PERFECTION BAKERIES, INC. —

Decision of Arbitrator

In re PERFECTION BAKERIES, INC. [Saginaw, Michigan] and UBDW LOCAL 87, FMCS Case No. 97/05865, December 9, 1997

Arbitrator: Lamont E. Stallworth, selected by parties through procedures of the Federal Mediation and Conciliation Service

TERMINATION

1. Non-disciplinary severance ▸117.105 ▸118.655

Severance of employee was non-disciplinary termination, not discharge, and therefore was not subject to collective-bargaining contract provision requiring warning letter be sent to employee, where termination was not intended as discipline but rather was due to her inability to perform job because of shoulder injury.

DISABILITY

2. Shoulder injury — Inability to perform job ▸118.655

Termination of employee with shoulder injury did not violate either ADA or collective-bargaining contract, where injury only prevented her from performing one aspect of job, not broad range of jobs and she, therefore, was not protected by ADA.

Appearances: For the employer — Phillip Carson, attorney. For the union — Paul Purcell.

SHOULDER INJURY

Issues

STALLWORTH, Arbitrator: — The Parties submitted the following issues to the Arbitrator:

1. Whether the severance of employment is a termination or a discharge within Article 10 of the Contract.

2. Whether the Company failed to reasonably accommodate the Grievant's disability under the Contract, Article 2 non-discrimination clause and the Americans with Disabilities Act in terminating/discharging the Grievant from her employment with Perfection Bakeries. If so, what should the remedy be?

Relevant Contract Provisions

ARTICLE TWO
NON-DISCRIMINATION

The provisions of this Agreement shall be applied without regard to race, religion, color, age, sex, or national origin, or any Federal/State laws or directives. The use of the pronouns "he" and "she" and suffixes "men" or "women" shall not be interpreted to refer to members of either sex. It is further understood that the Union will cooperate with the employer's policy of nondiscrimination in all aspects of employment.

ARTICLE SIX
PART-TIME EMPLOYEES

Section 1. Part-time employees shall not establish full-time seniority until they acquire a regular full-time job. When part-time employees acquire a regular full-time job, they shall be established therein as a regular full-time employee.

Their seniority shall date from the date they become a regular full-time employee. Part-time employees will establish seniority in this particular part-time category.

Section 2. Part-time employees shall be defined as those employees who are hired directly or indirectly for he relief of regular full-time employees [sic] absences and/or vacation purposes.

ARTICLE TEN
DISCHARGE OF EMPLOYEES

Section 1. It is mutually agreed that the power of discharge and discipline lies with the Company, but it is agreed that this power is exercised with justice with regard for the reasonable rights of the employees.

Section 2. The Company agrees that no discharge will be made without appropriate notice, except as listed in Company work rules.

* * *

Section 4. Warning letters must be postmarked no later than five (5) working days following the employers [sic] knowledge of the violation, except in those cases where a letter of investigation was issued within such five (5) day period.

* * *

APPENDIX "A"
HOURLY RATES AND EFFECTIVE DATES

Job Classification	4/27/96
Mixer Operator	12.10
Oven Operator	12.00
Divider/Moulder	11.63
Pan Stacker/Unstkr	11.50
Bagger Operator	11.76
Checker/Loader	11.61
Packer	11.22
Receiving Clerk	11.36
Maintenance	14.17
Sanitor	10.40
Semi	12.60
Office	10.50
Break Relief Makeup	11.63
Break Relief Wrap	11.76
Lid Man	11.50

* * *

New employees shall receive ninety percent (90%) of the contract rate during their probationary period and one hundred percent (100%) of he contract rate after completing their probationary period.

Background

The instant grievance challenges the Company's severance of employ-

ment of a part-time employee who was unable to perform certain job duties because of a pre-existing shoulder injury. The Company produces baked goods, primarily bread and buns.

On May 1, 1996, the Grievant, M__ was hired at the Saginaw, Michigan production plant as one of several part-time vacation relief employees. Lee Sharich, Production Manager for the Plant, testified that the Company hires vacation relief employees in the spring for the purpose of covering absences of full-time employees. He further testified that all part-time employees are initially hired in the "packer" classification for purposes of determining their pay rate. Although demand slows for part-time employees in the fall, the Company does not lay off part-time employees, but assigns them to project work, such as painting, training, or intensive cleaning. Mr. Sharich testified that he trains all part-time employees in two to three different classifications, usually during the winter months. Many part-time vacation relief employees are eventually employed in regular full-time positions in the plant.

