

## Labor Arbitration Decision, Peoples Gas Light and Coke Co., 2023 BL 97198, 2023 BNA LA 17

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Printed By:EBROWN62 on Mon, 26 Jun 2023 14:27:01 -0400

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### BNA Headnotes

#### LABOR ARBITRATION

#### SUMMARY

**[1] Promotions - Ability and qualifications - Seniority** ► [119.121](#) ► [119.11](#) ► [93.4663](#) [[Show Topic Path](#)]

Arbitrator Lee Hornberger ruled that The Peoples Gas Light and Coke Company didn't violate the CBA seniority provision when a Temporary OA, hired almost two months after the grievant, was later promoted to Permanent OA approximately four months before the grievant was promoted. The arbitrator ruled that based on the totality of the circumstances, the alleged denial of the grievant's seniority rights occurred on a continuing basis, so the grievance was timely filed. However, in line with the CBA the company relied, with the union's agreement, on job performance—including performance evaluations—when determining which Temporary OAs to promote to full-time employment, and the grievant's composite evaluation score was 37.17 while the co-worker promoted before him had a score of 45.67.

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**Pagination**

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**LABOR ARBITRATION TRIBUNAL  
FEDERAL MEDIATION AND CONCILIATION SERVICE**

In the Matter of:

Local 18007, Utility Workers Union of America, AFL-CIO

Union,

and

The Peoples Gas Light and Coke Company,

Employer.

FMCS No. 220605-05798

Seniority Issue

Arbitrator Lee Hornberger

**DECISION AND AWARD**

February 10, 2023

**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 Local 18007, Utility Workers Union of America, AFL-CIO, (Union) and The Peoples Gas Light and Coke Company (Employer). The Union contends that the Employer violated the CBA when it promoted Temporary OA (Temp OA) Luis Torres (March 3, 2012, hire date) to Permanent OA (Perm OA) on March 13, 2013, ahead of Grievant (Temp OA hire date January 12, 2012, Perm OA date July 24, 2013). The Employer maintains that it did not violate the CBA when it promoted Temp OA Torres (March 3, 2012, hire date) to Perm OA on March 13, 2013, ahead of Grievant (Temp OA hire date January 12, 2012, Perm OA date July 24, 2013). In addition, the Employer maintains that the Grievance was not filed timely. The Union maintains that the Grievance was filed timely.

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 December 1, 2022, in Chicago, Illinois, 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 by me on December 16, 2022. The dispute was deemed submitted on February 1, 2023, the date the post-hearing submissions were received.

The parties stipulated that, other than the procedural arbitrability issue concerning timeliness of the Grievance, 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. Tr. 7.

The advocates did an excellent job of presenting their respective cases. Both sides filed powerful post-hearing briefs.

**ISSUE**

The parties stipulated that the issues to be resolved in the instant arbitration are:

Was the CBA seniority provision violated when Temp OA Torres (March 3, 2012, hire date) was promoted to Perm OA (March 13, 2013) ahead of Grievant Temp OA (hire date January 12, 2012, Perm OA July 24, 2013)?

Was the Grievance filed timely?

What shall the remedy be?

## RELEVANT CONTRACTUAL LANGUAGE

### ARTICLE IV - GRIEVANCES

**Section 1.** Should any dispute or difference arise between the Company and the Union or its members as to the interpretation or application of any of the provisions of this Agreement, the dispute or difference (hereinafter sometimes referred to as a "grievance") shall be settled through the Grievance Procedures as hereinafter provided.

A grievance shall be presented to the Company within fifteen (15) days after the event giving rise to the dispute.

A grievance shall be processed from step to step[\*2] promptly. The last decision given on any grievance in any of the first three steps shall be considered a satisfactory adjustment unless, within ten days after the decision has been given, the grievance is carried to the next step. However, if the tenth day falls on a Saturday, Sunday or holiday, the ten-day period shall be extended until the next business day. If the request to move a grievance to the next step is untimely, the grievance will be considered withdrawn unless extenuating circumstances exist, in which case the time limit will be extended by agreement between the Company and the Union.

