Labor Arbitration Decision, American Fuji Seal, Inc., 2022 BL 218016, 2022 BNA LA 162

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VOLUNTARY LABOR ARBITRATION TRIBUNAL

FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of:

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union,

Union,

and

American Fuji Seal, Inc.,

Employer.

Grievance No. 2021-23

FMCS Case No. 221217-02018

Arbitrator Lee Hornberger

DECISION AND AWARD

May 10, 2022

Hide Summary

BNA Headnotes

LABOR ARBITRATION

SUMMARY

[1] Health insurance - Spousal waiver payment - Modification of insurance plan
►116.6005 ►116.6019 ►94.60525 [Show Topic Path]
Arbitrator Lee Hornberger ruled that American Fuji Seal didn't violate the current CBA—stating that only "current waiver recipients" are eligible to waive all single or family health care benefits to receive a monthly payment—when it denied the waiver payment to two grievants who attempted to claim it on October 7, 2021 before union ratification on October 1, 2021. He found that the clear and unambiguous provision for an October 4, 2021 effective date for the entire agreement controlled, not the date of ratification, and that the grievants were therefore not "current waiver recipients" on the date they applied for the payment. He cited arbitral support for this conclusion, and he noted that the parties were aware of their ability to specify unique effective dates for specific provisions, but they chose not to do so for spousal waiver payments.

APPEARANCES

For the Union:

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For the Employer:

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INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (Union) and American Fuji Seal, Inc. (Employer). The Union contends that the Employer violated the CBA when the Employer ignored a CBA extension to prematurely implement one piece of the new CBA that had not been ratified yet. The Employer maintains that it did not violate the CBA when it denied two employees (Grievants) the healthcare waiver payment in CBA Art. 29(1)(c) after Grievants attempted to claim the waiver on October 7, 2021. For the sake of clarity, I refer to the two employees in question as the Grievants.

Pursuant to the procedures of the Federal Mediation and Conciliation Service, I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on March 2, 2022, in Bardstown, Kentucky, via Zoom. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses and for introduction of relevant exhibits. The hearing was transcribed. The transcript was received on March 17, 2022.

The last post-hearing brief was received on April 21, 2022. The Union's request to Amend the Record to Include Evidence Arising After Conclusion of the Hearing was received on April 25, 2022. The Employer's Answer to the Union's request to Amend the Record was received on April 25, 2022. I then established a briefing schedule. The Union's supplemental Motion to Amend the Record was received on May 2, 2022. The Employer's supplemental Answer to the Union's Motion to Amend the Record was received on May 6, 2022. The dispute was deemed submitted on May 6, 2022, the date the last post-hearing submission was received.

The parties stipulated that the Grievance and arbitration were timely and properly before me, and that I could determine the issues to be resolved in the instant arbitration after receiving the evidence and arguments presented.

The advocates did an excellent job of presenting their respective cases.

ISSUE

The Union framed the issue as:

Whether the Employer can ignore a CBA extension to prematurely implement one piece of the new CBA that had not been ratified yet?

The Employer framed the issue as:

Whether the Employer violated the parties' current CBA by denying Grievants the healthcare waiver payment set forth in Art. 29(1)(c) of the 2021-2025 CBA after Grievants attempted to claim the waiver on October 7, 2021?

I frame the issue as:

Did the Employer violate the CBA when it[*2] denied[*2] Grievants the healthcare waiver payment, and, if so, what is the remedy?

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 11 — ARBITRATION

***

> [Section 1] The arbitrator shall have no power to add to, subtract from or modify the terms of this Contract ...

ARTICLE 28 — WAGES

***

> Section 5. Employees will receive increases during the term of this contract as follows:
>
> Effective October 4, 2021 increase all base hourly wage rates by 3%.

***

ARTICLE 29 — GROUP INSURANCE AND PENSIONS

***

[Section 1] (c). The Company will allow eligible employees to waive all health and orthodontic benefits and will pay $250/month for single and $450/month for family waiver. Only current waiver recipients are eligible to receive the waiver moving forward. New hires and current employees who are not receiving the waiver will not be able to choose the waiver in future plan years.

