply. They included "seasonal layoffs, layoffs within seniority groups, reductions in workforce, etc." Clearly, according to the County, the enumerated "layoffs" are those of a like type which are employer-generated and which benefit the employer in some way. County witness Dallas Cecil, who helped bargain this contract, testified in support of this interpretation of the bargain.

The Grievant, also a participant in the bargain, testified that the focus of bargaining was workforce reduction for any reason. He also indicated that the focus was to make the transition from working to layoff less problematic. The language agreed to by the parties supports his interpretation of Article 4. It states that "in laying off employees for any reason,

including seasonal layoffs, layoffs within seniority groups, reductions in workforces, etc., the inverted seniority system shall be used." (Emphasis added).

Consequently, application of the doctrine of Ejusdem Generis to an interpretation of Article 4 does not lead to the County's desired result of excluding layoffs pursuant to Article 36 from that section's requirements. Under the doctrine of Ejusdem Generis, a general word or phrase will be interpreted to include only those things of a same general type as those listed. County brief, page 4. Several similar types of layoffs in which the workforce reduction procedures are to apply are listed in Article 4. They include "seasonal layoffs, layoffs within seniority groups, reductions in workforce, etc." Standing alone, they support the County's interpretation of Article 4 as applying only to employer-generated layoffs. However, Article 4's layoff procedures apply when laying off employees for any reason. This is very broad language and when used prior to the listed types of layoffs prevents a narrow reading of the clause to apply only to the types of layoffs enumerated. Consequently, the parties own agreed upon language extends the application of the article beyond the listed examples of employer-generated layoffs.

It is true, as claimed by the County, that the bulk of the layoff procedures contained in Article 4 are inapplicable to the instant dispute. It is also true, as pointed out by the County, that allowing an employee who is absent from work due to his own actions to accrue benefits in the same manner as an employee who is laid off for economic reasons, and is allowed to accrue benefits to soften what is usually a traumatic time in an employee's career, does not seem equitable. However, as noted by the County, at no time during the discussions on the revisions to Article 4 was Article 36 mentioned. The language in Article 36, in fact, has remained unchanged since CDL's were originally required in approximately 1990. Presumably the parties were aware of all this when they bargained the changes in Article 4. They could have decided to exclude Article 36 layoffs from the coverage of Article 4. They failed to do so.

The County claims that there simply was never any intent on either party's part that Article 4, apply to Article 36. According to the County, it's like comparing apples and oranges; the two articles simply do not deal with the same or similar things.

In this regard, the County opines that it is clear on its face that Article 36 involves absences from work, which though confusingly called layoffs within the article, are employee-driven. The County explains: "That is to say they are not absences that the employer desires. They are absences generated, as in this case, by actions of the employee." The County notes that Cecil testified he did not even consider this absence from work a layoff and, in fact, told the Grievant that he was not permitted a layoff. The County also notes that it was the Grievant who pointed to the language in Article 36 as calling it a "layoff." In sum, it is the County's position that, irregardless of the verbiage used, what we are dealing with is an employee who is unavailable for work.

The language of Article 36 is very clear. It states that when a driver loses his license he "shall be placed on immediate layoff." The only qualification on this language is the availability of other work. The availability of other work for the Grievant is not at issue here. Cecil testified that there were no vacant positions that the Grievant could fill when he was laid off. Consequently, under the language of Article 36, the Grievant was placed on layoff when he lost his CDL due to an operating while intoxicated citation.

The parties used the term "layoff" in Article 36 to describe an employee's absence from work due to the loss of their CDL. If the parties had intended that the term "layoff" mean something different than how it is used in Article 4 they could have so provided. They chose not to. The Arbitrator is hesitant to read something into the agreement that the parties themselves did not put there.

Finally, the County argues that it would be unreasonable and unfair to permit the Union and, in particular, the Grievant, to benefit from the inclusion of language (Article 4) which he had a hand in drafting and negotiating, when at all times he understood there was no intent to include other sections of the contract thereunder. However, the County has not shown that there was any such intent. The matter was not even discussed during bargaining. Bargaining history is not indicative of parties' intent when the subject of the grievance was not discussed during negotiations. ASHLAND COUNTY BOARD OF MENTAL RETARDATION, 101 LA 302, 308 (Fullmer,1993)

Based on all of the above, the Arbitrator finds that the answer to the issue as stipulated to by the parties is YES, the County violated the terms of the collective bargaining agreement when it refused to extend benefits to the Grievant, Jeff Moen, when he was laid off due to losing his CDL.

In reaching the above conclusion, the Arbitrator is cognizant of the County's genuinely held belief that the Union has not dealt with this matter in good faith. The Grievant testified that the Union was prepared to address the issue of the interplay between Article 4 and 36 during the next negotiations. Since the current collective bargaining agreement expires on December 31, 2004, presumably the parties will be able to address the matter shortly in negotiations. That is the proper forum to resolve this dispute for the future.

In light of all of the foregoing, it is my

AWARD

The instant grievance is hereby sustained. The County is ordered to make the Grievant whole for benefits lost while he was on layoff as a result of the County's action. The Arbitrator will retain jurisdiction over the application of the remedy portion of this Award for at least sixty (60) days to resolve any dispute over remedy that may arise.

Dated at Madison, Wisconsin, this 11th day of January, 2005.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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