\* \* \*

### ARTICLE VII - SENIORITY

**Section 1.** It is understood and agreed that in all cases of promotion, transfer, and demotion of employees under this Agreement, the Company will consider the ability to perform the work, and the seniority of each of the eligible candidates. When the abilities of the candidates are equal, seniority, not only in the Company but also in a particular classification, shall be the governing factor. Demotions and layoffs for lack of work shall be solely on the basis of seniority and the employee laid off last shall be rehired first.

\* \* \*

### ARTICLE XIII - MANAGEMENT RESPONSIBILITIES

Except as in this Agreement expressly limited, the management of the Company and the direction of the working forces covered herein, including the determination of the adequacy of supervision, the right to hire, suspend, discharge for proper cause, discipline, promote, demote, transfer, and lay off because of lack of work or for other proper reasons, shall continue to be vested in the Company. However, the Union may exercise its right to present grievances in accordance with Article IV for claimed wrongful suspensions, discharges, discipline, demotions, transfers, layoffs, or promotions within the unit.

\* \* \*

## REVIEW OF THE FACTUAL PRESENTATIONS

### Participants

**Grievant** was hired on January 20, 2012, as a Temp OA.

**Don Iocco** is a Crew Leader, Union Recording Secretary, and on the Union Executive Board. He has been with the Employer for 32 years.

Senior HR Business Partner **Amber Tucker** has been with Employer since October 2014.

Customer Service Field Manager **Nivardo Almazan** has been with the Employer for 21 years.

Operations Manager **Dennis Dixon** was hired in February 2012 and supervised Temp OAs.

**Charles Wagner** is Manager HR Business Strategy.

### Introduction

The Employer is a utility company that delivers natural gas to residents and businesses in the Chicago area. The Union represents some employees of the Employer. Grievant is one of these employees.

### Grievant was hired in January 2012 as a Temporary OA

**Grievant** was hired in January 2012 as a Temp OA. He was assigned to Operations as a Helper. His Supervisor was Alex Tischer. Eventually Grievant got his own vehicle. Grievant is presently a Utility Worker 6. He is still waiting to become a **[\*3]** Journeyman. Mr. Torres is now a Journeyman Lead. According to Grievant, based on the print-out of evaluations, employees in Operations got zeros. According to Grievant, this is not an accurate evaluation. Grievant did not receive evaluations in that role.

**Operations Manager Dennis Dixon** was hired in February 2012. He supervised Temp OAs. Mr. Dixon met with Grievant in late 2012. Dixon did performance evaluations for Temp OAs in 2012. All Temp OAs were evaluated every 30 days. Then they were evaluated every 90 days. Rx. 104. An evaluation form was used to perform the evaluations. The Employer would go over the evaluation forms with the employees. The Employer decided to promote employees to OA. The Employer needed more OTAs. According to Dixon, the evaluations absolutely played a role in these promotions. The top performers were selected. The top OAs knew this. In 2012 Grievant had some concerns about his seniority. Rx. 102. The "speaking points" document was to give a uniform answer. The evaluations were kept in our "our files."

**Manager HR Business Strategy Charles Wagner** has been with the Employer for 24 years. The documents were stored in local places. They were password protected. A lot of folks are gone. Many employees had left the Employer organization. Jx. 7. Rx. 107. Grievant's raw score from the composite

evaluation form was 37.17. Torres' raw score was 45.67. The Employer relied on these scores. Grievant's weighted average score was 37.69. There was an agreement with the Union.

#### **Grievant contacted Amber Tucker in HR in 2018**

**Grievant** testified that he started noticing that employees who he thought were junior to him were going to Journeyman class. Grievant asked the Union about the situation. The Union said it was a HR issue. Grievant contacted Amber Tucker in HR in 2018. She said she would look into it. She did not get back to Grievant. Grievant did not follow up with her.

According to **Don Iocco**, the Union refers all seniority issues to HR. HR has the information. This information can include physical ability, attendance, discipline, etc.

