Labor Arbitration Awards: 1986 - Present, Americold Logistics, LLC and Teamsters Local 63., 23-2 ARB ¶8290, (Sept. 12, 2023)

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23-2 ARB ¶8290. LEE HORNBERGER, Arbitrator. Selected by the parties. Case No. FMCS 220727-08019. Hearings held via Zoom in Victorville, California, April 10, June 5, and June 13, 2023. Post-hearing briefs filed by August 29, 2023. Award issued September 12, 2023.

Headnote

Absence, leaves of: Termination: Year absence.–
An employee filed a grievance contesting his termination for missing work for an entire year due to a work-related injury. The arbitrator sustained the grievance in part and denied it in part. Under the collective bargaining agreement, employees who failed to work for 12 consecutive months could be terminated. The arbitrator ruled, however, that the employee had not been away from work for 12 consecutive months when he was terminated because the employee was ineligible to work for one of those months because he was previously terminated for one month, then rehired. Thus, the arbitrator agreed to reinstate the employee, but he refused to reinstate him with full back pay. Instead, he reinstated the employee to leave-of-absence status, with no back pay but with full seniority.

Alan I. Model, Attorney, for the Employer. Paige D. Chretien and Dennis J. Hayes, Attorneys, for the Union.

[Text of Award]

DECISION AND AWARD

INTRODUCTION

HORNBERGER, Arbitrator: This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between Americold Logistics, LLC (Employer) and Teamsters Local 63 (Union). The Union contends that the Employer violated the CBA when it discharged Grievant. The Employer maintains that it did not violate the CBA when it discharged Grievant.

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 April 10, June 5, and June 13, 2023, in Victorville, California, via Zoom. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses and for the introduction of relevant exhibits. The hearing was transcribed. The transcripts were received by me on April 24 [day one], June 12 [day two], and June 20, 2023 [day three]. The dispute was deemed submitted on August 29, 2023, the date the post-hearing submissions were 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.

Both advocates did an excellent job in representing their clients. The post-hearing briefs were very helpful.

ISSUES

The Employer frames the issue as follows:

Did the Employer violate CBA Art. 9, Sec. 2, by terminating Grievant's employment after he “failed to perform work for the Company for a period of 12 consecutive months for a work-related injury or illness”?

The Union frames the issue as follows:

Was the Grievant discharged for just cause? If not, what is the appropriate remedy?

I frame the issue as follows:

Was Grievant discharged for just cause? If not, what is the remedy?

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 6 “B” – ARBITRATION

Section 4. In rendering a decision, the arbitrator shall be governed and limited by the specific provisions of this Agreement. He shall have no power to add to, subtract from, or modify any of the terms and provisions of this Agreement, and he shall consider and render a decision concerning only such issues as are directly raised by the written grievance. The decision of the arbitrator shall be final and binding upon the parties hereto and upon the Company or associates concerned; provided, however, that the arbitrator shall make no award outside the scope of his authority outlined herein, or effecting a change, modification, or addition to this Agreement and shall confine himself strictly to the facts submitted in the hearing, the evidence before him, and the express terms and provisions of this Agreement.

ARTICLE 9 – SENIORITY

Section 1. The Company recognizes the principal of seniority shall prevail unless otherwise outlined in this Agreement. Seniority is defined as an associate's most recent period of continuous employment with the Company in the bargaining unit.

Section 2. An associate's seniority shall be lost in the following instances:

(a) Discharge for just cause;
(b) Voluntary quit;
(c) Failure to return to work on the specified date following layoff; or being laid off for a period that is the lesser of twelve (12) months or the length of the associate's seniority with the Company,
(d) Failure to perform any work for the Company, for a period that is the lesser of six (6) months or the length of the associate's seniority with the Company, for a non work related illness or injury, unless an extension is required by applicable law;
(e) Failure to return to work on the specified date after a leave of absence or vacation;
(f) An unexcused absence of three (3) consecutive working days without notifying the Company;
(g) Retirement;
(h) Failure to perform work for the Company for a period of twelve (12) consecutive months for a work related injury or illness.

Section 3. At the start of each shift, assuming that the requisite skills are present jobs will be distributed based on seniority.

ARTICLE 19

LEAVES OF ABSENCE

…

Section 10. A union-member Associate will be eligible to participate in the Company's Transitional Return to Work Policy if he/she (a) is injured on the job at Americold Logistics, LLC, and (b) is Workers' Compensation eligible. Said policy stipulates the following:

(1) A suitable “light duty position” must exist. The Employer has no obligation to create one if there is no actual need for the position.
(2) Any such “light duty position” will not displace a current union-member associate, nor will it reduce regular or overtime hours of union-member associates.
(3) Said “light duty position” will be limited to no more than six (6) calendar months.
(4) Upon completion of the “light duty job”, said position will not become a bargaining unit job.
(5) Before beginning the “light duty job”, the Employer will provide the union-member Associate's attending physician with a detailed job description of the Job being offered, and the attending physician MUST provide the Employer with written approval of said job stating that the job being offered presents absolutely no further risk to the existing injury currently experienced by the union-member Associate.
(6) While doing the “light duty job” being offered, the union-member Associate will receive eighty-five percent (85%) of his/her normal hourly wage, rather than the lesser compensation offered by Workers' Compensation.
(7) Of course, the union-member Associate will retain the right to refuse said “light duty job”, but in doing so may risk the loss of his/her Workers' Compensation benefits.
(8) Whenever the union-member Associate is deemed by his/her attending physician to be fit for full-time work doing his regular job, he/she will immediately be returned to that job at 100% pay.

ARTICLE 27

EXTRA CONTRACT AGREEMENTS

Section 1. The Company agrees not to enter into any other agreement or contract with its associates, individually or collectively, which in any way conflicts with the terms and provisions of the Agreement.

Section 2. Modifications to this Agreement will not be controlling unless reduced to a writing and signed by the Labor Relations Director and the Union.

FACTUAL OUTLINE

List of Participants

Grievant was a Lift Truck Operator (LTO) with the Employer. He was hired on March 26, 2010; injured on April 7, 2020; absent from work April 7, 2020, to November 30, 2020; working on light duty November 30, 2020, to February 2, 2021; absent from work February 2, 2021, to June 9, 2021; discharged June 9, 2021; reinstated July 9, 2021; absent from work July 9, 2021, to June 8, 2022; and discharged June 8, 2022.

HR Manager JV has been employed by the Employer for more than seven years.

Senior Manager Risk Management DW has been with the Employer for two and a half years. He is a Certified Risk Manager. He is familiar with the California WC process.

Dr. W, MD, FAAOS, FACS, **AME**, was the Agreed Medical Examiner (AME).

Dr. AE was Grievant's treating physician for a period of time.

Dr. NT was Grievant's treating physician beginning in March 2022.

LTO JN has worked for the Employer for 12 ½ years.

Introduction

April 2020

Grievant suffered an on-the-job back injury on April 7, 2020. Grievant's back was hurt while he was picking up cases from a pallet that was dumped over on the dock. Rx. 2. He filed a back injury claim with WC. According to Ms. JV, the Employer selected the occupational health clinic of “Dr. Mike.” Rx. 3. The Employer can direct medical treatment during the first 30 days. On April 14 and 21, 2020, Grievant received Work Status Reports from Dr. Mike's 24-Hour Walk-in Clinic. Rx. 3. These were the first documents from a medical provider. The diagnosis was “lower back pain.” There was a Work Status document on April 29, 2020. The diagnosis was “muscle spasm of back-M62.830.” Rx. 5.

May and June 2020

There were Work Status documents from Concentra on May 4, 11, and 21; and June 1 and 12, 2020. Rx. 6, 7, 8, 9, and 10.

July 2020

On July 21, 2020, Grievant's attorney and the Employer's attorney agreed for Dr. W to be the AME. Rx. 11 and 50.

August and September 2020

On August 5, 2020, Dr. AE, Grievant's primary treating physician, submitted a Primary Treating Physician's Progress Report indicating “no lifting over 15 pounds.” Rx. 12. On August 11, 2020, there was a Joint Agreed Medical Evaluation Letter in which Grievant's worker's compensation attorney and the Employer's worker's compensation attorney agreed that Dr. W would be the Orthopedic Agreed Medical Examiner (AME). Rx. 13. On September 9, 2020, AME Dr. W submitted an initial mediation evaluation indicating “temporary partially disabled with restrictions of no lifting, pushing, or pulling more than 20 pounds.” Rx. 14. On September 16, 2020, there was a Progress Note/Work Status from ATT PA, of Dr. AE's office, indicating no lifting over 15 pounds. Rx. 15. In addition, on September 16, 2020, there was a Primary Treating Physician's Progress Report from ATT PA, of Dr. AE's office. Rx. 16.

October 2020

On October 14, 2020, there was a Dr. AE Primary Treating Physician's Progress Report, Addendum, p.4, of August 5, 2020, report reviewing light duty work proposal. Rx. 17. This report states,

> In my opinion patient is able to perform the requirements for the position: sweeping, dusting, cleaning without lifting more than 15 lbs., filing paperwork without lifting any more than 15 lbs.

On October 28, 2020, there was a Dr. AE Primary Treating Physician's Progress Report. Rx. 18.

November 2020

On November 19, 2020, AME Dr. W issued an Agreed Medical Examination Supplemental Report suggesting treatment by Dr. AE before Grievant would be considered permanent and stationary. Rx. 19. On November 27, 2020, there was a letter to Grievant to return to work on light duty. Rx. 52. On November 30, 2020, Grievant “Return[ed] from Leave.” He remained working on light duty until February 2, 2021. Rx. 20 and 21. This light duty was primarily janitorial duty in the warehouse. The light duty included sweeping. Grievant mainly swept

the warehouse. There was some office work. Grievant was unable to continue due to pain. He was removed from work. According to the Grievant, his “work restrictions not being followed.” The Employer said it could not accommodate Grievant's work restrictions.

January to March 2021

On January 29, 2021, there was a Dr. AE Primary Treating Physician's Progress Report. Rx. 22. This continued the 15 lbs restriction. On January 29, 2021, there was also a Dr. AE Progress Notes/Status Report. Rx. 23. This continued the 15 lbs restriction. According to Grievant, Ms. JV told Grievant that the Employer could not accommodate Grievant's January 2021 work restrictions. According to the Employer records, on February 2, 2021, Grievant was placed on “Leave of Absence” because of “Workers' Compensation.” Rx. 24. On February 1, 2021, a grievance was filed. Ux. 112. On February 2, 2021, Grievant went on leave. Rx. 24. Since February 2, 2021, Grievant had not physically worked for the Employer. According to Ms. JV, the Union did not object to LOA. On February 19, 2021, there was a Dr. AE Primary Treating Physician's Progress Report, Rx. 25, and a Dr. AE Progress Note/Work Status Report. Rx. 26.

April and May 2021

On April 14, 2021, there was a Dr. AE Primary Treating Physician's Progress Report. Rx. 27. This continued the 15 lbs restriction. On April 26, 2021, there was an AME Dr. W Follow-Up Medical Evaluation – ML202 (Agreed Medical Evaluation) stating:

> permanent and stationary. … [Grievant] should observe work restrictions of no lifting, pushing or pulling more than 20 pounds and from repetitive bending and stooping. I do not recommend that he returns (sic) to work in his usual and customary occupational. Rx. 28.

The document also indicated, “Permanent and Stationary.” Spine: 5% whole person impairment. 13% whole person impairment. Grievant asked to go to a pain specialist medical doctor. Dr. NT.

On May 26, 2021, there were progress notes from Dr. AE discharging Grievant from care and providing more restrictions on work. “Modified work. Alternate 1 hour standing/walking x 1 hour sit down work in an 8 hour day. No lifting over 15 pounds.” Rx. 29.

June to December 2021

On June 9, 2021, permanent disability benefits apparently commenced. According to the Employer records, on June 9, 2021, the Employer did a “Termination” of Grievant because of “Worker's Comp Settlement.” Rx. 30. Via an undated termination letter, the Employer discharged Grievant effective June 9, 2021. Ux. 114. On June 14, 2021, there was a grievance filed concerning the June 9, 2021, discharge. Rx. 31.

On June 16, 2021, there was a Dr. ETC (with Dr. AE's office) Primary Treating Physician's Progress Report. Rx. 49. This, in part, continued the 15 lbs restriction.

On June 18, 2021, the Employer submitted its grievance response. Rx. 32. On June 30, 2021, there was a grievance meeting concerning Grievant's termination. At this meeting, Grievant and the Union claimed that the Employer did not reach 12 months necessary as per the CBA to terminate Grievant's employment. Ms. JV testified, “[t]he union cited the contractual language regarding 12 months and that an associate loses their seniority after 12 months of no work performed for the company. So based upon that, they felt that we had acted prematurely and terminated prior to his 12 months being off.” Tr. 50. Grievant testified,

> Q. Okay. Now, during this meeting, this June 30,
>
> 2021, meeting, did you request to be placed on a leave of absence?

A. No, I did not. Tr. 286.

Q. Okay. And did the company, in fact, reinstate

you to a leave of absence status?

A. Yes. They put me on a leave of absence status. Tr. 289.

On July 1, 2021, Grievant's permanent disability benefits ceased in accordance with Grievant's counsel's request. On July 9, 2021, Grievant was reinstated in accordance with the grievance meeting. Rx. 33. The decision to reinstate was made by Ms. JV and Risk Management. According to the July 9, 2021, reinstatement letter, Grievant was reinstated to a LOA. Ux. 116. The reinstatement letter said,

> This letter shall serve as a follow up to the meeting held 6/30/21 to discuss the grievance filed by [Grievant] regarding his termination due to inability to accommodate permanent work restrictions outlined in the Agreed Medical Examiner's (AME) report. The Union and [Grievant] have verbally requested that [Grievant] be reinstated.
>
> The Company continues to be unable to accommodate the permanent work restrictions outlined in the Agreed Medical Examiner's (AME) report. The Company is not able to reconcile the competing opinions outlined in the AME report and those outlined by [Grievant's] personal physician and the Company and Grievant] await further evaluation and guidance through the worker's Compensation process.
>
> All other alleged violations are denied. Rx. 33.

On October 1, 2021, AME Dr. W provided his Agreed Medical Examination Supplemental Report stating “permanent.” Rx. 34. On November 26, 2021, there was an email from Ms. JV concerning shift bids. Ux. 117. On December 1, 2021, Dr. AE confirmed that Grievant reached maximum medical improvement and discharged Grievant from his care. Ux. 110.

February 2022 to May 2022

According to the Employer, February 2, 2022, was the 12 month date from Grievant's absence from work.

On March 1, 2022, Dr. NT wrote a Primary Treating Physician's Progress Report. Rx. 35. This indicated a 35 lbs restriction.

On April 29 and May 4, 2022, Ms. JV tried to contact Grievant in light of the 12 months absence situation. On May 5, 2022, Ms. JV sent a letter to Grievant advising him that his employment would be terminated effective May 16, 2022, if he cannot return to work. Rx. 36. This letter did not go to the Union. According to Grievant, Grievant “was shocked” to receive this letter. He showed up to work the next day with a MD note.

According to Grievant, there was the April 26, 2022, visit to MD. Grievant thought this meant he had no work restrictions. Dr. NT was still Grievant's treating physician. On May 10, 2022, Grievant reported to work with a blank Progress Notes/Work Status from Dr. NT dated April 26, 2022. Rx. 37. Grievant was not allowed to work that day. He was sent home. On May 10, 2022, Grievant sent an email raising a grievance. Rx. 38.

On May 11, 2022, Grievant sent an email to Ms. JV. Rx. 39.

On May 13, 2022, Ms. JV sent Grievant an email concerning the blank Dr. NT document. Rx. 39.

On May 13, 2022, there was a discussion concerning whether Grievant could return to work with or without accommodation.

On May 19, 2022, Ms. JV sent a letter to the Union responding to the May 10, 2022, grievance email. Rx. 40. On May 19, 2022, Ms. JV sent a letter to Grievant concerning the May 10, 2022, Dr. NT note not being from “your

treating physician of record or the approved and agreed upon AME," offering to delay discharge under CBA to May 30, 2022, to give Grievant a chance to present information after the May 24, 2022, Dr. NT visit. Rx. 41.

On May 24, 2022, Grievant reported to work with a Progress Notes/Work Status from Dr. NT saying to return to full duty. Rx. 42. May 24, 2022. Appointment with Dr. NT. Ux. 120. "Return to Duty. May 24, 2022." Grievant provided this document to Ms. JV. The Employer did not return Grievant to work.

Grievant would not agree to go back to Dr. W. There were Grievance meetings. The Employer asked for Grievant to be reevaluated by the AME. Grievant declined.

June to July 2022

On June 8, 2022, the Employer discharged Grievant giving the reason as being the CBA language due to Grievant being on LOA for 12 months. Rx. 43. In addition, the discharge final pay letter was done on June 8, 2022. Rx. 44. The discharge letter states,

> After careful consideration of the information that we have, our multiple communications and interactive discussions, we do not see any reason to change our course of action against confirmed / agreed upon AME provider evaluation. There were no accommodations that would fit within the provider's permanent restrictions. Additionally, as we have previously noted in our previous communications, you have not performed any work within a 12 month period. Therefore, based on our information and in accordance with the CBA, we are moving forward with separation of your employment, effective Date 6/8/22.

On June 14, 2022, there was an email grievance concerning the discharge. On June 21, 2022, the Employer sent a letter responding to the grievance email. Rx. 46. There was a grievance meeting held on June 28, 2022. Ux. 119 and 120. On July 7, 2022, Ms. JV sent a letter to the Union after the grievance meeting. Rx. 47. On July 26, 2022, Union counsel sent a letter to Ms. JV concerning proceeding to arbitration. Rx. 48.

Grievant wants to return to the LTO job.

Ms. JV

Under California WC law, AME Dr. W decides.

Mr. DW

According to Mr. DW, the first step is to attempt to agree on an AME. Dr. W was the AME. The AME decision is binding on the employee. The Bureau of WC gives the AME great deference. There is a rigorous process to be on AME panel. There is screening. The AME is to reconcile the history, the job description, etc. Dr. W is an orthopedic spine specialist. The AME does tests of the employee. There is a "Primary Treating Physician (PTP)." The PTP MD is involved until there is a dispute. The AME opinion is given a heavy weight. The AME is unique to California. Dr. W is a fair and objective neutral. Dr. AE is a good orthopedic specialist. Eighteen percent is debilitating. One has to consider the safety of the entire work environment. According to Mr. DW, the heaviest weight of opinion should be given to Dr. W and Dr. AE, rather than to Dr. NT. There can be lumbar spine aspirations (increase) while operating a light truck. This would be a "very substantial risk." Dr. W was not providing day to day treatment of Grievant. Pain reading is subjective to the patient. No WC settlement was reached with Grievant. Mr. DW believed Grievant was still under a high degree of pain. According to Mr. DW this is in the March 2022 notes. The MMI level dictates Grievant could not come back to work.

Grievant

According to Grievant, the “shooting pain” was “a second.” Ux. 109. It was a “snap of the finger.” Meloxicam side effects were upset stomach. Grievant did not experience any dizziness. There was no visual change. Grievant is not aware of any time when he could not operate a motor vehicle. Ux. 119. March 1, 2022. Grievant “took medicine as needed.” There was “just an upset stomach.”

LTO JN

LTO JN has worked for the Employer for 12 ½ years. He operates different pieces of equipment, order picks, and other things. According to Mr. JN, some job functions can be done “by hand.” “Case picking” is done 10% by hand. According to Mr. JN, the way it used to be done.

> 90% were 35 lbs or less.
>
> 85% were 25 lbs or less.
>
> 75 % were 15 lbs or less.

Unloading can be done by hand. Seniority is a factor. There is a shift meeting every shift. LTO on the docks rarely have hands on the product. All of the Lift Trucks are battery operated. There is a designated battery changer.

Mr. JN has been injured on the job. This included 2011 and 2013. In 2013, he had lower back, knee, and wrist issues. He missed work. He filed a WC claim. He had a designated treating physician. He could choose any physician that was in the Sedgwick network. He has an AME. His AME is Dr. W.

He returned to work. He had a flare-up in March 2020. He missed ten months of work because of the flare-up. He was on WC leave. He returned to work in February 2021. He had a Work Status Report from his own MD. While he was off work he saw the AME. Ux. 128. The AME was Dr. W. Ux. 129. January 29, 2021. Rx. 54. August 17, 2020. AME. Dr. W report.

“Case picking.” Everybody case picks differently. 25% of work is case picking. Some is still done by hand. “10% by hand.” He knows this based on his being there. He “can't answer what majority is.” He knows this “from experience.”

In early 2023, the Employer's facility became an all frozen food warehouse. Before then it was approximately 75% frozen food.

CONTENTIONS OF THE PARTIES

a. For the Employer

The Employer contends that this is a straight-forward case of an employee who failed to work for 12 consecutive months which led to his termination under the negotiated terms of the CBA. According to the Employer, the arbitration hearing expanded beyond one day and is cluttered with an abundance of medical-related documents because of Grievant's pending Worker's Compensation litigation. This is a simple question of whether the Union met its burden of establishing the Employer violated the express terms of CBA, Art. 9, Sec. 2(h), that provides an employee who fails to work for 12 consecutive months due to a workplace injury loses his seniority and, thus, his employment is separated.

Grievant failed to perform work for the Employer for over 12 consecutive months due to a workplace injury. Once his absence exceeded 12 months, the Employer acted in strict adherence to Art. 9, Sec. 2(h), and terminated Grievant's employment. As this was the bargained-for outcome of Art. 9, Sec. 2(h), I am compelled to uphold Grievant's termination of employment under Art. 9, Sec. 2(h). According to the Employer, the evidence compels only one conclusion: that the Employer acted within its rights in discharging Grievant for failing to work for 12

consecutive months pursuant to Art. 9, Sec. 2(h), which is certainly in line with the Employer's rights under the CBA.

The Employer and the Union agreed in their CBA that seniority shall be lost when an employee fails to perform work for the Employer for a period of 12 consecutive months due to a work-related injury or illness. The facts are undisputed. Grievant was injured while working in April 2020 and went on a leave of absence. After returning from a brief stint handling light-duty, Grievant again went on a leave of absence on February 2, 2021, and remained out for over a year, triggering Art. 9, Sec. 2(h). The Employer decided to terminate Grievant's employment on June 8, 2022, more than 12 consecutive months since he last worked, once it was determined by two orthopedic surgeons, selected by the Employer's and Grievant's counsel, determined that Grievant is permanently disabled and could not return to work. The Employer's actions are consistent with the express terms of the CBA which cannot be modified through arbitration.

The Employer requests that the Grievance be denied.

b. For the Union

According to the Union, the Employer violated CBA Art. 9, sec. 2. Discharge under the CBA must be for just cause. CBA, p. 14. Art. 9, sec. 2, does not identify grounds for termination, but rather, specific instances where employees may lose their seniority. As explained in *Cooper Industries, Inc.*, 78 LA 850 (Aisenberg, 1982), discharge and termination of seniority are separate and distinct concepts. This is particularly true where the employer's right to discharge is derived from a different article than its right to terminate seniority, and discharge for cause is one of enumerated bases for terminating seniority. “If the two were not separate and distinct concepts, there would have been no need to include discharge for proper cause in [the] section [pertaining to termination of seniority].” *Id*.

The Employer's authority to discharge for just cause is derived from Art. 14, sec. 1, which provides, in relevant part, “The Company will have the right to discharge or suspend for just cause ….” CBA, p. 14. Loss of seniority is governed by Art. 9, sec. 2. Discharge for just cause is also specifically identified as a basis for loss of seniority under Art. 9, sec. 2. CBA, p. 10. Accordingly, under the CBA, loss of seniority is not tantamount to discharge, and not performing work for the Employer for 12 consecutive months following a work-related injury is not in and of itself just cause for discharge.

While the Employer relies on paper on Grievant's alleged non-performance of work for the Employer for 12 consecutive months as the basis for terminating Grievant (despite the fact that Grievant was not employed by the Employer for the 12 consecutive months prior to the subject termination due to the Employer's terminating his employment for approximately one month in June 2021), the facts suggest that Grievant was terminated for his conduct in refusing to agree to submit the issue of whether he was fit to return to full duty to a physician other than his treating physician. The CBA includes a negotiated for-policy by which a unit employee who is injured on the job and workers' compensation eligible, like Grievant, is to be returned to their regular position upon being released to full duty by their treating physician. CBA, pp. 20-21.

The Union requests that I sustain the grievance and order a make-whole remedy including that Grievant be reinstated to his regular LTO position, with full seniority, and made whole for all wages and benefits lost.

DISCUSSION AND DECISION

Introduction

For the following reasons, I conclude that the Employer violated the CBA when it discharged Grievant. There was not just cause to discharge Grievant.

Termination

Grievant was terminated for allegedly failing to work 12 consecutive months for a work related injury or illness. Art. 9, Sec. 2 (H). CBA, pp. 10-11.

The Employer contends that Grievant was in violation of the Art. 9, Sec. 2, twelve consecutive month rule. The Union contends that Grievant did not violate the twelve month rule and there was no just cause for the discharge.

CBA Art. 9, Sec. 2(h), pp. 10-11, provides that:

> An associate's seniority shall be lost in the following instances … **Failure to perform work for the Company for a period of twelve (12) consecutive months for a work related injury or illness.** Emphasis added.
>
> CBA, Art. 14, Sec. 1, CBA, p. 14, requires just cause for discharge.
>
> CBA, Art. 19, Sec. 10(8), pp. 20-21, states:
>
> Section 10. A union-member Associate will be eligible to participate in the Company's Transitional Return to Work Policy if he/she (a) is injured on the job at Americold Logistics, LLC, and (b) is Workers' Compensation eligible. …

c. Whenever the union-member Associate is deemed by his/her attending physician to be fit for full-time work doing his regular job, he/she will immediately be returned to that job at 100% pay. Emphasis added.

Burden of proof

The Employer has the burden of proof in a discipline case. Elkouri & Elkouri, *How Arbitration Works* (8th ed.), pp. 15-26 to 15-32; Abrams, *Inside Arbitration* (2013), pp. 206-209.

The twelve consecutive month rule is binding on Grievant

The twelve consecutive month requirement is in the CBA. It is inherently binding on Grievant.

The rule was a reasonable work rule

Management has the right to establish reasonable work place rules not inconsistent with the CBA. Elkouri & Elkouri, pp. 13-144 to 13-145. Assuming there is a proven violation and the other requirements of just cause, the twelve consecutive month rule is reasonable. Abrams, pp. 206 and 261. The twelve consecutive month termination of seniority provision is in the CBA. It is not a unilaterally established work rule. The twelve consecutive month rule is inherently a reasonable rule because the parties agreed to put it in the CBA.

There was a fair and objective investigation

There was an appropriate investigation.

“Industrial due process … requires management to conduct a reasonable inquiry or investigation before assessing punishment.” Elkouri & Elkouri, p. 15-49. It is a fundamental principle of employment law that the issue of due process and following correct procedures can impact on the issue of just cause and the amount of discipline, if any, that should be approved or imposed. *Id*. at 15-47 to 15-50. *Federated Dep't Stores v. Food & Commercial Workers Local 1442*, 901 F.2d 1494 (9th Cir. 1990) (arbitrator appropriately determined due process to be component of good cause for discharge); *Teamsters Local 878 v. Coca-Cola Bottling Co*., 613 F.2d 716, 718 (8th Cir.), cert. denied, 446 U.S. 988 (1980) (appropriate for arbitrator to interpret just cause as including requirement of procedural fairness).

Abrams, p. 211, states:

> … [T]he concept of "due process" is inherent in the just cause provision.
>
> … [a]arbitrators prefer seeing evidence that management … offered the accused employee the opportunity to contribute before the investigation hardened into a decision. A discharge followed by an investigation obviously puts the cart before the horse. An employer need not keep an employee at work, but there is no obvious reason why it cannot suspend the employee pending investigation.

Arbitrators "often overturn otherwise valid discharges where the employer has denied the employee those [due process] protections." Nolan, *Labor and Employment Arbitration* (1999), pp. 205 to 206.

Arbitrator Goldstein indicated at *State of Illinois*, 136 LA 122, 129-130 (2015), that:

> [A]n employer's obligation to a predisciplinary investigation is determined by context. …
>
> [T]he level of discipline involved is an important consideration … in determining whether the underlying investigation by the employer was fair and reasonable.

The Grievant was given a meaningful opportunity to tell his side of the story before discipline was imposed. There was an adequate check against the possibility of an incorrect decision.

The rule was applied evenly and without discrimination

There is no evidence that similarly situated or comparable employees have allegedly violated the twelve consecutive month rule.

Neither Employer nor Union witnesses should be given higher deference.

> [S]upervisors should not necessarily be given greater credibility …. [It has been suggested that] neither the discharged employee, the steward, nor the supervisor who made the [discipline] decision [is] inherently more credible …. Elkouri & Elkouri, p. 8-97.

I have considered all the circumstances of all the witnesses when assessing testimony. I have considered the totality of the circumstances. Abrams, pp. 189-192; Elkouri & Elkouri, pp. 8-93 to 8-98.

Furthermore:

> The arbitrator's decision in discharge and discipline cases must reflect the parties' values and interests, not the arbitrator's personal conception of how the workplace should be run." Abrams, p. 202.

An arbitrator may require a high degree of proof in one discharge case and at the same time recognize that a lesser degree may be required in others. Similarly, where the burden of proof was not strong enough to justify a discharge, some arbitrators have found it strong enough to justify a lesser penalty. Elkouri & Elkouri, pp. 15-28 to 15-29.

Art. 19, Sec. 10 – Treating Physician Release

The Union argues that the return to work documentation from treating physician Dr. NT should have been followed requiring Grievant's return to work. This argument does not control. Art. 19 addresses the leaves

of absence that may be available to unit employees given their specific situations. Sec. 10 pertains to the Employer's “Transitional Return to Work Policy” and the situation where an employee is working in a light duty position for up to six months. Sec. 10, Sub. 8 provides for the situation where the employee working in the light duty role is cleared to return to full-time work. It states “[w]henever the union-member Associate is deemed by his/her attending physician to be fit for full-time work doing his regular job, he/she will immediately be returned to that job at 100% pay.” CBA, p.21.

Ms. JV testified that Art. 19, Sec. 10, Subsec. 8 is not applicable to Grievant's situation.

> Q. Now, what circumstance does Article 19, Section 10, Subsection 8 apply to?
>
> A. This in regards to transitional duty, so returning from light duty to full duty.
>
> Q. Okay. So is this language applicable to someone who is out on a leave of absence?
>
> A. No. This is specifically talking about transitional duty. Tr. 111.

Grievant was not working a light duty position in May 2022 when Dr. NT issued her note permitting him to return to full duty without restrictions. Art. 19, Sec. 10, did not apply to that situation.

Art. 9 Loss of Seniority and Loss of Employment

The Union argues that loss of seniority under Art 9. does not mandate loss of employment. This does not control. Art. 9 loss of seniority means the employment relationship ends. Elkouri & Elkouri states,

> Contractual provisions for loss of seniority in designated situations are not uncommon …. In some instances, the agreement will expressly indicate that loss of seniority due to unexcused absences shall also constitute a termination of the employment relationship. Termination of employment without such express provision has been upheld in some cases as a concomitant of the loss of seniority, but not always. Elkouri & Elkouri, pp. 14-42 to 43.

Under the parties' CBA, the reasonable interpretation of the loss of seniority language is that it results in termination. *Bassick Co.*, 38 LA 279 (Seitz, 1962) (termination of seniority is termination of employment); *Krey Distributing Co.*, 1996 WL 34672857 (Cohen, 1996) (interpreting the loss of seniority to be something other than termination would be illogical as it would allow a grievant to be absent an indefinite length of time and claim they should simply be put at the bottom of the seniority list with no further penalty); *Board Workers United*, 2010 LA Supp. 161563 (Gootnick, 2010) (“His employment at the Company came to an end by operation of the Agreement …. He had exhausted all the disability benefits … including the provision that temporarily preserved his seniority.”)

In *Cooper-Standard Automotive Group*, 129 LA 1700 (Dilts, 2011), the grievant sustained a work-related injury and began to receive workers' compensation benefits. The CBA in *Cooper-Standard* authorized the breaking of seniority for any employee being on leave for more than two years. The arbitrator denied the grievance stating, “the parties have had language in their Agreement which governed the breaking of continuous service, and it included common reasons often found in collective bargaining agreements, including voluntary quit, discharge for cause, absence without reporting for three consecutive working days, et cetera.” Like in *Cooper-Standard*, the Employer and the Union have negotiated into the CBA language similar as in *Cooper-Standard*, which details how seniority is lost.

Disparate Treatment

The Union argues that there was disparate treatment. This does not control.

It is the Union's burden to establish inconsistent treatment. *State of Ohio*, 99 LA 1169, 1173 (Rivera, 1992). Elkouri & Elkouri, p. 15-83 to 86.

> In order to prove disparate treatment, a union must confirm the existence of both parts of the equation. It is not enough that an employee was treated differently from others; it must also be established that the circumstances surrounding his/her offense were substantively like those of individuals who received more moderate penalties. *Genie Co.*, 97 LA 542, 549 (Dworkin, 1991) [Elkouri & Elkouri, p. 15-84].

"Discrimination is an affirmative defense and, therefore, the union generally has the burden of proving that the employer improperly discriminated against an employee." Elkouri & Elkouri, p. 15-84.

A recognition that not every employee is treated exactly the same does not justify a charge of invidious discrimination against any employee or any other intentional discrimination. To show disparate treatment strong enough to overcome management's decision requires the Union to show by clear and convincing evidence purposeful discrimination. *Ohio Department of Rehabilitation and Corrections*, 93 LA 1186 (1990) (denying grievance and explaining that each employee's total work record, longevity, and past discipline are important considerations, particularly where there is no indication that the employer was out "to get" the employee). *City of Alton*, 121 LA 1288 (Pratte, 2005) (denying grievance and rejecting instances of alleged disparate treatment lacking evidentiary support and without evidence regarding the prior disciplinary records of others).

The Union argues that BQ and JN are comparable to Grievant.

The Union argues that Mr. BQ's ability to work light duty in April 2021 means Grievant was deprived of that light duty position. No grievance concerning this situation was filed by Grievant. Ms. JV testified that the light duty position offered to Mr. BQ in April 2021 could not have been performed by Grievant as he had already been deemed permanently disabled. Tr. 112. Ms. JV testified, "[o]nce restrictions are permanent, they're no longer considered a reasonable accommodation, because the company does not accommodate permanent light-duty restrictions." Tr. 81-82. There is no evidence Mr. BQ was out of work for 12 consecutive months due to a workplace injury and treated differently than was Grievant.

Mr. JN was not out of work for 12 consecutive months and subject to termination as per Art. 9. The facts are different in his situation. Mr. JN had Dr. P, an orthopedic surgeon, treat him for eight years and perform multiple surgeries before JN's March 2020 flare-up of his injuries. After a ten month leave, JN was returned JN to work without restrictions by Dr. P, his primary treating physician. Dr. P's opinion was given deference due to JN's eight-year history with Dr. P, as an orthopedic surgeon who operated on and treated JN and served as JN's primary treating physician. Art. 9, Sec. 2(h) was not implicated. Grievant's situation is different. Orthopedic surgeons Dr. W and Dr. AE agreed Grievant reached maximum medical improvement. Grievant had 18% Whole Body Impairment compared to JN's 8%. Grievant experienced electric-shock like pain that could immobilize him whereas JN had less severe pain. JN had not experienced electric shock-like pains down his leg that immobilized him.

Were there 12 consecutive months?

The Union argues that there was not a 12 consecutive month period because of the intervening June 2021 discharge. According to the Union, while the Employer reinstated Grievant back to the original date of his termination (June 9, 2021), he could not have performed any work for the Employer during the month in which he was terminated, regardless of any work restrictions or medical recommendations, since he was not employed by the Employer at such time. Tr. 51/20-23.

Ms. JV testified that at the June 30, 2021, grievance meeting, the Employer agreed to reinstate Grievant to a leave of absence as his 12 months had not ended. At this meeting, "[t]he union cited the contractual language regarding 12 months and that an associate loses their seniority after 12 months of no work performed for the

company. So based upon that, they felt that we had acted prematurely and terminated prior to his 12 months being off." Tr. 50.

Art. 9, Sec. 2(h), states,

> An associate's seniority shall be lost in the following instances … **Failure to perform work for the Company for a period of twelve (12) *consecutive months* for a work related injury or illness.** Emphasis added.

Because of the June 2021 discharge period, there was not a "failure to perform work … for a period of twelve (12) ***consecutive*** months for a work related injury or illness."

Art. 9, Sec. 2(h) is clear and unambiguous. An employee's seniority will be lost if he fails to work for 12 consecutive months due to a work-related injury or illness. Ms. JV testified as to her discussions with the Union in June 2021 as to the applicability when the Employer terminated Grievant's employment and agreed, after meeting with the Union, to reinstate Grievant to a leave of absence as his 12 months of job protection had not run its course. At this meeting, "[t]he union cited the contractual language regarding 12 months and that an associate loses their seniority after 12 months of no work performed for the company. So based upon that, they felt that we had acted prematurely and terminated prior to his 12 months being off." Tr. 50.

Both the Employer and the Union agreed to specific terms for Art. 9 to mark the end of an employee's employment, inclusive of Section 2(h) after a consecutive twelve month absence due to a workplace injury. The one month discharge status was in the middle of the 12 months and kept the 12 months from being consecutive.

The effective date of the termination before me is June 8, 2022. The Employer previously terminated Grievant on June 9, 2021, and did not reinstate him until July 9, 2021. Grievant had only been employed by the Employer for about 11 consecutive months as of June 8, 2022. Any action taken against Grievant pursuant to Art. 9, Sec. 2(H), on June 8, 2022, was thus premature.

My "first obligation is to determine whether disputed language is clear and unambiguous. If so, [I] must give the language its plain meaning, even if one party finds the result somewhat harsh or contrary to its initial expectations." *Buckeye Rural Electric Coop.*, 15-2 ARB 6513, (Zeiser, 2015). "Contract interpretation requires determining just what the parties intended when they agreed to the contract language in question …. This intent is generally found in the words of the contract. It is the arbitrator's duty to read, interpret, and apply the provisions of the parties' agreement …. [A]rbitrators should attempt to determine the intent of the parties from the instrument as a whole." *Watkins*, FMCS 11-02972-3 (Grenig, 2012), pp. 17-18.

> The primary goal of contract interpretation is to determine the mutual intent of the parties. Many arbitration awards considering issues of contract interpretation are written in the context of the intent of the parties. The principle of considering the parties' intent is based on the assumption that there is an obligation to construe collective bargaining parties' agreements so that they carry out the intent, real or attributed, of the parties. Because no single principle of interpretation can establish exactly what the parties intended, the determination of intention requires the exercise of judgment. The parties' intent is generally found in the words which they used to express their intent in the collective bargaining agreement. Although contract language provides a significant indication of what the parties intended, extrinsic evidence found in the bargaining history and the parties' administration of the contract may also be helpful. Grenig, *Principles of Contract Interpretation: Interpreting Collective Bargaining Agreements*, 16 CAP. U. L. REV. 31, 33 (1986).

My role is to give effect to the parties' true intentions. *Waco International*, 111 LA 808, 812 (Talarico, 1998); *Levy Co.*, 123 LA 1735, 1738 (Ponticelli, 2006). "[T]he literal wording of the agreement itself provides the most

reliable basis for determining the parties' intent[.]" Theodore J. St. Antoine, THE COMMON LAW OF THE WORKPLACE 73 (2nd ed. 2005); *Safeway Stores*, 85 LA 472,475 (Tharp, 1985). The best way to determine the parties' true intentions is to give the words used in the CBA their ordinary or plain meaning. *Waco International*, 111 LA 808 (1998) (Talarico, 1998.); *Levy Co.*, 123 LA 1735 (Ponticelli, 2006) ("It is a long standing principle of contract interpretation that arbitrators should give the plain meaning of the words to the language of the [CBA].").

"[T]he existence of an ambiguity must be determined from the 'four corners of the instrument' without resorting to extrinsic evidence of any kind." *Primeline Indus.* 88 LA 700, 700 (Morgan, 1986); *Snokist Growers*, 122 LA 345, 351 (Sellman, 2006); Elkouri & Elkouri, p. 9-8. "[I]f the words are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used." *City of Canton*, 131 LA 51 (Szuter, 2012); Elkouri & Elkouri, *p.* 9-8 ("[T]he mutual intent must be drawn from the language alone. Unambiguous language must be given its clear meaning"). "For an arbitrator to apply anything other than the clear and unambiguous language would usurp the role of the labor organization and the employer working together in a cooperative labor-management context." *Fresno County*, 127 LA 1017, 1020 (Rothstein, 2010).

It has been stated that,

> I cannot base a decision in this matter on notions of equity. My authority is narrowly defined and it is not my function to rewrite the agreement when to do so would change its entire context. …. *The School City of Hobart*, 109 LA 527, 533 (1997, Goldstein).

An award that "does not 'draw its essence' from the [CBA] … constitutes legislation rather than interpretation and will not be enforced by the courts." Elkouri & Elkouri, p. 9-20.

> [The arbitrator's] function is not to rewrite that Agreement and certainly it is not to suggest, imply nor to inform the Parties of what changes should be effected, renegotiated or changed even if his sense of justice and fairness so dictate, or even if he believes the Agreement contains inequities. Nor can the Arbitrator allow the economic consequences of an Award [to] influence him in his ultimate decision. The Arbitrator's Award … must derive its essence from the Agreement, and … tell the Parties what they can or cannot do inside of that Agreement. *Lorillard, Inc.*, 87 LA 507, 512 (Chalfie, 1986).

In the case before me, the arbitrator "shall have no power to add to, subtract from, or modify any of the terms and provisions of this Agreement …." CBA, p. 9.

Remedy

The Employer requested that I deny the Grievance.

The Union requested that I sustain the Grievance and order a make-whole remedy, including that Grievant be reinstated to his regular LTO position, with his full seniority, and made whole for all wages and benefits lost.

Grievant shall be reinstated to leave of absence status, with no back pay but with no loss of seniority. This recognizes that (1) Grievant was not in violation of the twelve consecutive month rule and that (2) Grievant was not in the Art. 19 Transitional Return to Work Policy status and hence treating physician Dr. NT's return to work document did not have to result in Grievant being returned to work. The evidence does not substantiate that Grievant should have been returned to a LTO position in June 2022.

Conclusion

The crucial points in this case include:

1. The Employer has the burden of proof;
2. Because of the June 9 to July 9, 2021, discharge period, Grievant was not off work for twelve consecutive months for a work related injury or illness;
3. There was not just cause to discharge Grievant;
4. Absent discrimination or exigent circumstances, a violation of the twelve consecutive month rule is just cause for discharge;
5. There is not a preponderance of evidence of disparate treatment;
6. Grievant was not participating in the Art. 19, Sec. 10, Transitional Return to Work Policy at the time of the discharge;
7. Clear and unambiguous language is interpreted consistent with the parties' intent as reflected by clear and explicit terms;
8. Ordinary meaning given to words unless they are clearly used otherwise;
9. The totality of the circumstances; and
10. 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, in part, grant the Grievance and, in part, deny the Grievance.

Grievant shall be reinstated to the leave of absence status, with no back pay but with no loss of seniority.

I retain remedial jurisdiction over this matter for sixty days from the date of this Award for the sole purpose of resolving any questions that may arise over application or interpretation of a remedy. *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, Part 6, Section E. Elkouri & Elkouri, pp. 7-49 to 7-54.