Brocken #5

In the Matter of Arbitration Between:

EMPLOYER

AND

UNION

Arbitration Hearing: August 14, 1995

ARBITRATION DECISION

The undersigned Arbitrator was appointed by letter dated September 6, 1995 to arbitrate the grievance of the Employee. The Employee was separated from his employment as a Customer Service Agent for Employer on March 1, 1995 for failing to accept a light duty assignment thereby abandoning his job. A third step hearing was held May 19, 1995 on the grievance filed by the Employee. The hearing officer denied the grievance, and also held that the grievance filed was untimely, as it exceeded the ten day requirement stipulated in the Collective Bargaining Agreement. The Union appealed the Employer's finding to arbitration.

An arbitration hearing was held on August 14, 1995 at the Employer's offices.

BACKGROUND

The Employee was injured at work at the Employer's City 1 station in December 1993 while off loading pallets. Sometime in 1994, it was determined that the Employee was physically capable of light duty assignments. Since the Employer had established a light duty program, the Employee was offered a light duty assignment at the Employer's City 2

station until such time as he could return to full duty. The offer was made through the Employer's Vocational Rehabilitation Counselor on November 14, 1995.

On November 22, 1994, the Employee advised the Counselor that he did not want to accept the City 2 position as his wife gave birth to their first child on November 14, 1994, and he wanted to stay close to home until things were settled. According to the Counselor's report dated November 25, 1994, the Employee wanted to wait until something opened in City 3 or City 1. In the Counselor's report it was stated that the Employee stated that he had contacted his Union representative, and they advised him that he was not obligated to take a position anywhere other than his home station (City 1). Discussed was the fact that the employer had provided a good faith effort to provide him with alternate work until he is released to usual and customary job duties, as nothing has been identified and made available to him, either at his home station or at the City 3 station. He was also advised that he was under no obligation to take the position. However, since his employer had gone through the effort to provide him such, it should seriously be considered.

The Counselor also stated in her report that "we have discussed on numerous occasions all of the ramifications of a decision of this sort (i.e. the fact that it could affect his disability benefits, as well as future entitlement to vocational rehabilitation services). Although the Employee was offered a light duty assignment at the City 2 station in November, 1994, it was not until March 1995 that the Employee was notified by letter that because he had refused the assignment "it was deemed that you voluntarily abandoned your job. As such, your employment separation from Employer is effective March 1, 1995."

The Union appealed the discharge under the provisions of the Collective Bargaining Agreement, and a third step hearing was held May 19, 1995. The hearing officer denied the grievance, because the grievance was not filed within the required ten day period, and because the Employee refused to accept the City 2 assignment thereby abandoning his job.

The Union submitted the dispute to arbitration. At the hearing, it was established that the grievance was timely filed. Despite that, the Employer submitted that the Employee was properly terminated as admittedly he had refused the City 2 assignment.

ISSUES

1. Was the Employee terminated for just cause?

2. If not, what should be the remedy.

DISCUSSION

The evidence established that the grievance was submitted within ten working days as required by Article XV of the Collective Bargaining Agreement. As to the charge that the Employee had voluntarily abandoned his job, the relevant contract provisions are as follows:

> ARTICLE XV, BARGAINING AND GRIEVANCE PROCEDURE
>
> F. No employee covered by this Agreement shall be discharged or suspended without pay from service without a prompt, fair and impartial hearing . . .
>
> ARTICLE IX, SENIORITY
>
> F. An employee covered by this Agreement shall lose his seniority status and his name shall be removed from all seniority lists under the following conditions:
> 1. He quits or resigns.

3 He is absent from work for two consecutive work days without properly notifying the Employer, giving a satisfactory reason for his absence.

N. An employee injured on the job shall be put on work he can do, and paid at the rate he was receiving when injured; provided, however, that when he is physically able to perform his original job, as certified by his attending physician, he shall be so assigned.

ARTICLE X, VACANCIES

K. No employee will be compelled to accept any transfer against his wishes.

A witness for the Employer testified concerning the establishment of a light duty program to permit employees injured on the job to continue with limited work and to save the Employer Workers Compensation costs.

The Employer's workers' compensation carrier worked with a vocational rehabilitation consulting company to service such cases as the Employee's. It was the consulting service which dealt directly with the Employee, and offered him the City 2 light duty assignment which he refused in November 1994, because of family considerations. It was not until March 4, 1995, however, that the Employee was sent a letter advising him that he was terminated as of March 1, 1994 for abandoning his job. No hearing preceded the termination letter, nor was the Employee advised that refusal to accept the City 2 assignment would result in his termination.

On January 27, 1995, the Unemployment Insurance Division, advised the Employee that he was not entitled to benefits effective January 15, 1995 as he did not accept work, because of the birth of his child that week. On May 5, 1995, a similar decision was issued except the effective date of ineligibility was November 20, 1994. The Employee appealed, but the Department of Labor and Industrial Relations denied the appeal on the

basis that the Employee failed to show good cause for refusing an offer of suitable work at the Employer's City 2 station.

The Union correctly argued that the Department of Labor's decision could not be used to substantiate the Employer's termination decision. A different standard is used to determine the continuation of unemployment benefits and a decision to terminate. A refusal to accept an offer of suitable work under State law is a reason to stop unemployment benefits, but it is not necessarily a justification to terminate the Employee's employment if inconsistent with the Collective Bargaining Agreement. None of the witnesses at the arbitration hearing testified that the Employee was warned that he would be terminated if he refused the City 2 assignment. None of the letters and reports from the consulting service reflects that the Employee was warned of termination if he refused the offer they were conveying to him on behalf of the Employer. In fact, the November 25, 1994 letter report from the consulting service to the insurance carrier for the Employer states that "he was also advised that he was under no obligation to take the position, however, since his employer had gone through the effort to provide him such, it should seriously be considered." Finally, support for the Union's position came from the testimony of a witness from management who stated he knew about the Employer's light duty policy, but was unaware of any policy that an employee could be terminated for refusing a light duty offer.

It is evident from a review of the relevant provisions of the Collective Bargaining Agreement that termination for such a reason is not permissible when the employee has neither been advised of the consequences of his refusal nor been provided a hearing prior to dismissal under the circumstances of this case. The burden of proof in a discharge case

is on the employer. In this instance, that burden has not been met because of the reasons stated above and the ambiguity of the relevant Agreement provisions.

While the Employee's discharge is set-aside, he is not entitled to back pay as his damages in this regard were the result of a choice he made. The Employee elected to stay at home, because of the birth of his child rather than accept an offer of employment. While such a choice is not unreasonable, it is not the responsibility of the employer to compensate the Employee for making that election.

AWARD

1. As to the termination of the Employee, the grievance is sustained.

2. Except for the disallowance of back-pay compensation, the Employee is awarded the seniority due him from the date of his discharge to the date of reinstatement.