According to **Amber Tucker**, Grievant approached Ms. Tucker pre-pandemic. Grievant believed his seniority was incorrect. Each time Grievant would raise a different argument. Grievant felt there was some sort of a letter in 2012. Tucker directed Grievant to talk with the Union. Tucker did not see a promotion violation.

#### **Grievant spoke with Ms. Tucker in 2020**

**Grievant** testified that he spoke with Ms. Tucker in 2020. Grievant spoke with the Union. Again the Union said talk with HR. In March 2020 there was an in-person meeting. There was no follow up.

#### **Grievant filed an Ethics Complaint in 2020**

**Grievant** testified that he filed an Ethics Complaint in July 2020. Tr. 51. Rx. 105. In that report Grievant described his concern, in part, as follows:

Since 2013, seniority has not been respected at WEC People Gas, which is a subsidiary of the company. Some employees with high seniority have not[\*4] been allowed to grow within the company, and many employees with lower seniority have been giving better job opportunities. When seniority is not respected it affects the employees' pay, job titles, and schedules. Dwight Acoos, utility worker, has witnessed the issues.

On February 12, 2020, [Grievant] met with Adrian Duenas, union steward, Tim Jaroch, president of the union board, and Eddie Brown, union steward about the problems with the employees' seniority. Adrian, Tim, and Eddie agreed to look into [Grievant]'s concerns; however, nothing has been done. Adrian and Amber Tucker, HR representative, recognized some inconsistencies with seniority. The employees feel that the HR department and the union do not care about the problems.

On March 5, [Grievant] had his last conversation with Amber about [Grievant]'s seniority. Amber assured [Grievant] that she would have weekly meetings with [Grievant]. However, [Grievant] did not hear anything back from Amber.

On July 29, the seniority problems were still happening, and [Grievant] is afraid of any sort of retaliation because of this report. Rx. 105.

#### **June 4, 2021, meeting**

**Grievant** testified that there was a June 4, 2021, meeting. Grievant's question was not answered. Grievant testified that "I was angry. ... I was confused."

**Don Iocco** was not at the June 2021 meeting. Mr. Iocco expected there would be another meeting. According to Customer Service Field Manager **Nivardo Almazan**, Almazan found out about the situation in May 2021 from Ms. Tucker. He attended the June 4, 2021, meeting. Grievant had an issue with seniority and how seniority related to progressions. There was the Docent program. There was some schooling. There were internships.

#### **Grievant filed ULP charge against Union with NLRB November 29, 2021**

On November 29, 2021, Grievant filed an Unfair Labor Practice charge against the Union with the National Relations Board. Rx. 108. Grievant did this in order to get a grievance filed. Grievant had never asked the Union to file a grievance before he filed the ULP.

#### **Grievance filed December 9, 2021**

According to **Grievant**, the Grievance was then filed right away. The Grievance went through the Step process. Grievant believes he should have been promoted ahead of Torres. Grievant knew Torres back at the time of the March 2013 promotion. Eventually Grievant became aware that Torres had been promoted. This was while Grievant was a Utility Worker.

The Grievance stated the alleged CBA violation as:

[Grievant] should have been promoted into the UW Classification after Milner and before Torres and many cohorts of Dawson Graduates. [Grievant] should have followed Milner into the Journeyman classification before Torres 6 Dawson Graduates. ...

[Grievant] does not have any regressions due to tests, disciplines [or] injuries. [Grievant] should be behind Milner every progression step from OA temp to OA to UW. ...

Past Practice, Seniority, Art. XII. ...

Slot him into the Journeyman classification:[\*5] behind Milner. Pay [Grievant] backpay and to make [Grievant] whole. Jx. 3.

According to **Don Iocco**, after the NLRB ULP charge, Iocco met with Grievant. Iocco then filed the Grievance on Grievant's behalf. According to Iocco, the violation is ongoing. Mr. Iocco was present at all Step meetings. Performance was not brought up by the Employer at Step 1 or 2. Iocco has not seen a document concerning performance scores. Jx 8. Rx. 102. Concerning the talking points document, Iocco never heard anything about this actually happening. Rx. 104. Concerning the evaluation form, Iocco has never seen this document. Iocco filed the Grievance. The Grievance does not state ongoing. On November 16, 2013, Torres went to UW. CBA Art. 7 is cited in the Grievance.

