BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

EGGERS INDUSTRIES, INC.

and

UNION LOCAL 1349, AFFILIATED CARPENTERS INDUSTRIAL COUNCIL OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Case 69
No. 70755
A-6467

(Vacation Pay – Grievance No. 1112)

Appearances:

Jonathan O. Levine, Attorney at Law, Littler Mendelson, P.C., 111 East Kilbourn Avenue, Suite 1000, Milwaukee, Wisconsin 53202, appearing on behalf of Eggers Industries, Inc.

Sandra Graf Radtke, Attorney at Law, Gillick, Wicht, Gillick & Graf, 6300 West Bluemound Road, Milwaukee, Wisconsin 53213, appearing on behalf of Union Local 1349, Affiliated Carpenters Industrial Council of the United Brotherhood of Carpenters and Joiners of America.

ARBITRATION AWARD

Eggers Industries, Inc. (Company) and Union Local 1349, Affiliated Carpenters Industrial Council of the United Brotherhood of Carpenters and Joiners of America (Union) are parties to a collective bargaining agreement (Contract) providing for final and binding arbitration of grievances arising under the Contract. On May 6, 2011, the Union filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission (Commission) and requesting a panel of five Commission staff members and commissioners from which the Parties could select an arbitrator. The undersigned was selected. Hearing was held on the grievance on October 18, 2011 in Two Rivers, Wisconsin and was transcribed. The Parties submitted post-hearing written arguments in support of their positions, the last of which was received on March 26, 2012, closing the record in the matter.

Now, having considered the record as a whole, I make and issue the following award.

ISSUES

At the hearing, the Parties stipulated that I may frame the issues in the award. The Union proposed the issues as:

> Did the Company properly apply the collective bargaining agreement when it denied vacation pay to laid off employees who returned to work and otherwise treated them as new employees. If not, what is the appropriate remedy.

The Company proposed the issue as:

> Did the Company violate the collective bargaining agreement when it denied vacation to former west plant employees that were hired back after layoff from the west plant.

I frame the issues as follows:

> Did the Company violate the Contract by denying vacation to employees who were laid off from the West Plant and subsequently returned to work at the East Plant?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE I

Section 1.

The East Plant and West Plant Divisions of Eggers Industries, Inc., hereinafter called the "Company," recognizes Union Local 1349 affiliated with the Carpenters Industrial Council of the United Brotherhood of Carpenters and Joiners of America, as the bargaining agent for all production and maintenance employees of the Company, exclusive of executive, administrative, office and clerical workers and all supervisory employees with the authority to hire, discharge, discipline or effectively recommend changes in the status of employees.

. . .

ARTICLE V
Seniority

Section 1. New employees shall have no seniority until they have been in the continuous employ of the Company for five hundred (500) hours, after which such new employees' seniority shall be computed from the date of hiring. New employees shall be on probation for the five hundred (500) hour period and the Company shall have the right to lay them off or discharge them with or without cause.

Section 2.

. . .

Qualified employees laid off from either the East Plant Division or West Plant Division will be offered any job openings at the opposite plant before any new employees are hired. After five hundred (500) hours of employment at the opposite plant, the employee will receive full credit for all bargaining unit seniority.

. . .

Section 4. An employee shall not lose seniority rights.

. . .

(d) If the Company recalls the employee within 24-months of his/her last day of work.

. . .

ARTICLE VIII
Vacation and Paid Holidays

Section 1. The Company agrees to give vacations with pay to all employees who have been continuously in the employ of the Company for one year. The number of employees allowed to be off at any given time shall be determined by the Company.

The employee's anniversary date of employment will be used to determine time off in accordance with the following schedule and conditions:

1 year but less than 9 years.....4%
9 years but less than 15 years.....6%
15 years but less than 25 years.....8%
25 years but less than 30 years.....10%
30 years and over.....12%

Percent of previous calendar year's earnings not including overtime excess, but including holiday and vacation pay.

. . .

Section 2. The term continuous service when used in the agreement shall mean uninterrupted employment, except for accident, leave of absence or bona fide sickness, of [sic] special calculations of seniority provided in Article I, Section 6, B (5).

BACKGROUND

As will be discussed in greater detail below, this dispute arises from the Company's decision to deny vacation benefits to a group of employees who were laid off and subsequently recalled to work. Another grievance was litigated to arbitration regarding the Company's decision to deny the recalled employees holiday pay benefits. The Company argues that the arbitration award deciding the holiday grievance also resolves the issue presented in this grievance. To that end, the record in this matter was supplemented with the transcript and exhibits related to that award, issued by Arbitrator Raleigh Jones. *See* Eggers Industries, Inc., A-6469 (Jones, 2/15/12) (Holiday Award). In that award, Arbitrator Jones denied the grievance by concluding that laid off and recalled employees were not entitled to holiday pay until after they worked a 500 hour probationary period following their recall to work. Although the Company acknowledges that the Holiday Award dealt with contractual language defining eligibility for holiday pay and not vacation pay and that there are differences in the eligibility language between the two benefits, the Company contends that the Holiday Award deals with a "similar concept and bargaining history."