The Grievant has undergone surgery in the past to remove parts of her shoulder and, as a result, she cannot hold her arms extended above her head for long periods of time. The Grievant was examined by the Company physician as part of the hiring process, but her shoulder condition was never discussed or disclosed.

The Grievant testified that she was trained in several different jobs, including the jobs of bagger, bun sorting, (stacking four buns on top of each other before placing in packages), single slices (wrapping bread slices for hospitals), "catching" the line, and sanitor, which includes washing windows, emptying the dumpster, cleaning the plant, and taking down the machines. The Grievant further testified that she received some training as divider/moulder, pan stacker, and bagger/operator. The Grievant testified that the break-in period lasted only a few weeks. The Grievant stated that there are probably ten other jobs which she never performed because she was not assigned to this work. The Grievant testified that she could have performed these jobs.

Following the break-in period, the Grievant testified that her first regular job as sorting buns and wrapping bread slices. She did this work for approximately 7 to 8 weeks without any problem.

Central to the instant grievance is the job of "traying bread". Mr. Sharich testified that traying bread is one of three sub-categories of the "packer" position, the position in which all part-time employees are hired. The other two jobs of a packer are traying buns and packing buns. Mr. Sharich further testified that all three jobs are fundamental to the packer position and that all part-time employees are trained in these jobs.

The Grievant described the job of traying buns as moving wrapped packages of buns from a conveyor belt to a tray, then placing the trays on a rack. She testified that the bun trays do not have sides but slice in the rack on grooves. She further testified that the rack for buns did not extend above her head.

The Grievant described the job of traying bread as placing wrapped packages of bread on a tray. The bread trays have sides of four (4) to five inches high. The trays are placed on top of each other. She further testified that bread trays are heavier than bun tray and are stacked fifteen (15) high.

Mr. Sharich's description of traying differed from the Grievant's. He testified that buns and bread are placed on either "trays" or "baskets" depending on the order from the customer. He further testified that both trays and baskets must be placed on a rack that extends above the Grievant's head. He estimated that baskets reach a height of about six and one-half (6 1/2) feet, and that trays reach approximately six (6) feet. Mr. Sharich testified that traying bread is the same as traying buns, except that training bread is done on the night shift.

The Grievant testified that she performed three 10-hour shifts of traying buns without problems. Mr. Sharich confirmed that she performed this job without incident or complaint. In early July, she was first assigned to bread traying. This assignment was also the first time the Grievant was assigned to the night shift. The Grievant testified that after three hours of continuous traying, her arms were shaking because the top tray required her to extend her arms above her head. The Grievant told a supervisor that she could not continue to tray bread, but could do any other job. The supervisor told the Grievant he had no other work for her and sent her home.

The next day, the Grievant reported to work and asked Paul Schmidt, Plant Manager, whether she was fired. Mr. Schmidt told the Grievant no, that there were plenty of jobs she could do. The Grievant testified that Mr. Schmidt mentioned two other jobs, stacker and divider, that the Grievant could perform. She further testified that because Mr. Schmidt

said there were other jobs, there was no reason for her to ask for some accommodation for her inability to perform bread traying. Mr. Schmidt assigned the Grievant to sanitation.

A couple of weeks after the Grievant's transfer to sanitation, Mr. Schmidt asked the Grievant to provide a doctor's note stating her restrictions, because otherwise another supervisor could schedule the Grievant to tray bread. the Grievant provided Mr. Schmidt with a note from her doctor, dated July 30, 1996, which stated:

> Restrictions: M__ has had shoulder surgery and can only tray bread 3 hrs per shift. She is capable of doing any other job in plant.

The Grievant testified that the doctor wrote the note following the doctor's examination of the Grievant and review of the surgeon's records. The Grievant further testified that she described to the doctor the different jobs performed by part-time employees to enable the doctor to determine the Grievant's ability to perform other jobs.

The Grievant was never again asked to tray bread. Mr. Schmidt was transferred to another Company facility. The Grievant worked in the sanitation department for ten (10) to twelve weeks after her transfer. Mr. Sharich testified that the jobs of packer and sanitor are the two least desirable jobs in the plant.

When the Grievant reported to work on September 19, 1996, she was told to see Mr. Sharich. The Grievant was given a notice stating that she was discharged because there was "no suitable work available based on employee's restrictions of a part-time vacation relief employee". The Grievant testified that Mr. Sharich said it was not personal and that this had come from "higher up". Mr. Sharich, who had worked at the Company for twelve (12) years, testified that the Company had never kept a part-time employee who could not tray bread.

