Beitner #3

VOLUNTARY LABOR ARBITRATION

IN THE ARBITRATION MATTER BETWEEN:

EMPLOYER

-and-

UNION

GR. ELLIOT I. BEITNER

OPINION

An arbitration hearing was held on March 3, 1998, at the Employer offices in Grand Rapids, Michigan. At the hearing, the parties had an opportunity to present sworn testimony, to cross-examine witnesses, and to offer documentary exhibits into evidence. The parties also filed post-hearing briefs that were received on April 9, 1998, at which time the hearing was declared closed.

BACKGROUND

The grievance claims that the Employer is violating Article II, Section 4(a) and the settlement of Grievance #00-00 by continuing to use temporary or seasonal employees in the Parks and Recreation Department Customer Service Office.

The Employer's Step 2 answer denies any contractual violation and asserts that the issue in Grievance #00-00 involved a specific temporary employee who had worked several years on essentially a full-time basis. The settlement of that grievance, the Employer asserts, did not prohibit the Employer from further use of temporary employees. The Employer's Step 2 answer

also contains a timeliness defense.

The settlement resolution of Grievance #34-95 reads:

> In order to provide resolution to the above referenced grievance matter the parties stipulate and mutually agree to the following:
>
> 1. The Director of Human Resources shall advise the Director of Parks and Recreation by memorandum that continued utilization of a part-time employee in her current capacity (making Special Events reservations) within the Parks and Recreation Department is in violation of the provisions of the Agreement between the Employer and the Union. The Director of Parks and Recreation shall be directed to establish a full- time position to perform the clerical support work for the Special Events Division if that work is to be continued.
>
> 2. If a full time position is not established through the budgetary process by July 1, 1996, it is understood that at the time the final decision is made (if prior to July 1, 1996) the work of making Special Events reservations shall be assigned to permanent staff within the Union bargaining unit. Utilization of part-time, seasonal or temporary employee in making Special Events reservations beyond July 1, 1996, shall be in compliance with Article II, Section 4(a) of the Agreement.
>
> 3. The above terms constitute full and complete settlement of all issues raised in this grievance matter.
>
> 4. The parties agree that the cancellation fee (if any) for the arbitration hearing scheduled before Mark J. Glazer through the American Arbitration Association for April 18, 1996, shall be equally split between the parties.

In compliance with the settlement, Person 1, Director of the Department of Parks and Recreation, made a budgetary request for an additional full- time person (OA II) but her request was denied.

Person 2, a 20-year Parks and Recreation employee is an OA II and has been working as an Acting OA IV since January 16, 1998, when the position became vacant due to the death of Person 3. Person 2 testified that an OA II answers telephone calls about department classes and programs and deals directly with the public at the cash register and at the counter in the office. She estimated that an OA II spends her work time as follows: Telephone, 55%; computer work,

30%; counter work, 15%. Person 2 stated that she requested and received a breakdown of calls received between February 1 and February 20, 1998, from the Employer's telephone communication office. There were 1,740 calls received by the office during this time period. She stated that at one time, only the police department received more phone calls than the Parks and Recreation office.

Person 2 testified that there are usually two or three part-time, non-bargaining unit aides working in the office. She estimated that 90% of an aide's time is spent doing bargaining unit work, and the other 10% is spent working as a program aide for the recreational supervisors.

Union Exhibit 20 lists the number of hours that temporary or seasonal employees worked from January 1996 through February 1998. It lists the total weekly hours that each of the office aides worked and also contains the total of hours worked by aides in each week. In 1996, for 18 weeks, the combined hours worked by aides was 35 or less. For 10 of those 18 weeks, the combined total was 30 hours or less. In 1997, for 12 weeks, the combined hours of work for aides was 35 hours or less.

Apparently, the hour totals in Union Exhibit 20 include the time that office aides were also working as program aides. It also includes the work hours of Person 5, who became a payroll aide in April 1997.

Person 4, Financial Assistant I in the Department of Parks and Recreation, testified that she prepared Employer Exhibit 24, which shows significantly less hours worked by seasonal employees performing bargaining unit work. Person 4 explained that Union Exhibit 20 showed a greater number of hours worked because she believed it included the time seasonals worked as program aides for supervisors, work that did not belong to the unit. Exhibit 20 also included the hours that Person 5 worked as a payroll aide, work, the Employer claims that does not belong to

the bargaining unit.

Person 4 testified that aides are supposed to record different codes for office aide work and for program aide work. She estimated that aides spent about 50% of their time working as program aides. She stated that Person 5 is the only aide that she observed personally because she assisted her as a payroll aide and worked in close proximity. She stated that when they were not real busy, Person 5 would work up front as an office aide. Person 4 stated that the hourly totals in Union Exhibit 20 are accurate but do not contain a breakdown between office aide and program aide work.

Person 4 testified that she assigns payroll work and that she was unaware that Person 2 or Person 6, the regular OA II employees, were inputting payroll or doing any payroll work.