According to **Amber Tucker**, it was later discovered that the promotion was based on performance evaluations. Grievant received evaluations back at the beginning. There was an evaluation form.

## CONTENTIONS OF THE PARTIES

### a. For the Union

The Union contends that the Employer awarded promotions for Grievant and other Temp OAs without regard to seniority in violation of CBA Art. VII, Sec. 1. That departure from the CBA's provisions was never agreed to by the Union.

According to the Union, the testimonial evidence was unanimous that these initial promotion decisions, if done improperly, would continue to negatively affect Grievant's seniority rights in all subsequent promotional opportunities and job assignments. The denial of Grievant's seniority rights was therefore a "continuing violation" which affected his wages on an ongoing basis from the time of the flawed promotions in 2013 to the filing of his Grievance in December 2021 and through the date of arbitration.

As the keeper of all human resource records, including seniority and promotion records, the Employer repeatedly failed to provide Grievant or the Union with information that would allow them to determine whether Grievant's seniority had been properly determined under the CBA. It was not until the Step 3 grievance meeting that the Employer first revealed that "performance," not seniority, had been the deciding factor in Temp OA to Perm OA promotions. The Employer then failed to provide any details or documentation of its alleged performance-based promotion system until after the Union filed for arbitration.

As a result of the Employer's conduct, Grievant had labored in vain for three years to find out whether any contract violations had occurred in assigning his seniority. The Employer had promised to give him answers at the June 2021 meeting, but had not delivered. The Union also remained unaware of any violation which would call for the filing of a grievance. On December 9, 2021, after meeting with Grievant, the Union took the unusual step of filing a grievance while still in the dark as to whether a contract violation had occurred. That grievance should be considered timely.



The Union met its burden of proof that Grievant's rights under CBA Art. VII were[\*6] violated when promotions to Perm OA were made without regard to seniority. The Employer offered no evidence to back its claim that the Union had agreed to this course of action.

The evidence showed that the Employer failed to inform Grievant or his Union representatives of its action. At the hearing, the Employer attempted to argue that its "performance-based" promotion scheme had been both well-known to the affected employees and their union officials, and completely unknown to the Employer's own representatives — a logical impossibility.

The contract violation in question qualifies as a 'continuing' violation by virtue of its ongoing effect on Grievant's wages and other conditions of employment, and the date of filing is therefore timely. The evidence showed that the Employer's actions (whether due to "nefarious intent" or simple negligence) concealed the fact of the violation. To deem the grievance "untimely" as a result would unfairly penalize Grievance and the Union.

Grievant deserves to be made whole for all wages and benefits lost.

**b. For the Employer**

The Employer contends that this case involves a Grievance filed by the Union on December 9, 2021, in which the Union alleges that the Employer violated the seniority provision of the CBA when Temp OA Torres was promoted to Perm OA before Grievant, another Temp OA, on March 3, 2013.

The December 2021 Grievance should be denied as it is clearly untimely. CBA, Art. IV, in effect at the time of this promotion in 2013 provides "[a] grievance shall be presented to the Company within 15 days after the events giving rise to the dispute." The promotion decision at issue occurred almost 10 years before the December 2021 Grievance was filed. Even though the CBA does not have any requirements that the time for filing a grievance first starts upon knowledge by the Union or Grievant of the events giving rise to the dispute, Grievant expressed concerns around this issue as early as 2013 and clearly identified his concern as a "contractual violation" in 2020 when he filed an Employer Ethics Complaint. The Union did nothing about Grievant's claims until after he filed a NLRB charge against the Union on November 29, 2021. Only then did the Union file a grievance - more than eight years after the decision at issue in the December 2021 Grievance.