The Grievant received a letter at her home a few days later, dated August 18, 1996, which stated as follows:

> When you were hired at Perfection Bakeries as a vacation relief employee it was with the understanding that once trained, you would be able to perform any and all jobs in the bakery. Your disclosure to the Company at a late date (July 30, 1996) of previous shoulder surgery which restricts your ability to perform certain jobs puts the Company in a situation where it cannot guarantee you on a daily basis that you'll be assigned work within your restrictions. Nor can the Company combine your daily assignments to accommodate your restrictions.
>
> Due to the above reasons the Company must terminate your employment effective this date. We are sorry we must take this action, but had you been forthright with us in the hiring process we could have emphasized how vacation relief employees are utilized throughout the bakery.

A couple of weeks later, the Grievant received a copy of the same letter with the corrected date of September 18, 1996.

The Grievant was employed by the Company for a total of 20 weeks. On December 16, 1996, she filed a charge with the Michigan Department of Civil Rights alleging disability discrimination. That charge is still pending. At the hearing, the Grievant testified that some employees could not perform certain jobs because of a lack of coordination or hands that were too large, and that these employees were not scheduled for such jobs.

Mr. Sharich testified that from May through September, the plant produces two shifts of buns and one shift of bread, while from October through April the plant produces one shift of buns and two shifts of bread. Because bread packing is automated, the Company needs four (4) packers and six (6) trayers in the summer, and only two (2) packers and six (6) trayers in the winter. Mr. Sharich testified that he believed that a person with the Grievant's restrictions also could not perform the jobs of mixer/operator, pan stacker/unstacker, and checker/loader. It is undisputed that the Grievant was never trained in these positions, even before her shoulder condition became known. Mr. Sharich further testified that from October through December, 1996, part-time employees spent 32% of their total hours traying bread and buns, and 47% of their total hours performing the combined tasks of traying, mixer/operator, pan stacker/unstacker, and checker/loader.

Mr. Sharich testified that vacations of sanitation employees were scheduled from July 13 to September 19. There was no guarantee that a full-time sanitation employee would be off after September 19. He further testified that there are fifty-six (56) full-time employees who could be replaced with part-time vacation relief employees.

Mr. Sharich testified that there has been a situation where a part-time employee could not perform a job other than packer. Mr. Sharich further testified that he trained this employee during the fall and winter months to perform jobs in another classification the next year.

James Skurzewski, Vice President of Labor Relations for the Company, testified that he discussed the Grievant's situation with the Plant Manager in July and later with Mr. Sharich. He further testified that it was Company policy to require documentation of an

employee's physical restrictions. Mr. Skurzewski stated that once the Grievant said that she could not tray bread, she was placed in sanitation where there was a need for help. He further stated that the Company did not discuss accommodation at any point because the Grievant took herself out of consideration by submitting the doctor's slip. Mr. Skurzewski stated that the decision to terminate the Grievant's employment was made on September 18.

In response to a question by the Arbitrator, the Grievant sated that if the Company had provided her with a stool or platform to stand on, it might have allowed her to tray bread for a full shift.

The Parties were not able to resolve the instant dispute and the matter proceeded to arbitration. It is within this factual context that the instant dispute arises.

Position of the Union

The Union contends that the Company's failure to follow the procedural requirements for discharge when terminating the Grievant's employment violated Article 10 of the Contract. Article 10, Section 4 of the contract requires the Company to provide an employee with a warning letter of termination within five (5) days of the Company's knowledge of the employee's wrongful conduct. The Union argues that the Company's termination of the Grievant in September was based on an alleged wrongful act that occurred on July 13, 1996, which far exceeds the time set forth in the Contract. The Union avers that the Grievant's termination of employment should be considered a "discharge" under the terms of the Contract because she was employed by the Company for over five (5) months.

The Union further contends that the Grievant has a physical impairment under the terms of the Americans with Disability Act ("ADA"). The Union asserts that the Grievant's shoulder condition limits her in working, a major life activity, because she cannot perform extensive reaching actions in any job. the Union argues that this condition prevents the Grievant from performing the particular job of stacking racks of bread, but would also significantly restrict her ability to perform any job that required lifting and reaching at a height above her head.

The Union argues that the Company's failure to provide a simple accommodation, perhaps consisting of a single stepstool, to the Grievant to allow her to perform the job of bread traying violates the ADA and Article 2 of the Contract.