The Contract language defining eligibility for holiday pay that was at issue in the Holiday Award is found in Article VIII, Section 4 and provides that, in order to receive holiday pay, employees:

1. Must have passed his probationary period.

2. Must be regular (i.e. neither probationary nor temporary).

The Contract language defining eligibility for vacation pay that is at issue here is found in Article VIII, Section 1, and provides:

> The Company agrees to give vacations with pay to all employees who have been continuously in the employ of the Company for one year.

It is clear to me that the Parties adopted significantly different language defining the eligibility requirements for vacation and holiday pay. The central issue before Arbitrator Jones was whether the recalled employees must serve a 500 hour "probationary period" after they are recalled to work. The central issue before me is determining whether recalled employees were "continuously" employed for one year. I therefore conclude that the Holiday Award provides no guidance to interpreting the vacation pay eligibility language at issue here.

Factual Background

Although I decline to extend the rationale of the Holiday Award to the vacation pay issue presented here, I find that Arbitrator Jones statement of the background facts is largely the same as the statement of the background facts applicable here. For the sake of consistency, I will use the background as presented by Arbitrator Jones as follows:

> Prior to September, 2010, the Company operated two plants in Two Rivers, Wisconsin. They were known as the East Plant Division and the West Plant Division.
>
> While the two divisions were covered by a single labor agreement, the divisions were separate and distinct operations. Each division manufactured different products that involved different machines and processes and required different job skills. Additionally, each division had different production standards enforced by different managers and supervisors. Additionally, each division had different hours of work and labor grades.
>
> Because of these differences, and because the parties had agreed that movement by employees from one division to another could be disruptive, they had decided – via their contract language - to not make it easy for employees from one division to use their seniority to displace employees at the other division. The following shows this. Each division had separate seniority lists and were distinct units for purposes of seniority. Thus, cross-division bumping was prohibited. As an example, a long-term West Division employee facing layoff could not bump a junior East Division employee because West Division employees had no seniority rights at the East Division, and vice-versa. Additionally, employees were not permitted to bid on posted vacancies at the opposite division unless the Company was unable to fill the posting from within the division where the vacancy existed. When employees did move from one division to another, their moves were completely voluntary.
>
> In 2010, the Company decided to close the West Plant Division plant and lay off the employees who worked there. Before that happened though, the

parties engaged in effects bargaining. They had a bargaining session on August 9, 2010. In that meeting, the Union bargainers posed a variety of questions to Company bargainers about the impact of the West Plant Division closing. The next day, Company attorney Jonathan Levine sent Union Business Representative Greg Coenen an e-mail which contained the new positions the Company was creating at the East Plant Division and the wage rates that would be associated with those positions. Attached to that e-mail was a document the Company had prepared that purported to memorialize the questions which the Union had raised at the August 9 meeting and the responses which Company bargainers had given to them. That document provided in pertinent part:

> Q: When consolidating jobs into one department will total seniority of both plants be put together and given to the most senior in classification?
>
> A: Not sure what this question means regarding "given to the most senior in classification." East Plant employees would not be allowed to bid on the jobs being offered to West Plant employees. West Plant employees who accept job offers at the East Plant will need to pass the 500 hour probationary period in the contract before they have East Plant seniority. Once they pass their 500 hours, their East Plant seniority will be their total Eggers seniority.

Over the course of the next several days, Levine and Coenen exchanged several e-mails concerning the closing of the West Plant Division. In those e-mails, Coenen made various proposals regarding the rights the Union wanted West Plant Division employees to have if they were offered or recalled to jobs at the East Plant Division. In an e-mail on August 11, 2010, Coenen specifically proposed that the Company "Waive the 500 hour probationary period since the West and East plants are both learning new jobs." In that same e-mail, Coenen also proposed that West Plant Division employees be allowed to "bid on job openings immediately." The next day, Levine responded to Coenen's e-mail. In his response, Levine posed several questions to Coenen. One question was why did the Union want the Company to "waive the 500 hour probationary period." Coenen responded to that question by saying that the West Plant Division employees "fear that the Company is to bring them over to the East plant and say that they cannot do the job and lay them off and not recall them." Another question which Levine posed to Coenen in that same e-mail concerned the meaning of the Union's proposal for immediate job bidding rights. Specifically, Levine asked Coenen the following two questions:

> 3. When you say employees on layoff or transferred into the EP can bid on job openings immediately, what are you referring

> to? Are you referring to WP employees using their full seniority to bid against EP employees for openings?
>
> Coenen responded to Levine's question number 3 by saying: "3) yes, there would be no probationary period."
>
> The Company ultimately rejected all the Union's proposals.
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> On September 2, 2010, the Company closed the West Plant Division and laid off all the employees who worked there....
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> . . .
>
> Over time, the Company offered positions at the East Plant Division to laid off West Plant Division employees. Each time that happened (meaning each time a laid off West Plant Division employee accepted a recall to the East Plant Division), the Company notified the recalled employee that they were on probation for 500 hours. No grievances were filed challenging the Company's right to require those employees to pass another 500 hour probationary period.