It is clear that even if the December 2021 Grievance is timely, it must be denied. Mr. Torres' January 2013 promotion was proper based upon an agreement and practice between the Union and the Employer that promotion from Temp OA to Perm OA would be based on job performance. This is established by witness testimony and multiple contemporaneous documents reflecting this understanding. It begs belief that without such an agreement, the Union would not have filed a grievance earlier than December 2021 given that all 56 other Temp OAs under consideration for promotion in March[\*7] 2013 when Mr. Torres was selected for a Perm OA position had an earlier hire date than Mr. Torres. Mr. Torres was among the top ten performers of all employees considered and Grievant among the lowest.

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.

The Union contends that the Employer violated the CBA when it promoted Temp OA Torres (March 3, 2012, hire date) to Perm OA on March 13, 2013, ahead of Grievant (Temp OA hire date January 12, 2012, Perm OA date July 24, 2013). The Employer maintains that it did not violate the CBA when it promoted Temp OA Torres (March 3, 2012, hire date) to Perm OA on March 13, 2013, ahead of Grievant (Temp OA hire date January 12, 2012, Perm OA date July 24, 2013).

The Employer maintains that the Grievance was not filed timely. The Union maintains that the Grievance was filed timely.

### Procedural arbitrability

CBA Art. IV (1) says "A grievance shall be presented to the Company **within fifteen (15) days after the event giving rise to the dispute.**" Emphasis added.

The Employer contends that the Grievance was not timely filed. The Union maintains that the Employer's decision to promote less-senior Temp OAs ahead of Grievant continued to affect Grievant's seniority for purposes of promotion and job assignments through the present time. The Employer's disregard of seniority qualifies as a "continuing violation." It was not until after Grievant filed his Grievance on December 9, 2021, that the Employer first revealed that "performance evaluations," rather than seniority, had been used to determine promotions from Temp OA to[\*8] Perm OA. For both reasons (the continuing violation, and the Employer's failure to disclose the violation), the Grievance should be deemed to be timely filed. According to the Union, the alleged seniority violation at issue in this case was set in motion in March 2013, when Temp OAs were promoted to Perm OA outside of seniority order, and continued through the date of the arbitration hearing. Employer witnesses admitted that Grievant's subsequent promotion history and his current complaints were rooted in that initial promotion. Both Manager HR Business Strategy Wagner and Customer Service Field Manager Almazan agreed that it had impacted every other promotion and job placement decisions going forward.

The Employer has the burden of proof when it challenges the arbitrability of a grievance. Elkouri & Elkouri, *How Arbitration Works* (8th ed), pp 5-28 to 29. *Phillips 66 Co.*, 92 LA 1037 (Neas, 1989). "A general presumption exists that favors arbitration over dismissal of grievances on technical grounds." Elkouri & Elkouri, p 5-11. There is "a presumption of arbitrability." *Id.* at 5-29. "Many arbitrators have held 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, with each day treated as a new 'occurrence.'" *Id.* at 5-30. Grievances in such cases may therefore be filed at any time, although back pay can be limited in some cases to amounts accrued since the date of filing. *Id.* The "continuing violation" doctrine is relevant in cases involving compensation, because it can be argued that each improper paycheck is a new violation. *Id.*

The Employer claimed that Grievant had been "complaining about this exact promotion concern for years," yet failed to file a Grievance until December 2021. This was nine years after the Temp OA to Perm OA promotions. Tr. 29. The Union claims that Grievant did not articulate the "exact promotion concern" voiced in his December 9, 2021, Grievance, because he did not know that performance had been utilized in the promotion decision. In 2018, when the first promotions to Journeyman UW were made, Grievant became aware that Torres and other former OAs were ahead of him in line, and began "inquiring" as to why this was so. He was promised that the June 4, 2021, meeting would provide him with answers. Those answers were not provided until after the Union filed for arbitration.