***

ARTICLE 30 — DURATION OF AGREEMENT

Section 1. This Agreement shall remain in full force and effect from October 4, 2021 through September 28, 2025 and shall be considered self-renewing for yearly periods thereafter unless notice is filed by either party with the other in writing to change, alter or terminate this Agreement at least sixty (60) days prior to September 28, 2025. CBA, pp. 25-28. Emphasis added.

REVIEW OF THE FACTUAL PRESENTATIONS

Participants

Former Union Vice-President Keith Masterson has been employed by the Employer for 30 years.

Beverly Mattingly is the Senior Human Resources Manager.

Local Union President John Rogers has been with the Employer for 21 years.

Chief Steward James Tonge has been the Chief Steward for four years.

Introduction

The Employer is in the packaging business, printing labels for customers worldwide. Bargaining unit employees at the Employer's Bardstown, Kentucky, plant are represented by the Union.

The 2021-2025 CBA took effect on October 4, 2021, and expires on September 28, 2025. The prior CBA between the parties (2018-2021 CBA) was in effect from February 20, 2018, through October 3, 2021.

According to Senior Human Resources Manager Mattingly, healthcare waiver language has been in the CBAs since 2001.

Under Art. 29(1)(c) of the 2018-2021 CBA, an employee could choose to waive all health and orthodontic benefits provided by the Employer in return for a monthly payment of $250 for waiver of single coverage and $450 for waiver of family coverage. Art. 29(1)(c), p. 47.

According to Chief Steward Tonge, there was a meeting with the Employer before the 2021 negotiations. Senior HR Manager Mattingly said the Employer would take the waiver away. The Union said "not going to do that."

According to David Masterson, all four prior CBAs went beyond the expiration of the CBAs. The parties signed extensions. The parties worked under the old CBA until ratification. Two or four Tentative Agreements (TA) got rejected by the Union membership. The Employer has always paid benefits that were in the TA upon ratification. Under the TA[*3] working under the prior CBA with ratification in effect from the[*3] ratification vote and after October 11 would use the new CBA language.

February 20, 2018, to October 3, 2021 Prior CBA

The February 20, 2018, to October 3, 2021, prior CBA said,

> Effective May 1, 2018, the Company will allow the employee to waive all health and orthodontic benefits and will pay $250/month for single and $450/month for family waiver. 2018-2021 CBA, p. 47.

August 30, 2021 Union proposed $300/$500

In the Union's opening economic proposal on August 30, 2021, the Union proposed increasing the amount of the waiver payments to $300 and $500 respectively.

September 13, 2021 Employer proposed "eliminate entirely"

The Employer, in its first economic proposal, responded to the Union's proposed increase by indicating that the Employer "proposes eliminating the healthcare waiver." The Employer explained to the Union that the Employer's proposal arose because some unit members were claiming the waiver despite not waiving all health and orthodontic benefits. Some were waiving only health but not orthodontic, while others were waiving both benefits as the primary insured but were continuing to receive the benefits as the dependent of a parent or spouse also employed by the Employer. If no agreement were reached, the Employer told the Union, it would enforce the language as written, meaning that an employee would not receive the waiver unless they truly waived all health and orthodontic benefits.

September 15, 2021 Union proposal

The Union responded by proposing no changes to the then-current language. The waiver amount would not increase and there would be no other changes.

September 23, 2021 Second to last day of negotiations

According to the Employer on September 23, 2021, the second to last day of negotiations, there was a "sidebar" between the Union and the Employer. The Employer proposal was that the Employer would grandfather prior waiver recipients. According to the Employer, the Union reacted positively to this proposal. This means, according to the Employer, that on September 23, 2021, the parties had a breakthrough. During a bargaining session, members of the Union's bargaining committee stated that they could not ask their members currently receiving the waiver to give up a valuable economic benefit. At a sidebar between members of the Employer and Union committees, the Employer presented an idea that informally described the terms of a potential Employer offer for an overall TA. In this idea, the Employer indicated that it was willing to "grandfather" current waiver recipients, so no one would "lose" anything, but that no additional employees would be allowed to claim the waiver payment moving forward. According to the Employer, the Union reacted positively to this aspect of the idea. This Employer idea ultimately became part of the TA and 2021-2025 CBA.

September 28, 2021, TA

On September 28, 2021, when the parties next met, the Employer's formal offer for[*4] a TA included the concept that current waiver payment recipients would be grandfathered,[*4] but no additional employees would be able to elect the waiver. The Employer's offer for an overall TA was accepted and signed by the Union that same day and ratified by the Union membership on October 11, 2021.

