Horowitz #2

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

This arbitration arises pursuant to the 1994-2000 Mechanics' Agreement ("Agreement") between the Employer and the Union. The parties concur the grievance in question has been processed pursuant to the provisions of Article XVIII of the Agreement and the matter is properly in arbitration before the System Board of Adjustment.

MATTERS AT ISSUE

The parties stipulated the grievance of the Employee presents the following issues to be decided in this arbitration:

1. Did the Employer violate Article X, Paragraph L. and Article XV, Paragraph D. of the Agreement when it separated the Employee from Extended Illness Status?

2. If so, what shall be the remedy?

BACKGROUND

The Employee was hired by the Employer on September 4, 1984 as an Aircraft Mechanic at the Maintenance Base in City 1. The Employee transferred to City 2 on August 7, 1989. On November 30, 1992, he was promoted to Aircraft Maintenance Inspector. The Employee remained in that position until the separation of his employment at issue effective June 15, 1995.

The Employee sustained an occupational injury to his left shoulder on August 22, 1990. That injury kept him out of work through February 2, 1992. On March 31, 1993, the Employee sustained an occupational injury to his right shoulder. This injury prevented him from working. On June 19, 1993, the Employee was placed on Extended Illness Status ("EIS") pursuant to Article XV, Paragraph A. of the Agreement. The Employee's treating physician was Person 1 for both of the occupational injuries to his shoulders.

Thereafter, the Employee underwent three surgeries to his right shoulder, but his condition did not improve sufficiently to allow him to return to work in 1993 or 1994. On April 18, 1995, Person 1 issued the Employee a written release to return to work on April 24, 1995 without restrictions. The Employee said he brought the release to management on April 24, 1995, and they in turn referred him to Person 2, Regional Medical Director for Employer in City 3. Person 2 had examined the Employee for fitness for duty on several occasions since 1990. On April 24, 1995, Person 2 found the Employee could not return to work due to the pain and the condition of his shoulders. Person 2 informed City 2 management it was "impossible" for the Employee to work in any capacity for the Employer at that time.

Also on April 24, 1995, Manager of Aircraft Maintenance Person 3 sent the Employee the sixty day notice for employees on EIS pursuant to Article XV, Paragraph D. The letter advised the Employee that his EIS would expire on June 19, 1995. Person 3 added if the Employee wanted to be considered for an extension, it would be necessary for him to provide Person 2 a clinical narrative from his physician indicating a date he would be able to return to work.

On May 22, 1995, Person 3 sent the Employee the thirty day notice required by Article XV, Paragraph D. The letter again advised the Employee his EIS would expire on June 19, 1995 and

added, "Please contact me as soon as possible if you will be medically fit to return to work, or if you feel there are any extenuating circumstances."

After receiving his thirty day letter, the Employee was unable to obtain a clinical narrative from a physician. Person 1 was not available to examine the Employee until June 7, 1995. The Employee testified that Person 1 said he could return to work but refused to prepare a clinical narrative. The Employee was not given a written release by Person 1 to return to work. A letter from Person 1 dated July 10, 1995, however, stated the Employee was last seen on June 7, 1995 and "has a complete and permanent disability from any use of either his right or his left arm for any work or employment because of severe pain and disability in both arms."

Meanwhile, the Employee testified he left several messages for Person 3 in the office but none of his calls were ever returned. The Employee asserted he was therefore prevented from discussing his desire for an extension of his EIS with management.

On June 19, 1995, the Employer separated the Employee from EIS and terminated his employment pursuant to Article XV, Paragraph D. The instant grievance challenging the separation of his employment ensued. After the parties were unable to resolve the matter through the steps of the contractual grievance procedure, the dispute was duly appealed for decision in arbitration by the System Board of Adjustment.

At the hearing in this proceeding, the parties were afforded a full opportunity to call and cross-examine witnesses under oath, introduce documentary evidence, and present argument. A transcript of the proceedings was prepared.

No useful purpose is served in summarizing all of the testimony, exhibits, and argument submitted by the parties in this proceeding, all of which has been carefully reviewed and

considered. Rather, only those matters deemed essential in deciding the issues presented are addressed in this opinion and award.

EXCERPTS FROM THE AGREEMENT

ARTICLE X -- SENIORITY

L. Employees who have given long and faithful service in the employ of the Employer and who have become unable to handle their normal assignments, will be given preference for such other available work as they are able to handle within their classification at the rate of pay for the job to which they are assigned.

ARTICLE XV -- EXTENDED ILLNESS STATUS

A. An employee who exhausts his sick leave or who is off work - because of illness or injury longer than sixteen (16) days without sick leave pay shall be placed on extended illness status up to a maximum of two (2) years from the first day placed on extended illness status. . . .

D. At least sixty (60) days prior to the end of the employee's extended illness status, the employee's condition shall be reviewed by the Employer and further extensions in the period of extended illness status may be granted if circumstances warrant. Thirty (30) days before the end of the employee's extended illness status, the Employer shall notify the employee, the System General Chairman, and the Local Committee of its decision to extend the employee's extended illness status or to separate the employee. Separation by termination of the employee's extended illness status shall be automatic and the Employer shall not be required to follow the procedures specified in the Disciplinary Action Article of the Agreement.

1. If the Employer grants an extension of the period of extended illness status, the extension will be confirmed by letter to the Union indicating the length of the extension and the reason(s) therefore.

2. Following notice to the Union and the employee that the employee will be separated, the employee may file a grievance protesting his separation and the Union may appeal the Employer's decision directly to Step Three of the grievance procedure as provided in the Bargaining and Grievance Procedure Article of the Agreement.

3. The grievance must be filed within ten (10) days after the date of separation. If such appeal is not filed, the Employer's action shall be final and binding.

4. Further appeal, if desired, shall be to the System Board of Adjustment provided for in this Agreement.

POSITIONS OF THE PARTIES

The Union contends that the Employer has not sustained its burden of justifying the termination of the Employee from EIS on June 19, 1995 under Article XV, Paragraph D. The Union faults management for the breakdown in communication during the last sixty days of the leave between the Employee, his managers, and the medical department. It is also said management should have done more to ascertain the Employee's eligibility for light duty. The Union further argues the Employee was denied the right to a job preference under Article X, Paragraph L. as a disabled employee with long and faithful service. Accordingly, the Union seeks placement for the Employee in a job consistent with the seniority rights of other employees.

In its turn, the Employer asserts the Union has failed to meet its burden of demonstrating the separation of the Employee violated the Agreement. The Employer maintains the Employee was medically unable to return to work in any capacity for Employer at the conclusion of his two year period of EIS allowed by the Agreement. The Employer contends that separation is "automatic" under Article XV, Paragraph D. when an employee is not able to return after two years on leave. The Employer further argues the Employee did not have a right to preference under Article XV, Paragraph L. because of insufficient service and the reality he was not cleared for any work by the Employer medical office. The Employer therefore urges the grievance be denied.

OPINION

Article XV, Paragraph A. of the Agreement provides that employees who are off work because of illness or injury longer than 16 days without sick leave pay shall be placed on extended illness status ("EIS") for a maximum of two years. Article XV, Paragraph D. provides at the end of the two year period, "separation by termination of the employee's extended illness status shall be automatic." The right of the Employer under the Agreement to separate such employees at the expiration of their EIS has been sustained in prior decisions of the System Board of Adjustment. See, e.g., Grievance Nos. 82702-LAX (1973) and 111972-LAXMM (1979).

There is no dispute that the Employee, Aircraft Maintenance Inspector, was properly placed on EIS by the Employer on June 19, 1993 due to an occupational injury to his shoulder. The Union, however, claims the Employer violated Article XV, Paragraph D. by not considering the Employee for an extension to such leave during the sixty days preceding the end of the two year period. It is recognized Article XV, Paragraph D. allows management to grant an extension of an EIS "if circumstances warrant." But the evidence in this proceeding fails to support a finding the Employer's failure to extend the Employee's leave violated any provision of the Agreement. First, the Employee failed to establish that he informed any responsible manager, verbally or in writing, of a request to extend his EIS during the sixty day period in question. Second, even if it were to be found management knew or should have known of such request, there is no showing the Employee would have been medically able to perform any work for the Employer in the foreseeable future. Person 2 examined the Employee on April 24, 1995 and found he was unfit for any work whatsoever. The Employee's assertion that Person 1 found him fit to return to work on June 7, 1995 is not supported in this record. Person 1 did not give the Employee a written release as he had on April 18, 1995. Rather, Person 1 wrote on July 10, 1995 that his

examination of the Employee on June 7, 1995 revealed the Employee was disabled "for any work" due to the condition of his shoulders. The Employee has not presented any medical opinion which questioned the findings of Person 2 or Person 1 and indicated the Employee would have been able to perform any work for the Employer in the foreseeable future. From this evidence, the conclusion is inescapable the medical condition of the Employee would not have supported a request for an extension to his EIS. It follows that a violation of Article XV, Paragraph D. has not been established.

The Union also challenges this separation on the grounds the Employer violated Article X, Paragraph L. by denying the Employee a preference for other available work. It is seen Paragraph L. requires management to give long service employees who are unable to handle their normal assignments preference for other available work within their classification. Yet assuming, without deciding, the Employee is a long service employee who merits such preference under Article X, Paragraph L., the reality remains the Employee was unable to obtain medical clearance to perform any work for Employer. As discussed above, his physician, Person 1, as well as the Employer's medical officer, Person 2, found the condition of the Employee's shoulder to be disabling for any work at that time. There is no medical evidence in this record which suggests a finding to the contrary. Given the unfortunate extent of the Employee's disability at the time in question, the Union's claim of a violation of Article X, Paragraph L. cannot be sustained.

In conclusion, the record in this proceeding establishes the employment of the Employee was properly separated in accordance with Article XV, Paragraph D. at the end of his two year EIS. The evidence fails to-show there were any circumstances warranting an extension of the-EIS at the time in controversy. The record at arbitration further demonstrates the Employee was not

medically fit to work in any position for which he may have been eligible to receive a preference under Article X, Paragraph L. His grievance must therefore be denied.

AWARD

1. The Employer did not violate Article X, Paragraph L. and Article XV, Paragraph D. of the Agreement when it separated the Employee, Employee from Extended Illness Status.

2. The grievance is denied.