At the time that the East Plant employees were laid off, the Company sent the laid off employees a "Notice of Separation" that informed them, among other things, that the Company considered the layoff "permanent," that their Company health, dental, life insurance, accidental death and dismemberment, and short term disability insurance policies were being cancelled, and that their accrued vacation balances would be paid out on their final paychecks. There is no dispute that the laid off employees received a payout of their accrued vacation balances shortly after they were laid off.

When the laid off East Plant employees were called to return to work at the West Plant, they were informed that they did not have paid vacation eligibility. The Union grieved the denial of paid vacation benefits to the recalled employees. That grievance was denied by the Company, resulting in these proceedings.

DISCUSSION

Before receiving paid vacation, Article VIII, Section 1 requires employees to "have been continuously in the employ of the Company for one year." Article VIII, Section 2 of the Contract defines "continuous service" to mean "uninterrupted employment, except for accident, leaves of absence or bona fide sickness, [or] special calculations of seniority provided in Article 1, Section 6, B(5)." Because I find that the layoff at issue interrupted the affected employees' employment with the Company and none of the listed exceptions apply, I conclude that the grievants are not entitled to vacation pay until after they attain one year of uninterrupted employment from the date they were recalled from layoff.

In Article VIII, Section 2, the Parties expressly defined that "continuous" employment means "uninterrupted employment" and provided four specific exceptions for when otherwise interrupted employment will be considered "continuous" for the purpose of vacation eligibility – accident, leave of absence or bona fide sickness, or special calculations of seniority provided in Article 1, Section 6, B(5).[1] Because the Parties did not include layoffs – in my view one of the more obvious examples of interrupted employment - as one of the exceptions, I conclude that it was their intent to consider layoff as an interruption to continuous employment.

The Union makes the argument that because laid off employees' seniority is protected for 24 months by Article V, Section 4(d), the laid off employees were continuously employed during the layoff period. In the absence of the specific exceptions listed in Article VIII, Section 2, such an argument might be persuasive. However, because the Parties chose to delineate the exceptions and did not include layoff as one of the exceptions, I must conclude that layoff is an interruption in employment.

I note that this conclusion does affect any seniority protections provided by Article V, Section 4 to the recalled employees. The "continuous service" language establishing eligibility for paid vacation that is at issue here is distinct from any seniority based language establishing the calculation for the amount of paid vacation an employee is entitled to after satisfying the eligibility period.

The Union also argues that requiring the recalled employees serve another eligibility period after their recall before becoming eligible for vacation benefits imposes a "probationary status" upon those employees. I do not view the one year continuous service requirement for paid vacation eligibility as a probationary period because those concepts are distinct within the Contract. Article V, Section 1 of the Contract provides a 500-hour probationary period during which new employees may be discharged without cause. In my view, the Article V probationary period is not relevant to the issue of vacation pay eligibility. The Contract does not tie vacation pay eligibility to probationary status. Therefore, I am unconvinced that the requirement that recalled employees must serve another "continuous" year of employment before becoming eligible for vacation "superimposes" a probationary status on the recalled employees.

The Union points to the fact that the Company carried forward certain employment data for laid off employees from those employees employment at the East Plant and applied that pre-layoff data to their employment at the West Plant after they were recalled. In the Union's view, this indicates that the Company treated recalled employees as continuously employed. I do not find this evidence persuasive when determining whether the recalled employees were "continuously" employed during the layoff period. The fact that the Company retained data related to a previous period of employment does not establish that the employees were continuously employed for one year for the purposes of vacation eligibility.

[1] There is no evidence or argument in the record that any of those exceptions apply here and I conclude that they do not apply.

The Union further argues that in previous layoff situations, the Company did not deny vacation benefits to recalled employees. The evidence on this fact consists of "Absence Detail Log" forms covering the period of January 1, 2010 through April 30, 2010 for 14 employees who were laid off for relatively short periods of time, at least when compared to the layoff at issue here, in early 2010. The logs show that 8 employees were laid off for varying lengths of time from January 2010 through February 2010 and were subsequently permitted to use paid vacation within one year of the layoff. Those situations are distinguishable from the circumstances in this matter because the layoffs at issue in those cases were of a short duration and there is no evidence that the Company paid out those employees' vacation pay balances or otherwise acted to sever the employment relationship during the layoff like it did with the employees at issue here.

I am also not convinced by the Union's argument that upholding the denial of vacation benefits at issue here represents a "absurd and harsh" interpretation of the contract. While I do not dispute that paid vacation benefits are "premium and precious," I am not convinced that requiring waiting periods for employee(*s)* to become eligible for such benefits, such as the one year period provided for in the Contract, is unusual or unreasonable. Accordingly, I also reject this contractual interpretation.

CONCLUSION

For the foregoing reasons, the grievance is denied.

Dated this 20th day of September, 2012.

Matthew Greer /s/
Matthew Greer, Arbitrator

MG/gjc
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