The TA was signed on September 28, 2021. The TA stated,

> The parties have further agreed to extend the current CBA through 11:59 p.m. on October 17, 2021 in order to allow the Union time to prepare for its ratification vote.

The TA further stated,

> The Company will allow eligible employees to waive all health and orthodontic benefits and will pay $250/month for single and $450/month for family waiver. Only current waiver recipients are eligible to receive the waiver moving forward. New hires and current employees who are not receiving the waiver will not be able to choose the waiver in future plan years. Underlining in original.

According to Union President Rogers, the CBA extension equaled working under same CBA.

October 7, 2021 Grievants applied for waiver

On October 7, 2021, after the parties had signed their TA, and before the ratification vote, Grievants claimed the waiver after recent marriages to co-employees of the Employer. Senior HR Manager Mattingly testified that Grievants were denied the waiver when they applied. She was unsure whether they had been paid one installment before being deemed ineligible. The Employer ultimately determined that Grievants were not eligible for the waiver, which resulted in the Grievance.

October 11, 2021 Union ratification vote

The Union ratification vote was on October 11, 2021. The new CBA was ratified. The new CBA stated,

This Agreement shall remain in full force and effect from October 4, 2021 through September 28, 2025, ... CBA, p. 28.

October 25, 2021 Grievance

The October 25, 2021, Grievance stated,

> The Union charges the Company with a specific violation of Article 29 Section 1 and any of other provisions of the agreement that may be found to apply. ... Reinstate waiver payments for employees who waived healthcare coverage before contract was ratified.

November 15, 2023 Employer Third-Step Response

> The Company and the Union reached a tentative agreement for a new collective bargaining agreement on September 28, 2021. As reflected in the tentative agreement signed by the parties on that date, the parties agreed that only employees who were currently receiving the healthcare waiver would be eligible to receive it moving forward. The individuals at issue in this grievance were not receiving the healthcare waiver as of September 28, 2021 nor were they receiving the healthcare waiver as of the effective date of the new Agreement, October 4, 2021.

March 2, 2022 Arbitration hearing

The arbitration hearing was on March 2, 2022.

CONTENTIONS OF THE PARTIES

a. For the Union

According to the Union, the parties signed a CBA extension on September 28, 2021, that extended the CBA[*5] through October 17, 2021. On October 25, 2021, the Union filed a grievance to reinstate medical waiver payment[*5] for two of the bargaining unit employees that was previously approved on October 7, 2021, while under an extension of the previous CBA. HR Director Mattingly testified that she knew that the TA would need to be ratified by the Union membership prior to becoming enforceable. The TA, which was ratified on October 11, 2021, **had a provision that non-recipient employees could not receive the waiver in _**future**_ plan years**. Ms. Mattingly's testimony reflects that the current Healthcare plan year would not end till May 2022 and that the employees mentioned had a qualifying status change in the current plan year.

The medical waiver was a negotiated benefit under the CBA that was extended. The Union also contends that any member could apply for the medical waiver benefit prior to the ratification of the TA and those already receiving could maintain it afterwards. The Employer arbitrarily stopped payments on two employees saying that new language prevailed even though Union members were working under the terms of the previous CBA until a new one was ratified on October 11, 2021, by a vote of the members. However, even the Employer's argument does not change the fact that Grievants had a qualifying status change in the current plan year for medical benefits and the agreement clearly states that employees will not be able to choose the waiver in future plan years.

The Union requests that Grievants be made whole, including back payments on the medical waiver. The Union further requests that I retain jurisdiction until the parties have resolved differences concerning the quantity and nature of the make-whole remedy.

b. For the Employer

The Employer contends that the disposition of this grievance is controlled by the plain language of the 2021-2025 CBA, and, more specifically, by Arts 29 and 30, which establish that employees who did not elect the healthcare waiver prior to the new CBA (effective October 4, 2021) are ineligible to make that election going forward. Under Art. 29(1)(c), only employees "currently" receiving the healthcare waiver payment agreement were eligible to receive it moving forward. Given the 2021-2025's effective date, "current" can only mean October 4, 2021. While Art. 29(1)(c) contains no unique effective date to define the cut-off in eligibility, critically, Art. 30 sets forth the catch-all effective date of the agreement as October 4, 2021.