Position of the Company

The Company contends that the only Contract provision at issue in this case is Article 2, the Non-Discrimination Clause, and therefore the Company is not required to meet the standards for a wrongful discharge case. With regard to the merits of the Grievant's claim, the Company asserts that the Grievant is not a disabled individual within the meaning of the ADA. The Company argues that because the Grievant is unable to perform only one specific job within the Plant, that of traying bread, she does not meet the requirement found in the ADA and its regulations that a disabled individual's ability to work be *substantially limited* in a class of jobs or a broad range of jobs. See, e.g., *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723 [4 AD Cases 802] (5th Cir. 1995); *Dotson v. Electro-Wire Products, Inc.*, 890 F.Supp. 982 [4 AD Cases 1345] (D. Kan. 1995); *McKay v. Toyota Motor Manufacturing U.S.A., Inc.*, 110 F.3d 369 [6 AD Cases 933] (6th Cir. 1997); *MacDonald v. Delta Airline, Inc.*, 94 F.3d 1437 [5 AD Cases 1572] (10th Cir. 1996); *Wooten v. Farmland Foods*, 58 F.3d 382 [4 AD Cases 920] (8th Cir. 1995); *Bolton v. Scrivner, Inc.*, 36 F.3d 939 [3 AD Cases 1089] (10th Cir. 1994). The Company relies on the Grievant's own statement and her doctor's note that she is able to perform any job other than traying bread for more than three hours to support its contention that the Grievant is not substantially limited in a broad range of jobs. Therefore, the Company argues, the Grievant is neither "disabled" nor entitled to the protections of the ADA.

The Company further argues that even if the Grievant is found to be disabled, she has failed to show that she can perform the essential functions of the job with or without reasonable accommodation. The Company contends that vacation relief employees must perform all of the twelve (12) production jobs at the plant, and that the job of traying bread is a significant portion of a vacation relief employee's work. The Company relies on the testimony of its witness, Mr. Sharich, that an employee who could not tray bread could also not perform the jobs of mixer, pan stacker, and checker.

The Company asserts that, in total, these jobs are an essential function of the job of vacation relief employees, and that to accommodate the Grievant would impose an undue hardship on the Company. The Company contends that the Grievant bears the bur-

den of suggesting a reasonable accommodation to allow her to perform the position of vacation relief employee, and that she has failed to do so. Therefore, the Company argues, that the instant grievance should be dismissed.

Opinion

This case involves the employer's termination of an employee with a physical impairment in one arm, without any attempt by the employer to accommodate the employee's impairment. The Parties submitted the following issue(s) to the Arbitrator:

1. Whether the severance of employment is a termination or a discharge within Article 10 of the Contract.

2. Whether the Company failed to reasonably accommodate the Grievant's disability under the Contract, Article 2 non-discrimination clause and the Americans with Disabilities Act in terminating/discharging the Grievant from her employment with Perfection Bakeries. If so, what should the remedy be?

[1] The Arbitrator has carefully considered the facts, evidence and arguments presented by the Parties. The Arbitrator concludes that the severance of the Grievant's employment was a termination, not a discharge, under Article 10 of the Contract. The Arbitrator further concludes that the Grievant is not disabled under the terms and meaning of the Americans with Disabilities Act. Consequently, the instant grievance is denied. The Arbitrator's reasoning, findings, and conclusions are set forth below.

The preliminary issue to be addressed is whether the severance of the Grievant's employment should be considered a termination or a discharge. If found to be a discharge, the Company's actions would be subject to challenge as violating the procedural requirements of Article 10, Section 4.

The Undersigned Arbitrator concludes that the severance of employment is properly considered a non-disciplinary termination and therefore not subject to the provisions of Article 10, Section 4. There is no contention in this case that the Grievant's termination was intended to discipline or penalize the Grievant, or that the Grievant violated a Contract provision or Company rule. Rather, the facts consistently demonstrate that the Company's decision to let the Grievant go was based solely on the Grievant's inability to tray bread because of her shoulder condition. The Arbitrator notes that the Company's advocate implied that the Grievant's shoulder injury was a subterfuge to avoid working the night shift. The Arbitrator found no evidence for this claim and concludes that it was effectively refuted by the Grievant's credible testimony that she had worked years on the night shift for other employers and was willing to, and did, work the least desirable jobs at the Plant.