Person 7, an Accountant I with the Department, testified that she had discussed budget requirements with Person 3, who worked as an OA IV until her death in January 1998. She said that Person 3 had told her that the department did not need another full-time office aide. She stated that Person 3 told her that the office is very busy at four times during the year, when the Employer sends out promotionals about classes and programs. Then there is a great need for seasonals to answer telephone inquiries.

Person 1 testified that the department has always employed temporary or seasonal employees in the office and that there is currently no budgeted OA II position that is not filled. She stated that an office aide works in the customer service center assisting full-time staff by answering the telephone, taking registration and performing other similar work.

Person 1 testified that program aides assist recreational supervisors by scheduling, contacting instructors, making sure evaluations are done, and using computers. Some seasonals work in the morning performing office aide duties and then work in the afternoon or evening as

program aides performing work for a supervisor. Person 1 stated that the seasonal employees listed in Union Exhibit #20 were utilized to perform work in both classifications--office aide and program aide. She said that the current budget was approved on the basis of Person 3's budgeting requests.

Person 1 said that office aides are required to fill out timesheets and are instructed to record the actual hours they worked as office aides and/or program aides by inputting the appropriate code. Part of the department's program is revenue driven. It is necessary for the department to have this information to determine the amount to charge its customers. She stated that the department allows FAX registrations and has installed a voice mail system. This has cut down the work of office aides.

In rebuttal, Person 6 testified that accepting registrations by FAX does not always make her job easier because follow-up work is frequently required. The restructuring of the OA IV position has created more work for OA IIs and she has not noticed a lessening of her work duties. Person 6 said that she did not believe the timesheets of aides accurately reflected the work they were doing and estimated that aides work 90% of their time in the front area performing bargaining unit work.

The grievance remained unresolved and was processed to this arbitration hearing.

RELEVANT CONTRACT PROVISIONS

ARTICLE II - UNION SECURITY AND CHECKOFF

Section 4.

a. Management agrees that it will not make a series of seasonal hires for the purpose of filling a permanent bargaining unit position provided for in the Employer Budget or for the purpose of avoiding the filling of a position on a permanent basis which would otherwise result in a position in the bargaining unit. It is expressly understood that nothing contained in this Agreement will limit the right of Management to hire seasonal employees nor limit the right of

Management to make seasonal hires to fill positions temporarily open as a result of leave of absence, sick leave, vacation, or similar reasons.

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 3.

* * *

Step 1.

The grievance must be presented within fifteen (15) working days after occurrence of the event giving rise to the grievance, not including the day of occurrence, provided the employee(s) had knowledge of the occurrence or reasonably should have had knowledge of the event. The time limits in effect under the procedure shall not begin while an employee is off work because of vacation, sick leave, Workers' Compensation, leave of absence or other good and sufficient reason.

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. Decisions on grievances within his/her jurisdiction shall be final and binding on the employee or employees involved, the Union, and Management.

d. The fee and expenses of the arbitrator shall be paid by the party which loses the appeal to arbitration except as the arbitrator directs otherwise.

> Each party shall fully bear its costs regarding witnesses and any other persons it requests to attend the arbitration.

DISCUSSION AND DECISION

The grievance presents several issues for resolution: First, whether the grievance is timely and may be heard on its merits. Second, if timely, whether the Employer has violated the settlement agreement between the parties. The third issue is whether the Employer has violated Article II, Section 4(a) of the labor agreement.

Initially, the Union viewed its complaints as related to Grievance #00-00 and informed the Employer that it intended to seek arbitration of that grievance. The Employer notified the Union that Grievance #00-00 was settled and could not be arbitrated. Labor Relations Specialist Person 8 testified convincingly that he talked to Union First Vice President Person 9 on October 23, 1997, and told him the Employer's position was that #00-00 was settled and could not be arbitrated. Person 8 instructed Person 9 that if the Union had new issues, it could file another grievance.

It is undisputed that the Union did not file a grievance within 15 days of that conversation. The fact that the parties had discussions about the issues after that conversation does not waive the requirement to file a grievance timely. Clearly, this grievance was not filed in accordance with the time limits set forth in the labor agreement.

It is well recognized, however, that some grievances are of a continuing nature and can be filed at any time. Arbitrator Nathan Lipson stated this arbitral concept:

> The prevailing view among arbitrators is that continuing violations of the agreement (as opposed to a single isolated and completed transaction) give rise to "continuing" grievances in the sense that the act complained of may be said to be repeated from day to day - each day there is a new "occurrence"; arbitrators have permitted the filing of such grievances at any time, this not being deemed a violation of the specific time limits stated in the agreement. (Person 5el Day School, 89 LA 905 (Lipson, 1987)

I hold here that this grievance is of a continuing nature and, therefore, it cannot be defeated on the basis of timeliness. Likewise, I find that the Employer's related argument that the grievance should be barred by laches is not persuasive. Laches is an equitable concept that was used by Courts of Equity in the absence of statutes of limitations to bar stale claims. The principle underlying the defense of laches is that it is unfair to make a party defend old and stale claims.