In *City of Buffalo*, 93 LA 5 (Pohl 1989) [Elkouri & Elkouri, p. 5-30 n 145], an employee's incorrectly calculated service date deprived him of "longevity pay" based on years of service. This was held to be a continuing violation, because each payment based on the wrong service date constituted a new "occurrence." His grievance was thus timely even though he did not consult his union or file a grievance for 17 years (despite being aware that credit might be due for his prior service[\*9] with the city school system). The same logic was noted to apply in disputes over cost-of-living raises in *Cleveland Pneumatic Co.*, 91 LA 428 (Oberdank 1988) [Elkouri & Elkouri, p. 5-30 n 145] and health insurance premiums in *Hillel Day School*, 89 LA 905 (Lipson 1987) [Elkouri & Elkouri, p. 5-30 n 145].

The alleged denial of Grievant's seniority rights affected his wages on an ongoing basis. It thus qualified as a "continuing violation" in which each payment of reduced wages gave rise to a new occurrence. In view of the totality of the circumstances, the promotion case before me involves a continuing alleged violation. Hence, the Grievance was timely filed.

### Substantive promotion issue

The CBA says:

#### ARTICLE VII - SENIORITY

**Section 1. It is understood and agreed that in all cases of promotion ... of employees under this Agreement, the Company will consider the ability to perform the work, and the seniority of each of the eligible candidates.** When the abilities of the candidates are equal,

seniority, not only in the Company but also in a particular classification, shall be the governing factor. ... . Emphasis added.

The June 1, 2011, MOU says:

The temporary employees are eligible for regular employment at any time during their employment. **Opportunities for regular employment will be filled based on seniority, job performance (i.e. attendance, corrective action history, etc.) within the temporary job classification**, and successful completion of the required physical abilities test. Rx. 101, p. 3. Emphasis added.

### **Burden of proof**

The burden lies with the Union to identify a CBA provision which prohibited the Employer from acting as it did. Abrams, *Inside Arbitration*, pp. 246-247 and 301-303.

### **General overview**

When evaluating the substantive issue before me, I am considering the actual facts as they were finally discovered after investigation by the Employer. All of the witnesses testified honestly to the best of their recollections. It can sometimes be difficult to recreate an employment decision made years ago. *St. Mary's Honor Center v. Hicks*, [509 U.S. 502, 514](#) (1993). As indicated by Ms. Tucker, "that's been one of the challenges that we've had with this case, that it's still hard to get a full picture of this issue because it's almost 10 years old." Tr. 209.

According to Union Executive Board Member Iocco,

There's no reason why [Grievant] shouldn't have been promoted ahead of ... Torres, none at all. [Grievant] has been an exemplary employee. [Grievant] has never been hurt, never been injured, never had discipline, nothing should have prevented him from being in front of ... Torres. Tr. 160.

The Employer promotion decisions were consistent with the CBA VII provision that the Employer "will consider the ability to perform the work, and the seniority of each of the eligible candidates" and the MOU provision that "Opportunities for regular employment will be filled based on seniority, job performance (i.e. attendance, corrective action history, etc.) within the temporary job classification... ." Rx. 101, p. 3.

Ms. Tucker testified that, "the decision to promote temporary OAs to OAs was based on a performance evaluation." Tr. 207.

In line with the MOU, the Employer relied, [\*10] with the Union's agreement, on job performance in making determinations about the Temp OAs selected for full-time employment at the time at issue in this case. Tr. 222. Rx. 103. As reflected in meeting notes from an April 27, 2012, meeting between Employer and Union representatives, including Union President Tim Jaroch, regarding the hiring of Temp OAs as Perm OAs it is stated: "Decision to be based on performance rather than seniority." Tr. 204-206. Ux. 5, p. 5. Union President Jaroch and Business Manager Rick Pascarelli were made aware as early as April 2012 of the use of employee evaluations and the process used for selecting the Temp OAs who would be promoted to full-time OA:

John - For these 10, Supervisors sat together and evaluated these people.

[Union Steward] Rick [Pascarelli] - Who is completing these forms?

John - Supervisors

Rick - How are Shop supervisors going to know an employee's work output?

John - Crew Leads, talking to #1/#2's. We need to get better calibration.