On the basis of such uncontroverted evidence, the Undersigned Arbitrator concludes that the severance of the Grievant's employment is a non-disciplinary termination based on the employee's disqualification for the position due to her physical impairment. For this reason, therefore, the provisions of Article 10, Section 4 of the Contract, which require the Company to postmark warning letters to employees within five (5) days "following the employers [sic] knowledge of the violation", do not apply. The plain language of the Contract makes this requirement inapplicable to a termination of employment that is not based on a violation. Therefore, the Union's argument that the termination is procedurally invalid must fail.

[2] The Union's primary allegation in the Company violated Article 2 of the Contract, which incorporates the ADA as well as other nondiscrimination laws, when it terminated the Grievant's employment because of her shoulder impairment without offering any type of accommodation to the Grievant. the ADA prohibits an employer from discriminating "against a qualified individual with a disability because of the disability of such individual". 42 U.S.C. Sec. 12112(a). To successfully demonstrate a violation of the ADA, the person seeking relief must establish (1) that she is a disabled person within the meaning of the Act, (2) that she is qualified to perform the essential functions of her job with or without reasonable accommodation, and (3) that she suffered an adverse employment decision because of her disability. See, e.g., *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369, 371 [6 AD Cases 933] (6th Cir. 1997).

The Arbitrator concludes, on the basis of federal opinions applying the ADA, that the Grievant is not disabled within the meaning of the Act. A majority of courts interpreting the Act, including the Sixth Circuit Court of Appeals, have strictly interpreted the Act's definition of disability not to include those physical or mental impairments that do not *substantially limit* a major life activity of the employee. *See McKay, supra; Williams v. Channel Master Satellite Systems, Inc.*, 101 F.3d 346 [6 AD Cases 131] (4th Cir. 1996); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723 [4 AD Cases 802] (5th Cir. 1995); *Robinson v. Global Marine Drilling Company*, 101 F.3d 35 [6 AD Cases 97] (5th Cir. 1996); *Bridges v. City of Bos-*

sier, 92 F.3d 329 [5 AD Cases 1509] (5th Cir. 1996); *Robinson v. Neodata Services, Inc.*, 94 F.3d 499 [5 AD Cases 1441] (8th Cir. 1996).

The ADA defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual". 42 U.S.C. Sec. 12102(2)(A). "Major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working". 29 C.F.R. Sec. 1630.2(i).

Where, as here, the injured party asserts that the only major life activity affected is "working", "[t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. Sec. 1630.2(j)(3)(i). The determination of whether an injured party is restricted from performing a "class of jobs" or "braod range of jobs in various classes" rest on

> the nature and severity of the impairment;
>
> the duration or expected duration of the impairment; and
>
> the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. Sec. 1630.2(j)(2). The determination may also include the following factors:

> The geographical area to which the individual has reasonable access;
>
> The job from which the individual has been disqualified because of the impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. Sec. 1630.2(j)(3)(ii).

The courts have narrowly applied these regulatory guidelines to conclude that an individual with a physical impairment that restricts that individual from performing only part of his or her job, or only a few jobs, is not disabled under the Act. In *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369 [6 AD Cases 933] (6th Cir. 1997), the Sixth Circuit held that an assembly-line employee's carpal tunnel syndrome, which prevented her from performing repetitive-motion factory work, did not "significantly restrict her ability to perform the class of jobs at issue", which it termed as "manufacturing jobs". Accordingly, the Sixth Circuit found that she was not disabled under the ADA. *Id.* at 373. In *Williams v. Channel Master Satellite Systems, Inc.*, the Fourth Circuit held as a matter of law that a plant worker's "twenty-five pound lifting limitation—particularly when compared to an average person's abilities—does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity". 101 F.3d 346, 349 [6 AD Cases 131] (4th Cir. 1996). The Eighth Circuit has found that a clerk whose injury prevented her from operating a machine at work, the primary function of her position, was not disable because this was not a significant restriction in "her ability to work". *Robinson v. Neodata Services, Inc.*, 94 F.3d 499 [5 AD Cases 1441] (8th Cir. 1996). In *Dutcher v. Ingalls Shipbuiding*, a welder was unable to climb to the welding location due to a pre-existing arm injury. The Fifth Circuit held that the welder was not disabled under the ADA, because she was unable to perform only the aspect of her job, that of climbing, but was not prevented from performing welding work in general. 53 F.3d 723 [4 AD Cases 802] (5th Cir. 1995). The Fifth Circuit has also expressly held that an individual who was disqualified from the positions of firefighter, emergency medical technician, and paramedic due to mild form of hemophilia was not disabled under the Act because these jobs were "merely a narrow range of jobs", not a broad range of jobs of various classes. *Bridges v. City of Bossier*, 92 F.3d 329, 334 [5 AD Cases 1509] (5th Cir. 1996). These cases are, for the most part, thoroughly reasoned and consistent with prior interpretations of the Rehabilitation Act of 1973, as was intended by the drafters of the ADA. ("Because the standards under both [the ADA and the Rehabilitation Act of 1973] are largely the same, cases construing one statute are instructive in construing the other", *Andrews v. State of Ohio*, 104 F.3d 803, 807 [6 AD Cases 322] (6th Cir. 1997)).