Here, there is no evidence that the Employer has been disadvantaged by allowing this grievance to proceed to arbitration. Exhibits and witnesses are still available. The only disadvantage that the Employer might face would be an award that grants a retroactive benefit. Most arbitrators, myself included, restrict monetary awards for continuing grievances to the time of the actual filing of the grievances.

I conclude that the grievance is timely and may be heard on its merits.

The next issue to be decided is whether the Employer's conduct violates the written settlement of Grievance #00-00. The settlement resolution was directed at resolving the claim that one seasonal employee, Person 10, had been working almost full time for two years performing bargaining unit work for the Special Events Division. The settlement required the Director to establish or seek to establish a full-time bargaining unit position to perform that clerical support work. The Director of Parks and Recreation requested a full-time position in the budgeting process but her request was denied. The settlement contemplated that a full-time position would not be established in the budgeting process. Paragraph 2 of that settlement states:

> If a full time position is not established through the budgetary process by July-1, 1996, it is understood that at the time the final decision is made (if prior to July 1, 1996) the work of making Special Events reservations shall be assigned to permanent staff within the Union bargaining unit. Utilization of part-time, seasonal or temporary employee in making Special Events reservations beyond July 1, 1996, shall be in compliance with Article II, Section 4(a) of the Agreement.

There has been no evidence that: "Utilization of part-time, seasonal or temporary employee in making Special Events .. .." has not been in compliance with Article II, Section 4(a). Furthermore, paragraph 3 of the settlement agreement states: "The above terms constitute full and complete settlement of all issues raised in this grievance matter." I conclude that the settlement agreement was directed at the work performed by Person 10 in making Special Events reservations and has not been violated.

The final issue to be decided is whether the Employer has violated Article II, Section 4(a). There is no claim that the Department used seasonal hires for the purpose of filling a permanent bargaining unit position. It is the second part of the first sentence of Article II, Section 4(a) that the Union alleges was violated: "or for the purpose of avoiding the filling of a position on a permanent basis that would otherwise result in a position in the bargaining unit."

In non-disciplinary arbitrations, unions generally have the burden of proof. Here, the Union must prove that the Employer violated the labor agreement. There is conflicting evidence about hours worked by seasonal aides in performing bargaining unit work. Union Exhibit 20 contains the hourly breakdown of work performed by aides but does not contain a breakdown of office aide work and program aide work. It is undisputed that program aide work is not bargaining unit work. Aides are instructed to accurately record their allocation of work time by recording the appropriate codes. No explanation was offered to suggest that aides would not comply with this instruction. Apparently, aides earn the same hourly wage when working in either capacity. Person 2's and Person 6's estimates that seasonal workers were performing bargaining unit work 90% of the time is not conclusive because of the breakdown contained in Exhibit #24. Person 2 and Person 6 were extremely busy performing their own duties and it is doubtful they could know the actual time breakdown of the work performed by aides. Certainly,

the best evidence would have been the testimony of the seasonal and temporary aides. They could have explained how they allocated their time and whether they correctly coded their time. The Union's assertion in its brief that the Employer should have called the seasonal employees as witnesses is not persuasive. It is the Union who has the burden of proof.

The hours listed on Union Exhibit #20 and City Exhibit #24 for work performed by Person 5 was work that she performed as a payroll aide. The evidence suggests that payroll work is not bargaining unit work. Person 4 testified that she assigns payroll work and that Person 5 performed payroll work while working in close proximity to her work area. She stated she was unaware of Person 6 or Person 2 performing payroll work and it was her responsibility to assign that work.

Person 2 testified that Person 5 performed bargaining unit work and then was assigned to do payroll work. She then stated: "We are doing payroll work," but did not explain what that work consists of, or who "we" is. No questions were asked to elicit who the "we" is and what the specific work is.

Person 6, in her rebuttal testimony, was not asked whether she performed payroll work. Therefore, the records suggest that payroll aide work is not bargaining unit work. It is not necessary', however, to decide whether payroll work is non bargaining unit work.

At issue is not whether the Department could benefit from another full-time aide. It probably could. At issue is whether the Union has met its burden of proving a contract violation. I conclude the Union has not proven the alleged violation. Even Union Exhibit #20 establishes that for a significant number of weeks in a year, the total amount of time worked by seasonal aides was 35 hours or less. This exhibit also shows that there were many weeks when more than one aide was working the same hours and days. This lends credence to the Employer's argument

that there are peak times when more "bodies" are needed.

In conclusion, the grievance is denied. The Union has failed to meet its burden of proving a violation of the grievance settlement or of the grievance. The denial of this grievance is not intended to preclude the Union from raising the issue in the future under different facts or with new evidence.

The labor agreement provides that the loser shall pay unless the arbitrator directs otherwise. Here, because the issue is of importance and reflects an ongoing legitimate concern of both parties, I conclude that it is fair and appropriate to split the arbitrator's bill between the parties.

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ELLIOT I. BEITNER, Arbitrator

Dated: May 11, 1998