Because the Grievants were not receiving the waiver payment prior to October 4, 2021, and instead first requested it on October 7, 2021, they are ineligible for the payment. Grievants are also ineligible for the healthcare waiver payment under the 2021-2025 CBA - and would be ineligible under the 2018-2021 CBA if it applied - because they were attempting to claim the waiver payment ***and*** remain on AFS insurance through their co-employee[*6] wives. Even otherwise eligible employees can choose only one of these two options, but not both.

Under well-established arbitral principles,[*6] because the plain language of the CBA answers the question posed by this grievance, extrinsic evidence is irrelevant. Even if extrinsic evidence were allowed, the result would be the same, as the evidence would show that the intent of the parties was to protect employees who were receiving the waiver (and eligible to do so) ***prior to*** the effective date of the 2021-2025 CBA, while excluding any further participation. In this manner, the Union ensured that no member would lose something they had before the new CBA, and the Employer ensured that the waiver would eventually be eliminated by attrition. Nothing in the extrinsic evidence is sufficient to establish that the parties intended to tie any provision of the 2021-2025 CBA to ratification, as the Union suggests. If extrinsic evidence were to be considered - which it should not be - the proper result would be the same: denial of the Grievance.

The Union has failed to meet its burden of proving a violation of the CBA. The Grievance should be denied.

DISCUSSION AND DECISION

The instant case involves a contract interpretation in which I am called upon to determine the meaning of some portion of the CBA between the parties. I may refer to sources other than the CBA for enlightenment as to the meaning of various provisions of the CBA. My essential role, however, is to interpret the language of the CBA with a view to determining what the parties intended when they bargained for the disputed provisions of the CBA. Indeed, the validity of the award is dependent upon my drawing the essence of the award from the plain language of the CBA. It is not for me to fashion my own brand of workplace justice nor to add to or delete language from the CBA.

In determining the meaning of the instant CBA, then, I draw the essence of the meaning of the CBA from the terms of the CBA of the parties. Central to the resolution of any contract application dispute is a determination of the parties' intent as to specific contract provisions. In undertaking this analysis, I will first examine the language used by the parties. If the language is ambiguous, I will assess comments made when the bargain was reached, assuming there is evidence on the subject. In addition, I will examine previous practice by the parties related to the subject. When direct evidence is not available, circumstantial evidence may be determinative.

This is a contract interpretation case. The basic issue revolves around whether the Employer violated the CBA when it denied Grievants the healthcare waiver payment. The Union maintains that the Employer ignored a CBA extension to prematurely implement one piece of the new CBA that had not been ratified yet. The Employer maintains that it did not violate the current CBA by denying Grievants the waiver payment set forth in Art. 29(1)(c)[*7] of the 2021-2025 CBA after Grievants attempted to claim the waiver on October 7, 2021.

Burden of proof

The burden lies with the Union to identify a CBA provision which prohibited[*7] the Employer from acting as it did. *Reynolds Metal Co.*, *62 LA 695* (Volz, 1974). Abrams, *Inside Arbitration*, pp. 246-247 and 301-303.

General overview

The September 28, 2021, TA stated,

> The parties have further agreed to extend the current CBA through 11:59 p.m. on October 17, 2021 **in order to allow the Union time to prepare for its ratification vote**.
> Emphasis added.

The TA further stated,

> The Company will allow eligible employees to waive all health and orthodontic benefits and will pay $250/month for single and $450/month for family waiver. **Only current waiver recipients are eligible to receive the waiver moving forward. New hires and current employees who are not receiving the waiver will *<u>not</u>* be able to choose the waiver in future plan years**. Underlining in original. Bolding added.

The October 4, 2021, to September 28, 2025, CBA says,

ARTICLE 29 — GROUP INSURANCE AND PENSIONS

***

> [Section 1] (c). The Company will allow eligible employees to waive all health and orthodontic benefits and will pay $250/month for single and $450/month for family waiver. **Only current waiver recipients are eligible to receive the waiver moving forward. New hires and current employees who are not receiving the waiver will**

> ***not*** **be able to choose the waiver in future plan years**. ... Underlining in original. Bolding added.

> **This Agreement shall remain in full force and effect from October 4, 2021 through September 28, 2025**, ... CBA, p. 28. ... Bolding added.

"[M]inutes of bargaining meetings provide important evidence, as well as the actual text of the proposals exchanged by the parties during negotiations." Elkouri and Elkouri, *How Arbitration Works* (8th ed), p. 9-30.

All of the witnesses testified honestly and to the best of their recollections.

> The primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of a questioned word, or part, with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions. *Riley Stoker Corp*, *7 LA 764, 767* (Platt, 1947).

All words of the CBA have to be given meaning. "Ordinarily, all words used in an agreement should be given effect. The fact that a word is used indicates that the parties intended it to have some meaning ... ." Elkouri & Elkouri, p. 9-36. Each word and phrase of a contract is to be given meaning.

If CBA wording is clear and definite, clear language should be enforced. In cases where the language is clear and unambiguous, arbitrators are generally unlikely to consider extrinsic forms of evidence such as the intent of the parties, bargaining notes or history, or practices. *Champion Int'l Corp.*, *85 LA 877, 880* (Allen, 1985); and Elkouri & Elkouri, (2014 Supp), p. 59. Words should be given their ordinary and popularly accepted meaning in the absence of anything indicating that they were used in a different[*8] sense or that the parties intended some special or technical meaning.

The CBA says,

> **This Agreement shall remain in full force and effect from *October 4, 2021* through September 28, 2025**, ... CBA, p. 28. ... Bolding[*8] added.

The parties could have said "from October 11, 2011 through September 28, 2025." The parties chose to say October 4, 2021, not October 11, 2021, as the commencement date of the 2021-2025 CBA. I do not have the authority to change the commencement date of the CBA. "The contract itself determines when its provisions are effective." *BNI Coal*, **107 LA 336** (Jacobowski, 1996). The effective date stated in the agreement, not the date of ratification, was the date the agreement went into effect. *Temple Inland Forest Products Corp.*, *103 LA 1188, 1193* (Johnson, 1994).

There has been no citation of any CBA language which would show that the waiver language in the CBA has a different start date than the October 4, 2021, start date of the CBA as a whole. If the parties had wanted to say "October 11, 2021," as the start date of the CBA. they could have. They did not. Elkouri and Elkouri, pp. 9-26 to 9-31.

It has been indicated that:

> Although [I] may use [my] expertise in interpreting and applying the contractual provisions, [I] cannot substitute [my] own sense of equity and justice but the award must be grounded in the terms of the agreement. To do otherwise would, in effect, be to change or alter the agreement through indirection. This [I] cannot, and should not do in the interest of *all* parties and the collective bargaining process. In other words, it is the [my] duty ... to interpret the contract as precisely as [I] can, and not to rewrite it. *Johnston-Tombigbee Mfg Co.*, **113 LA 1015, 1020** (Howell, 2000). Emphasis in original.

The Union makes several serious arguments concerning the situation. I have seriously considered all of them.

The Union argues that on October 25, 2021, the Union filed a Grievance to reinstate medical waiver payment for two of the bargaining unit employees that was previously approved on October 7, 2021, while under an extension of the previous CBA. This argument does not control. This is because of the impact of the October 4, 2021, effective date of the 2021-2025 CBA. The language of the 2021-2025 CBA makes it clear that it, not the 2018-2021 CBA, controls the eligibility of Grievants, as the CBA states its effective date is October 4, 2021. Art. 29(1)(c) does not specify an alternate effective date specifically applicable to Art. 29(1)(c). If a CBA contains an effective date, that date controls, not the date of ratification - unless something in the CBA sets a unique effective date for a specific provision. This is true regardless of whether the effective date is before or after the parties finalize their agreement. *BNI Coal*, **107 LA 336** , (Jacobowski, 1996).

The Union argues that the TA had a provision that non-recipient employees could not receive the waiver in future plan years, Ms. Mattingly testified that the current Healthcare plan year would not end until May 2022, and that the employees mentioned had a qualifying status change in the current plan year. This argument does not control. There are three sentences[*9] in the waiver paragraph. These three sentences are "The Company will allow eligible employees to waive all health and orthodontic benefits and will pay $250/month for single and $450/month for family waiver. Only current waiver recipients are eligible[*9] to receive the waiver moving forward. New hires and current employees who are not receiving the waiver will not be able to choose the waiver in future plan years." The second sentence says, "Only current waiver recipients are eligible to receive the waiver moving forward." As of the October 4, 2021, effective

date of the new CBA, Grievants were not "current waiver recipients" Therefore they were not eligible to receive the waiver moving forward after the effective date of the new CBA.

The Union argues that the Union and the Employer mutually agreed to extend the previous CBA through October 17, 2021, and that the TA would have to be ratified by the Union membership. This argument does not control. The clear and unambiguous language of the 2021-2025 CBA says that the effective date of the new CBA is October 4, 2021. CBA, pp. 28.

The Union argues that the TA had specific timelines for anything for the negotiated terms and the dates they would take effect if different from the day of ratification. This argument does not control. Only employees who were receiving the waiver as of the effective date of the 2021-2025 CBA, October 4, 2021, were grandfathered and were eligible to receive the waiver. The parties were aware of their ability to specify unique effective dates applicable to specific provisions that differed from the general effective date. There were several provisions of Art. 29 that went into effect on November 1, 2021. The October 4, 2021, effective date of the 3% wage increase which is contained in Art. 27. Art. 29(5), regarding wages, notes that the first wage increases of the new CBA go into effect on October 4, 2021, which is also the effective date of the agreement. CBA, p. 26. Art. 29(a) provides that increases to employee healthcare premium contributions go into effect on May 1, 2022. CBA, p. 26. Increases to weekly sickness and accident benefits, Employer-provided life insurance, retiree life insurance, and the Employer 401(k) matching contribution all went into effect on November 1, 2021. CBA, pp. 27-28.

I have found that in light of the October 4, 2021, effective date of the 2021-2025 CBA the Grievants were not eligible for the waiver on October 7, 2021. I am not making a determination of whether Grievants were not eligible for the waiver for other reasons.

The National Academy of Arbitrators, American Arbitration Association, and Federal Mediation & Conciliation Service, Code of Professional Responsibility for Arbitrators of Labor Management Disputes, C(1)(a), states:

> **C. Awards and Opinions**
>
> 1. The award should be definite, certain, and **as concise as possible**.
>
> a. When an opinion is required,[*10] factors to be considered by an arbitrator include: **desirability of brevity**, consistent with the nature of the case and any expressed desires of the parties; need to use a style and form that is understandable to responsible representatives of the parties, to[*10] the grievant and supervisors, and to others in the collective bargaining relationship; necessity of meeting the significant issues; forthrightness to an extent not harmful to the relationship of the parties; and **avoidance of gratuitous advice or discourse not essential to disposition of the issues**. Emphasis added. Abrams, pp. 297-298.

Union's motion concerning April 25, 2022, communication

Union's argument concerning its motion that I consider April 2022 communication

The Union has filed a motion requesting that I consider Senior HR Manager's April 25, 2022, communication in making my final decision. According to the Union, the submission of this evidence would not delay the issuance of the award and there is no specific time for issuance of the award in the CBA. Elkouri & Elkouri, p. 8-91, states, "[s]ometimes important evidence is discovered or first becomes available after the hearing and may be considered if the opposing party has been given fair opportunity to meet it." In this case, the evidence only became available after the hearing. American Arbitration Association Labor Rules, Rule 31, states,

> The hearing may be reopened on the arbitrator's initiative, or upon application of a party, at any time before the award is made. If reopening of the hearing would prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened unless the parties agree on an extension of time. When no specific date is fixed in the contract, the arbitrator may reopen the hearings and shall have 30 days from the closing of the reopened hearing within which to make an award.

The Union asks me to consider three documents. These are (1) a communication sent to the Union by the Employer on April 25, 2022, (2) Medical Reimbursement Form 1, and (3) Medical Reimbursement Form 2.

The April 25, 2022, communication from the Senior HR Manager says,

> Please be advised that as we close out the open enrollment for the new plan year, we have identified 20 employees who are not waiving out of all medical and orthodontic but electing the waiver benefit. The 20 members names are attached. There are 11 employees who are waiving all per the contract language and are eligible to receive the waiver. We have drafted the attached letters to send to the 20 employees who will not continue to receive the waiver unless they opt out of all medical and orthodontic. These letters will be mailed today and to receive the waiver, the letter must be signed and returned by 5/2. Please let me know of any questions.
>
> In summary:
>
> Total currently receiving the waiver:
>
> 31 - Employees Total

11 - Remain Eligible for the waiver
6 - Have Dental currently carry dental coverage
14 — Covered under[*11] spouse/family coverage

Attached are copies of the two letters for employees

1) Employees who have waived medical/dental coverage but are covered under a spouse that works for AFS
2) Employees who have waived only medical but[*11] are enrolled in dental insurance

In short, the April 25, 2022, communication informs the Union that the Employer is sending letters to twenty employees informing them that they will lose the waiver benefit on May 2, 2022, if they do not take certain steps that the Employer believes are necessary to receive the benefit, which the Union disputes. The Medical Reimbursement Forms 1 and 2 are attached to the email and are the letters sent to employees. According to the Union, this evidence is relevant because it demonstrates that the Employer is attempting to deny as many employees as it can the benefit, including the two individuals discussed at the hearing. The evidence also demonstrates that the Senior HR Manager's testimony at the hearing is not credible. She testified at the hearing that all current participants would be grandfathered into the benefit. Medical Reimbursement Forms 1 and 2 were created on April 22, 2022. A day after the record closed in this case the Employer prepared letters to send to a majority of those "grandfathered" employees that they would lose the benefit in a week. These actions also reinforce the unchallenged testimony from the Chief Steward that the Senior HR Manager wanted to take the medical waiver benefit away prior to negotiations and the Union told her that she could not. Tr. 55/4-23. If the benefit were still in place prior to and during the negotiations before the CBA was finalized, which is the Union's position, then the two individuals discussed in the Grievance and at the hearing must be afforded the benefit.

According to the Union, *In re Respondent (Paper Allied Products)*, *1988 WL 1615683* at *3 (Nolan, 1988) supports the Union's position. According to the Union, the Employer's actions taken mere days after the record closed in this case were retaliatory against the Union for pursuing this Grievance. The Union asks that I consider this evidence as I make my final decision.

Employer's position on Union's motion

According to the Employer, the Union, in its May 2, 2022, motion, asks me to consider the Union's submission of additional evidence and argument that was not presented at the hearing of the instant Grievance. The Employer objects to the submission of this evidence (and consideration of the Union's accompanying argument) because there is no procedural basis to allow it, as it is neither relevant to or probative of the substantive issue before me - whether the two Grievants were denied the waiver payment in violation of the CBA - nor does it bear upon the credibility of the Senior HR Manager.

According to the Employer, the submission is an untimely attempt by the Union to address an issue repeatedly raised by the Employer at the hearing, which the Union (for whatever reason) neglected to address at the hearing or in its brief: The full requirements of receiving[*12] the waiver payment under the current 2021-2025 CBA. It also appears to be an improper effort by the Union to prejudice me against the Employer by making an unfounded attack on the credibility of the Senior HR Manager, and a meritless claim of post-hearing "retaliation."

According[*12] to the Employer, the Employer's objection should be sustained, and the Union's submission should not be allowed to become part of the record.

My ruling on the Union's motion

The October 25, 2021, Grievance said,

The Union charges the Company with a specific violation of Article 29 Section 1 and any of other provisions of the agreement that may be found to apply. ... Reinstate waiver payments for employees who waived healthcare coverage **before contract was ratified**.
Emphasis added.

At the hearing, the parties framed the issue as follows,

ARBITRATOR HORNBERGER: What is the issue?

MR. ORMES: ... The union believes that the arbitration before you today is a matter of whether or not an employee or a bargaining unit member is entitled to a benefit that is currently enjoyed on a contract extension.

ARBITRATOR HORNBERGER: Thank you, sir. Mr. Boulukos?

MR. BOULUKOS: ... The company sees the issue today as whether American Fuji Seal violated the party's current collective bargaining agreement by denying bargaining unit employees, ... and ..., the healthcare waiver payment set forth in article 291C of the agreement — and this is the agreement effective October 4, 2021, after Mr. ... and Mr. ... attempted to claim the waiver on October 7, 2021.

ARBITRATOR HORNBERGER: Do you all mind if you put both of your issues in your briefs and I can look at those two issues after I've read the whole case and come up

with the issue? Would that be okay with you folks?

MR. ORMES: Yes, sir.

MR. BOULUKOS: Yes, sir. Tr. 9-10.

In its brief, the Union framed the issue as: **Whether the Employer can ignore a CBA extension to prematurely implement one piece of the new CBA *that had not been ratified yet***? Emphasis added.

In its brief, the Employer framed the issue as: **Whether the Employer violated the parties' current CBA by denying Grievants the healthcare waiver payment set forth in Art. 29(1)(c) of the 2021-2025 CBA after *Grievants attempted to claim the waiver on October 7, 2021***? Emphasis added.

I framed the issue as: **Did the Employer violate the CBA when it denied Grievants the healthcare waiver payment, and, if so, what is the remedy**?

The April 2022 issue is not within the scope of the issues that were framed for this case. The issue in the case that is before me concerns whether the two Grievants who applied for the waiver on October 7, 2021, were entitled to the waiver. An arbitration "decision that answers questions that were not fairly posed in the issue may be vacated in later court proceedings for going beyond the arbitrator's authority." Elkouri & Elkouri, pp. 7-7 to 7-8. "The submission ... defines the jurisdiction[*13] of the arbitrator. If an arbitrator ignores the stipulated issue in rendering the award, it constitutes sufficient grounds to set aside the award." Abrams, p. 131. The April 2022 issue is not covered by the Grievance. Elkouri & Elkouri, pp. 7-8 to 7-9. It has been indicated that "[n]ormally the arbitrator may decide only those issues raised in the grievance process." Nolan, *Labor and Employment*[*13] *Arbitration* (1999), p. 304. *Univ. of Chicago Med. Ctr*, *128 LA 1578, 1586* (Finkin, 2011).

As set forth in the Grievance, the issue before me is whether the Employer violated the CBA in October 2021 by denying the waiver payment to two specific employees. The determination of this issue depends upon the consideration of facts and circumstances specific to the two Grievants, and the application of the CBA to those specific facts and circumstances.

The April 2022 communication is not necessarily inconsistent with the Senior HR Manager's testimony at the hearing.

Q ... [W]hat date did Mr. J___ apply for the waiver?

A October 7th. ...

A Of 2021.

Q ... [H]e was not among the grandfathered group?

A No, sir.

Q ***Was there any other reason that he was not granted the waiver?***

A **He was requesting to waive, but also requesting to go onto his new wife's insurance that was employed by Fuji Seal**.

Q ... So had his request been granted, he would've been receiving he waiver, but he still would've been covered by American Fuji Seal's health and orthodontic benefits?

A Yes, sir. Tr. 90/2-19. Emphasis added.

I am not deciding whether the above "was there any other reason that he was not granted the waiver" testimony concerning the interpretation of the CBA is correct or not. But the testimony is arguably consistent with the Employer's April 2022 communication to the Union.

According to *In re Respondent (Paper Allied Products)*, *1988 WL 1615683* at *3 (Nolan, 1988), the "proffered evidence must be pertinent ... [and] ... [t]he proffered evidence must be likely to affect the outcome." The April 25, 2022, communication is not pertinent to the issue of whether the Grievants were entitled to the waiver on October 7, 2021. The proffered evidence would not affect the outcome of the case before me.

I do not have the authority to decide the April 2022 issue nor does the April 2022 issue have any impact on my decision in this case.

CONCLUSION

The Employer did not violate the CBA when it denied Grievants the healthcare waiver payment.

The crucial points in this case include,

1. The Union has the burden of proof;
2. The term of the CBA is "October 4, 2021, through September 28, 2025," CBA, p. 28;
3. The request for waiver by the two non-current waiver recipients was on October 7, 2021, which is after the effective date of the CBA;
4. I do not have the authority to change the beginning date that has been chosen and memorialized by the parties in their CBA;
5. Clear and unambiguous language that is interpreted consistent with the parties' intent as reflected by clear and explicit terms;

6. Ordinary meaning given to words unless they are clearly used otherwise;
7. CBA language that is consistent with and supported by the[*14] negotiating history;
8. The totality of the circumstances; and
9. The wording of the CBA.

This decision neither addresses nor decides issues not raised by the parties.

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, I deny the Grievance.

LEE HORNBERGER
Arbitrator
Traverse City, Michigan

Dated: May 10, 2022