The testimony of the Grievant and the note containing her doctor's restriction show that the Grievant was restricted from performing only one aspect of her job duties, that of traying bread. Ironically, the Grievant's ability to show that she can successfully perform other numerous duties of her job undercuts her attempt to prove that she is disabled. Given the courts' narrow interpretation on this issue,

the Undersigned Arbitrator concludes that the Grievant's shoulder injury, resulting in an inability to tray bread, does not qualify as a disability under the ADA.

Furthermore, the Grievant provided no evidence that her shoulder injury substantially limited any other major life activity outside of working. (*See Dutcher v. Ingalls Shipbuilding*, 53 F.3d at 726 [4 AD Cases at 804-805], noting that the restriction of an individual's ability to perform heavy lifting and repetitive rotational movements is not a substantial limitation on major life activities other than working).

The Grievant bore the burden of showing that she is disabled under the ADA. This she failed to do. Therefore, the Undersigned Arbitrator must conclude that the instant grievance must be denied.

AWARD

The grievance is denied.

VAN AIR SYSTEMS —

Decision of Arbitrator

In re VAN AIR SYSTEMS, INC. and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT 83, LOCAL LODGE 83, FMCS Case No. 98/02537, June 16, 1998

Arbitrator: Jerry A. Fullmer

GRIEVANCES

1. Timeliness ▸93.4665 ▸116.1554 ▸116.2501

Union timely filed grievance challenging denial of vacation leave to employee, even though general manager told him, when he returned from injury leave, which was well before time grievance was filed, that he would have no vacation leave, where grievance was filed day employer sent him memorandum telling him it would not grant him vacation time, general manager statement of company's intentions could change, and grievant was given day of vacation leave before denial of second day.

VACATIONS

2. Injury leave ▸116.1554 ▸116.2501

Collective-bargaining contract, which indicated that vacations are "earned," was ambiguous as to whether employee off work on injury leave accrued vacation leave, since it is open to debate whether "earned" meant by working at job or whether "earned" meant by being carried on employer's rolls as employee and accruing continuous service in fiscal year.

3. Injury leave — Past practice ▸116.1554 ▸116.2501 ▸24.366

Employee, who was off work on injury leave for over year, was entitled to accrue vacation leave for that time, where past practice was that time spent out on industrial injury and/or sickness and accident claim was indistinguishable from time spent in active employment for purposes of time "earned" in given fiscal year, and that practice extended to leaves of over year under current collective-bargaining contract, one other employee had taken such leave, and two had been granted vacation leave during term of current contract.

Appearances: For the employer — Daniel M. Miller (MacDonald, Illig, Jones & Britton), attorney; Jeff Mace, general manager; Alice Jackson, operations manager. For the union — Roy J. Mueller, business manager; Ron Courtneau, former business manager; Tom Laskowski, Jim Szympruch, and Kirk King, shop stewards.

INJURY LEAVE

FULLMER, Arbitrator: — This case concerns the Grievant', Wes Yost, Jr.'s eligibility for one day of vacation on August 19, 1997.

I. Facts

A. Background Facts

The Company manufactures equipment facilitating the use of air in industrial applications. The Union represents a unit of some 31 production and maintenance employees including the Grievant.

The employees in the bargaining unit are provided with paid vacations according to provisions set out in Article 17 (quoted in large part below). In general, Article 17, Section 1 provides for a vacation year in which vacations are to be earned as July 1 to June 30 in a given year. Section 2 establishes a graduated scale of the number of days of paid vacation to which an employee is entitled based on his years of continuous service. Section 3 provides that the vacation period is the period July 1 to June 30 immediately following the period in which the vacations are earned.

The parties have customarily appended an Appendix 3 to their agreements in which it is indicated that: