

Beitner #10

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration Between:

EMPLOYER

-and

UNION, UNION

GR: Employee 1

Arbitrator: ELLIOT I. BEITNER

OPINION AND AWARD

An arbitration hearing was held in City A, Michigan on July 18, 1983 in accordance with the applicable provisions of the collective bargaining agreement in effect between the parties. Selection of the arbitrator was in accordance with the Memorandum of Understanding executed by the parties creating a closed arbitration panel. At the hearing opening statements were presented, testimony was given, and exhibits received in evidence. Both parties have filed post-hearing briefs which have been considered.

Issue:

Did the Employer violate the collective bargaining agreement laying off the Grievant?

Background:

EMPLOYEE 1, the Grievant, was laid off from his position as an Electrical Inspector in November of 1982 and continued employment in the lower position of Electrician I. He was told he was being laid off because of lack of work. The basic job

duty of an Electrical Inspector involves following up on permits. EMPLOYEE 1 was aware since beginning his duties as Electrical Inspector that some electrical inspection work was being performed by the Trench Inspector 1 employee. He was also aware that the Employer had lost revenues from the state. The parties stipulated that historically the Trench Inspector I position has included minor electrical inspecting and that the employee presently in that position continues to do such work.

In the 1978-79 period the Employer employed three Electrical Inspector 1 employees and one Electrical Inspector II. In the 1979-80 period there were 2,500 electrical permits issued generating \$34,000 in permit and licensing fees. In the 1980-81 period there were 2,160 permits issued generating approximately \$79,000; and in the 1981-82 period there were permits generating \$92,000 in fees. The permit and licensing fees go into the general fund, and the Employer attempts to recover approximately 75 percent of its costs for electrical inspectors by the permit fees.

PERSON 1, the Neighborhood Improvement Administrator, has worked for the Employer for fourteen years. He is responsible for preparing the budget for his department. He testified that in June of 1982 there was an interim budget review occasioned by the need to delete \$85-90,000 from his department. The Employer had been advised by the state that it was eliminating the fourth quarter payments to the Employer; in addition, a referendum vote was pending that would overturn a proposed Employer collection fee. The Employer correctly anticipated that the referendum would pass and that the Employer would lose the projected revenue from the collection fee.

PERSON 1 also testified that since the 1978-79 period electrical permits and all other permits have declined about 25 percent. In 1978-79 there were four inspectors who

had an average of about 7,500 'permits each, and he considered this fact in determining where he could cut \$85,000 from his budget. He stated that the wages, fringes, and overhead for each inspector position are calculated at approximately \$46,000. He determined that one Electrical Inspector position and one Heating Inspector position could be eliminated for a saving of some \$80,000 to \$84,000. His recommendation was adopted. He testified that the Trench Inspector has historically done minor electrical inspection, especially during the winter months. Since the filing of this grievance, PERSON 1 has afforded acting Electrical Inspector I status to the Trench Inspector when performing this work.

PERSON 2, a Employer Labor Relations Supervisor for the past three years, testified that in August of 1981 Person 3, an Equipment Operator II, filed a grievance because his position was eliminated and his job was filled by a Maintenance II employee on acting assignment. His grievance was denied by the Employer and not pursued to arbitration. PERSON 2 also testified that in the Employer's budget deliberations in October of 1982, the Employer Commission cut approximately \$1,966,000 from the general operating fund because of anticipated lost revenues. The actual lost revenue was \$1,000,000 from the state; the loss of the Employer collection fee of \$800,000; and a miscellaneous amount of \$112,000. He testified that in 1981-82 the Employer spent more money than it received. Its reserve at the beginning of that budget period was \$8,000,000, and today the balance is only about \$100,000.

Contract Provisions:

ARTICLE IV - MANAGEMENT RIGHTS

Section 1. Except as otherwise specifically provided in this Agreement, the Management of the Employer and the direction of the work force, including but

not limited to the right to hire, the right to discipline or discharge for proper cause, the right to decide job qualifications for hiring, the right to lay off for lack of work or funds, the right to abolish positions, the right to make rules and regulations governing conduct and safety, the right to determine schedules of work, together with the right to determine the methods, processes, and manner of performing work, are vested exclusively in Management. Management, in exercising these functions, will not discriminate against any employee because of his or her membership in the Union.

ARTICLE IX - GRIEVANCE PROCEDURE

Section 1 Grievance

- a. A grievance is any dispute, controversy or difference between (a) the parties, or (b) Management, and an employee or employees, on any issue with respect to, on account of, or concerning the meaning, interpretation or application of this Agreement or any terms or provisions thereof.
- b. A grievance shall refer to the specific provision or provisions of this Agreement alleged to have been violated. Any grievance not conforming to the provisions of this paragraph shall be denied. The grievant and/or the Union may amend a grievance at any step of the grievance procedure prior to advancement to arbitration by the deletion or addition of Articles of the Agreement as supported by evidence presented during the grievance procedure.

Section 3

Step 3.B. Arbitration

- c. The arbitration shall be conducted in accordance with the rules of the American Arbitration Association. The power of the arbitrator shall be limited to the interpretation and application of the express terms of this Agreement and he/she shall have no power to alter, add to, subtract from or otherwise modify the terms of this Agreement as written. His/ her decision or grievance within his/her jurisdiction shall be final and binding on the employee or employees involved, the Union, and Management.

ARTICLE XIII - LAYOFF AND RECALL

Section 1. Definition. Layoff shall mean the separation of employees from the active work force due to lack of work or funds or to abolition of positions because of changes in organization.

ARTICLE XL - ENTIRE AGREEMENT

Section 1. During negotiations, each party had the right to make proposals with respect to all bargaining matters. This sets forth the basic and full agreement between the parties. During its life, neither will require the other to engage in further collective bargaining as to any matter whether mentioned herein or not, except as such bargaining is provided for herein.

Union's Position:

It is the Union's position that management's right to lay off is restricted to lack of work or lack of funds or abolition of positions because of changes in organization. These situations did not in fact exist at the time of the lay off of the Grievant. The Union maintains that it is a basic tenet of the labor agreement to provide job security for covered employees and that management violated that intent by laying off the Electrical Inspector because there was neither a lack of funds nor a lack of work. The revenues received by the Employer from permits was \$77,785; in fact, the permit revenue has increased over the years. Some of the work previously performed by EMPLOYEE 1 was performed by the Trench Inspector employee, and other electrical inspection work was not completed.

It is inappropriate to base a layoff on the ratio of number of permits to number of inspectors in the 1978-79 period merely because that ratio was reduced in 1980, 1981, and 1982. There was no lack of funds, no lack of work, and no reorganization to justify the layoff; in addition, the Employer violated the contract by having the Trench Inspector perform the work of the laid-off Electrical Inspector.

The Grievant seeks reinstatement to his position as Electrical Inspector with back wages.

Employer's Position:

It is the Employer's position that it has not violated any provisions of the collective bargaining agreement. The management rights section grants it the right to manage the Employer except as otherwise specifically provided in the agreement. Furthermore, among the rights enumerated are the right to lay off for lack of work or funds, the right to abolish positions, and the right to determine the methods, processes, and manner of performing work. The Employer has established that a financial situation existed that required budget reductions. The Grievant's department was required to reduce its budget approximately \$85,000; this necessity was occasioned by facts beyond the Employer's control. Specifically, the Employer was advised that it was losing anticipated state revenues and was about to lose a tax collection fee which was facing a referendum of the voters. The Employer's financial problems paralleled those of the state and other communities, and reductions were obviously necessary. Under these facts the layoff of the Grievant did not violate the provisions of the collective bargaining agreement.

With regard to the propriety of the use of acting assignments when an employee is laid off, the Employer maintains that this issue was resolved in the Person 3 grievance. After Person 3 was laid off in July of 1981, the Employer began using active assignment status to get that work performed. A grievance filed by the Union was denied by the Employer, and the Union did not pursue the matter to arbitration. The contract provides that any grievance not advanced to the next step of the grievance procedure is considered settled on the basis of management's last reply. That grievance was filed and answered in August of 1981 prior to both the contract negotiations and the effective date of the

current agreement. Therefore, the Union was aware of the Employer's position at the time the contract was negotiated and had the opportunity to attempt to negotiate a prohibition against the use of acting assignments in such instances. It is impermissible to attempt to obtain in arbitration what the Union should have attempted to attain in the negotiating process.

The Employer points out that Union President PERSON 4 testified that the Person 3 grievance was not pursued further because it was considered part of a grievance that went to an arbitration hearing and was decided by Arbitrator David Grissom. Arbitrator Grissom decided that the Employer has the right to make layoffs. The Union then, the Employer asserts, intended the Person 3 grievance to be decided by Grissom's opinion, and that grievance was decided against the Union.

No provision of the contract prohibits acting assignments, and Article XL provides that the collective bargaining agreement is the entire agreement of the parties. It would violate the grievance provisions of the contract for an arbitrator to add to or amend the agreement by interpreting the contract to mean that acting assignments cannot be used under layoff circumstances. The Employer requests that the grievance be denied.

Decision:

The Union has alleged that the Employer violated both the management rights provisions of the contract and the layoff and recall provisions. Article IV - Management Rights, Section 1, specifically grants the Employer the right to lay off employees because of lack of work or lack of funds and the right to abolish positions. It is undisputed that the Employer was faced with an unexpected decline in revenues: withdrawal of state funds for the fourth quarter of 1982 resulted in a one million dollar reduction, and the

Employer anticipated a loss in revenues to the Employer because a referendum vote was about to challenge the tax collection fee from which the Employer was to realize \$800,000. The Employer correctly anticipated that voters would support the referendum, and the \$800,000 reduction became a reality.

Based on the Employer's lost revenues, it was incumbent upon management to make budgetary reductions. The question of where these cuts would be made was a matter of judgment and discretion, a judgment to be made by management. The fact that approximately \$77,000 in revenues was realized from permits is irrelevant to the issue of whether management had the right to lay off an Electrical Inspector. Permit fees went into the general fund, and those fees would continue to be collected even if fewer employees performed the work of inspection. Deciding what positions were to be eliminated so as to bring the budget in line with revenues was an appropriate managerial function, and no showing has been made that management's action was in any way arbitrary or capricious. Management made a decision to lay off certain employees because of lack of funds, a right specifically given to management in Article IV, Section 1.

The Union has also alleged a violation of Article XIII, Section 1, which clause defines a layoff as "the separation of employees from the active work force due to lack of work or funds or to abolition of positions because of changes in organization." While no lack of work nor any reorganization took place, unrebutted testimony was given, as stated above, relating to the reduction in revenues and the requirement to reduce the budget correspondingly. This provision does not stand for the proposition that a shortage of funds must be shown in the revenues specifically produced by the department where a

layoff occurs. As stated previously, revenues collected go into the general fund; the \$77,000 collected in revenues from permits and licensing fees is not in any event sufficient to cover the full cost of the inspectors employed to do the necessary inspection work.

The language used in Article XIII, Section 1, to define a layoff does not mean that the Employer must show that a reduction in work has in fact taken place. The phraseology is in the disjunctive and states that a layoff is defined as "the separation of employees from the active work force due to lack of work or funds or to abolition of positions because of changes in organization." (Emphasis added.) Were the clause worded differently an argument might be made that any lack of work relates only to a comparison with an optimal period in 1978-79 rather than to any reduction in work that took place between 1981 and 1982. The language, however, is similar to that used in the management rights section of the contract which also allows for layoff based on lack of work or lack of funds.

Administrator PERSON 1 did state in his testimony that he considered the fact that permits have declined about 25 percent since 1978-79. He also took into account that the average number of permits per inspector was higher during that period. PERSON 1 was faced with making cuts and took this information into account in deciding that one Electrical Inspector position would be abolished to meet the necessities of the adjusted budget. His consideration of these facts does not show that any arbitrary or capricious action was taken by management; in fact, it was reasonable for him to include such statistics in his thinking and decision making. Had the layoff provision been worded to require both a lack of work and a lack of funds, the comparison with 1978-79 might have

made some difference. A lack of work might suggest that such a change in work load must have taken place during the year prior to the layoff. Both conditions do not have to be present, however, to justify making a layoff.

It is true that some of the Electrical Inspector's work is being performed by a Trench Inspector. Since the grievance was filed, the Employer has provided acting assignment status to the Trench Inspector while he is performing those duties. Nothing in the contract prohibits this type of acting assignment. The contract does call for specific pay changes for those working out of classification, and affording the Trench Inspector acting assignment status presumably has also brought with it the appropriate changes in pay. The contract defines such assignments in Article XIX, Section 2. as being "for a limited time to a classification as determined by the needs of the service."

It must be added that the contract is specific in defining a grievance as relating to "the meaning, interpretation or application of this Agreement or any terms or provisions thereof." Article IX further provides that it is incumbent upon the Union to recite the specific provision violated. Neither Article IV nor Article XIII, Section 1, the provisions cited by the Union, contains any prohibition against acting assignments. Furthermore, the evidence shows that a prior grievance (Grievance #XX Hi) was filed in 1981 contesting the assignment of some of the duties of a laid-off employee, Person 3, to another position and creating an active assignment. The Employer's denial of that grievance was not contested further by the Union and stands as a binding resolution of that particular grievance.

It is not clear that the resolution of the Person 3 grievance also stands for a binding precedent with regard to the arguments raised by the Union, but it is nevertheless

significant that during negotiations for the current contract the Union was aware of the Employer's position and the action taken by the Employer in denying the grievance. It was incumbent upon the Union to attempt to change that interpretation in the collective bargaining agreement that was being negotiated at the time. Expanding the contract is not an appropriate function of arbitration; rather, changes must occur through the process of negotiating an agreement.

No violation of the provisions cited by the Union has been shown, and it should be added finally that Article XI, entitled Entire Agreement, specifies that the collective bargaining agreement is the entire agreement of the parties. There has been no showing of a violation of any specific provision as a result of the Employer's use of acting assignment status to complete some of the work of the laid-off Electrical Inspector. For this reason the Union's arguments must be rejected and the grievance denied.

AWARD

No specific contract violation was shown to have occurred when the Employer laid off the Grievant, an Electrical Inspector, and chose to use acting assignment status as a means of accomplishing the completion of some of the work of the laid-off Grievant. The Grievant was actually continued in employment at a lower classification. His layoff was made because of a lack of funds in accordance with both the management rights and layoff provisions of the contract. The grievance is denied.

ELLIOT I. BEITNER

DATED: September 14, 1983