[Union President] Tim [Jaroch] - Company will have to go to shops and explain why the 1st 10 came out of Division. Union is not going to do that.

John - As we are filling these spots; 1st 10 have been fairly evaluated. The next 2 groups will encompass everyone else. Ux. 5, p. 2.

In 2012 and 2013, all Temp OAs, including Grievant, were subject to the evaluation process. Tr. 276-277. These performance evaluations were put into use in the process for selecting which employees would be promoted from Temp OA to Perm OA. Tr. 282-283. Rx. 104. Supervisors at the facility where Grievant worked utilized an evaluation form on day 30, 60, 90, 180, 300, 365 and onward on a set schedule to evaluate each Temp OA. Tr. 277. Jx. 7. Rx. 104. Supervisors in the facility worked together to provide input into the evaluation for each employee. Tr. 276. To address concerns that the employees may have regarding the process of promoting Temp OAs to Perm OAs, supervisors were given talking points on or around February 27, 2013. Tr. 284-286. Rx. 102. Those talking points described why positions at the time were being filled, noting "[a]s negotiated between the Company and the Union, the Company had 10 remaining Operation Apprentice positions to fill from the original agreement to fill 30." *Id.* at question 1. Those talking points also specifically explained that "[e]mployees were selected based on their evaluations." Rx. 102, p. 1, question 2. They noted that "[r]atings for each evaluation were compiled and those with the highest ratings were selected." *Id.* at p. 2, question 10.

The records of the evaluation process from January 17, 2013, include an evaluation spreadsheet providing scores for each Temp OA under consideration for a Perm position. Tr. 307, 312. Jx. 7, pp. 1-2. Grievant was among the lowest rated employees of all Temp OAs. Tr. 307 and 312. Jx. 7, pp. 1-2. [\*11] In order to account for missing or different numbers of evaluations and not disadvantage employees who were in that situation, the Employer utilized a weighting system. Tr. 305-306. Through the weighting process, Grievant's weighted rating of 37.6875 was higher than the average rating of his raw scores 37.1666, meaning that the weighting system increased, rather than decreased his scores. Tr. 306. Jx. 7, pp. 2 and 5. Not every employee benefited in this manner. Jx. 7. Notwithstanding the increased score

provided by the weighting process, Grievant still had one of the lowest evaluation averages of any of the Temp OAs considered for promotion. Mr. Torres was rated among the top 10 employees with an average score of 45.2 and a weighted average of 47.25. Tr. 307 and 312. Jx. 7, pp. 1-2. As a result, Mr. Torres was promoted to Perm OA on March 3, 2013. Tr. 44, 85. Jx. 4 and 5.

The MOU provided that Perm OA roles would be filled from the ranks of the Temp OAs based in part upon "job performance." It is reasonable that this would include performance evaluations. Tr. 176. Ex. 101, 222. Rx. 101, p. 3. The "attendance, corrective action history, etc" language in the MOU contemplates other types of "job performance" by the inclusion of "etc."

The Employer appropriately relied upon these performance evaluations in evaluating employees and, while Mr. Torres was rated among the top 10 employees, Grievant was among the lowest rated employees of all Temp OAs. Tr. 313. Jx. 7, pp. 1-2. The evaluation spreadsheet provides scores for each of Grievant's evaluations over the course of his first year of employment. Tr. 304. Jx. 7, p. 3, 11th row from bottom. That the Employer is unable to locate the underlying evaluations reflects on when the December 9, 2021, Grievance was filed and not on the impropriety of their use. In the normal course of events, the Union would have been aware that the most junior of all Temporary OAs considered, Mr. Torres, was hired for a full-time role ahead of 47 other employees with earlier Temp OA hire dates.

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

"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 ... ." *Id.*, p. 9-36. All words used in a CBA should be given effect. *Id.*, pp. 9-34 to 9-35.

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).

If CBA wording is clear and definite, clear language should be enforced. In cases where the language[\*12] 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). Words should be given their ordinary and popularly accepted meaning in the absence of anything indicating that they were used in a different sense or that the parties intended some special or technical meaning.

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).

The Union argues that the Employer failed to produce any evidence that its system for promoting Temp OA to Perm OA was agreed to by the Union and could not point to any written agreement to that effect. This argument does not control. CBA Art VII (1) provides that the Employer "will consider the ability to perform the work, and the seniority of each of the eligible candidates." The MOU provides "Opportunities for regular employment will be filled based on seniority, job performance (i.e. attendance, corrective action history, etc.) within the temporary employee job classification ... ." What was going on in 2013 concerning promotions from Temp OA to Perm OA would have been open and obvious at that time and was consistent with the CBA and the MOU.

The Union argues that the Employer's evidence failed to show that its purported "performance evaluations" for Temp OAs actually occurred as claimed, or that either the Union or Grievant had been aware of them. The Employer claimed that the existence of a performance-based promotion system had been unknown to its own managers until after the Union filed its Grievance. This argument does not control. There is credible evidence that the evaluations actually occurred. This includes the contemporaneous rating sheets and the testimonial evidence explaining these rating sheets and the criteria that were used. Consistent with the MOU, the Employer relied on job performance in making determinations about Temp OAs selected for Perm OA. Tr. 222. Rx. 101. This is reflected in notes from the April 27, 2012, meeting between Employer and Union representatives. "Decision to be based on performance rather than seniority." Tr. 204-206. Ux. 5, p. 5. The records of the evaluation process from January 17, 2013, include an evaluation spreadsheet providing scores for each Temp OA under consideration for Perm OA. Tr. 307, 312. Jx. 7, pp. 1-2. Mr. Dixon testified,

... it's based on evaluations. ... [A]t that point I think they was selecting at least maybe 30 out of the over a hundred temp OA's. ... [I]t[\*13] came down to the top 30 at some point. Again most likely it was based on their evaluations, and that's pretty much what I remember. Tr. 286.

Mr. Dixon further testified, "I know there was evaluations done on [Grievant]." Tr. 290.

The Union argues that the evidence failed to support the Employer's claims that Grievant or the Union knew of a contract violation but failed to file a timely grievance in response. I have found that the Grievance was timely filed because under the totality of the circumstances the Grievance involved an allegation of a continuing violation.

The Union argues that the Grievance was timely because the denial of Grievant's seniority rights affected his wages on an ongoing basis. I have found that the Grievance was timely filed because under the totality of the circumstances the Grievance involved an allegation of a continuing violation.

The Union argues that given Grievant's persistent but unsuccessful attempts to get answers from the Employer, his filing of an ULP charge was the fruit of honest confusion and did not demonstrate the Union's "refusal" to file a grievance on his behalf. I have found that the Grievance was timely filed because under the totality of the circumstances the Grievance involved an allegation of a continuing violation.

The CBA seniority provision was not violated when Temp OA Torres (March 3, 2012, hire date) was promoted to Perm OA (March 13, 2013) ahead of Grievant (Temp OA hire date January 12, 2012, Perm OA July 24, 2013).

The Grievance was filed timely.

The crucial points in this case include the following.

1. The Union has the burden of proof.
2. CBA Art VII (1) provides that the Employer "will consider the ability to perform the work, and the seniority of each of the eligible candidates.
3. The MOU provides "Opportunities for regular employment will be filled based on seniority, job performance (i.e. attendance, corrective action history, etc.) within the temporary employee job classification ... ."
4. Clear and unambiguous language is interpreted consistent with the parties' intent as reflected by clear and explicit terms.
5. Ordinary meaning given to words unless they are clearly used otherwise.
6. CBA language that is consistent with and supported by the negotiating history.
7. The totality of the circumstances.
8. The wording of the CBA.

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

#### **8. 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: February 10, 2023



## General Information

<b>Case Name</b>	Peoples Gas Light and Coke Co.
<b>Date Filed</b>	Fri Feb 10 00:00:00 EST 2023
<b>Judge(s)</b>	Lee Hornberger
<b>Citation</b>	2023 BL 97198; 2023 BNA LA 17; 220605-05798