

IN THE MATTER OF THE ARBITRATION BETWEEN;

**United Food and Commercial
Workers, Local 1189**

And

**ARBITRATION OPINION
and AWARD**

Rainbow Foods

FMCS Case No. 11-52061-3

Arbitrator

Richard A. Beens

Appearances

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June 13, 2011

JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement¹ (“CBA”) between United Food and Commercial Workers, Local 1189 (“Union”) and Rainbow Foods (“Employer”). Brad Rosenberg (“Grievant”) is a member of Local 1189 and an employee of Rainbow Foods.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render a binding arbitration award. The hearing was held on April 13, 2011 in St. Paul, Minnesota. No procedural objections were raised. Both parties were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Final briefs were submitted on June 10, 2011. The record was then closed and the matter deemed submitted.

ISSUE

Framing the issue to be determined was left to the arbitrator. I find the issue to be as follows:

Did the Employer violate the collective bargaining agreement by failing to allow Grievant to qualify for a new position subsequent to his layoff as a Utility Worker? If so, what is the appropriate remedy?²

FACTUAL BACKGROUND

The Employer, Rainbow, is a subdivision of Roundy’s Supermarkets, Inc., and operates 32 grocery stores, primarily in the Minneapolis-St. Paul area. Between 900 and

¹ Joint Exhibit 1.

² During the course of the arbitration hearing, the parties agreed there was no ADA issue related to Grievant’s layoff and subsequent grievance.

1000 UFCW Local 1189 members work in the stores generally located in St. Paul and its suburbs. A different UFCW Local, 653, represents Rainbow workers at stores generally located in Minneapolis and its suburbs. This arbitration involves events occurring at a Rainbow grocery store located on Larpentaur Avenue in Roseville, Minnesota.

Grievant is a developmentally disabled individual who has worked at the Employer's Larpentaur store for 24 years. Despite his disability, Grievant was always early for work and had a virtually perfect attendance record. He was classified in the CBA as a "Bagger/Carry-out/Part-time Maintenance" employee, more commonly referred to as a "utility worker".³ Grievant worked less than 32 hours per week, earned \$7.40 per hour and received no health or pension benefits.

Due to the economic recession and ever-increasing competition, the Employer has suffered a significant decrease in sales and market share over the last two years. In early 2010, they had a pressing need to reduce costs. At first, the Employer approached the Union and suggested a reduction in hours for all full-time employees. The Union declined, refusing to waive a CBA provision that would cause the Employer to lose the right to vendor shelf-stocking if the hours of full-time employees were reduced.⁴ This left layoffs as the only realistic way for the Employer to significantly reduce costs. They determined that laying off all in the Utility worker category, along with a hiring freeze, would be the least damaging to the company.⁵ Approximately 55 workers were laid off in

³ Joint Exhibit 1, Article 6, Sections 6.4 and 6.5.

⁴ Joint Exhibit 1, Article 16. The current CBA allows "...suppliers, vendors and salesmen to stock products they represent" on store shelves. This work would otherwise be done by Union employees.

⁵ Union Exhibit 6.

Rainbow's St. Paul and St. Paul suburban stores in March, 2010.⁶ Eight Larpentaur store Utility workers, including Grievant, were included.⁷

The CBA allows laid-off Utility workers to notify the Employer and Union in writing if they desire to fill a part-time position. Once notified, the CBA requires the Employer to give them “...*the opportunity to fill part-time openings, by seniority and if qualified, within the particular store.*”⁸ Grievant, the most senior Utility worker in the Larpentaur store, first notified the Employer in writing of his desire for the “...*next available regular part-time grocery job*” on March 24, 2010.⁹

The Employer has not recalled any employees in the Utility worker category. However, in June, 2010, the Employer lifted its hiring freeze on a limited basis to offer a few positions at the Larpentaur store that included qualifying as a cashier in addition to other duties. This requirement stemmed from the Employer's need to have more flexibility in assigning duties to its reduced workforce. For the first time, a condition of all new hires, even those hired as part-time grocery or dairy clerks, was that each must pass the company's standard test to qualify for performing cashier duties.¹⁰ For those without prior cashier experience, the company provides approximately two days of training. Upon completion, the trainee is given three opportunities to pass a computerized cashier test. Some extra tutoring may be given to those who initially fail.

Work previously performed by the Utility workers is now being performed by personnel from higher categories, particularly regular part-time grocery clerks. The new

⁶ Union Exhibit 1.

⁷ Union Exhibit 1.

⁸ Joint Exhibit 1, Section 4.6 D 3.

⁹ Union Exhibit 3.

¹⁰ Union Exhibit 8.

jobs were offered to laid-off workers on the basis of seniority as required by the CBA.¹¹ Grievant had the most seniority in the Larpentaur store. In fact, he had the most seniority in the entire Utility category subjected to lay-off.¹² On June 18, 2010, company representatives met with Grievant to consider him for one of the newly available jobs. Also in attendance were Grievant's father and "Heather" who has been characterized as a "Job Coach."¹³ In the course of the meeting, it was explained that the new job would require qualification as a cashier. At that point, "Heather" informed the company that Grievant would not be able to do that kind of work. As a consequence, Grievant did not receive a job offer.

Two former Larpentaur store Utility workers have been rehired as part-time workers. Each received cashier training and passed the cashier's test.¹⁴ Both had less seniority than Grievant.

On August 12, Grievant personally gave a second letter to Doug Loe who had recently taken over as director of the Larpentaur store.¹⁵ In the letter, Grievant expressed a willingness to take any part-time position available in the store. Loe testified that someone in Rainbow management had told him Grievant could not qualify to be a cashier. As a consequence, Loe did not forward the letter to the Rainbow human resources department. Subsequent to Grievant's second letter, the Employer hired seven new Larpentaur store employees in various categories ranging from Grocery Clerk, to

¹¹ Joint Exhibit 1, Section 4.6 D 3.

¹² Union Exhibit 1.

¹³ No one who testified at the arbitration appeared to know "Heather's" last name or her qualifications as a "Job Coach." Neither side subpoenaed her to testify.

¹⁴ Employer Exhibits 1, 2, 10 and 11.

¹⁵ Union Exhibit 7.

Cashier to Bakery Clerk.¹⁶ All of the new hires received cashier training and passed the cashier's test.¹⁷ Grievant was not interviewed for any of these positions.

On October, 2010, the Union filed the present grievance.¹⁸

APPLICABLE CONTRACT PROVISIONS

Section 4.6: Application of Seniority:

B. Layoff and Rehire

5) *Bagger/Carry-out/Part-time Maintenance Seniority: Bagger/Carry-out/ part-time Maintenance employees shall acquire seniority for layoff and recall as set forth in PARAGRAPH D. 3. On a store-wide basis.*

D. Job Posting:

3) *Bagger/Carry-out/part-time Maintenance to Part-time: Bagger/carry-out/part-time Maintenance shall have the option of notifying the Employer and the Union in writing of his/her desire to secure a part-time position. An employee who so notifies the parties will be given the opportunity to fill part-time openings, by seniority and if qualified, with the particular store. The provisions stated in this paragraph shall not apply to part-time openings that occur in delicatessens which were previously covered by the area meat agreement.*

LETTER OF AGREEMENT #6¹⁹

...The employer will assume responsibility to train employees to perform the various tasks which may be assigned to them in the store.

OPINION AND AWARD

The instant case involves a contract interpretation in which the arbitrator is called upon to determine the meaning of some portion of the collective bargaining agreement

¹⁶ Employer Exhibit 5.

¹⁷ Employer Exhibit 6.

¹⁸ Joint Exhibit 2.

¹⁹ Joint Exhibit 1, p. 59.

between the parties. The arbitrator may refer to sources other than the collective bargaining agreement for enlightenment as to the meaning of various provision of the contract. The essential role of the arbitrator, however, is to interpret the language of the collective bargaining agreement with a view to determining what the parties intended when they bargained for the disputed provisions of the agreement. Indeed, the validity of the award is dependent upon the arbitrator drawing the essence of the award from the plain language of the agreement. It is not for the arbitrator to fashion his or her own brand of workplace justice nor to add to or delete language from the agreement.

The Union does not challenge the need for or procedures used in laying off the Utility worker category. Given their declining market share, the Employer had a clear need to reduce costs. In accordance with the CBA, Utility workers were at the bottom of the seniority ladder and, thus, the first category to be laid off. The Employer meticulously followed the CBA when effectuating the workforce reduction.

The process Employer used in recalling Utility workers, at least in the case of Grievant, is less clear. As a starting point, Grievant's letter of March 24, 2010, states, *"This letter is to document my request for the next available regular part time grocery job."*²⁰ It was only in his June 18, 2010, meeting with Employer representatives that he learned cashier qualification would be demanded. The Employer's right to add this requirement is not in question. The CBA requires laid off Utility workers, *"...will be given the opportunity to fill part-time openings, by seniority and if qualified, within the*

²⁰ Union Exhibit 3.

particular store.”²¹ (Emphasis added) However, since no Utility worker had previously performed cashier work, all who applied pursuant to CBA Section 4.6 D 3 would need to go through company training and pass the requisite test. At least two other former Larpentaur Utility workers, Vanberkel and Abdi, were rehired, given cashier training, and passed the required test.²² Since the March 2010 layoffs, a number of new hires were similarly trained and tested.²³ Enter, the mysterious “Heather.”

No one testifying in this arbitration knew Heather’s last name, much less her qualifications to advise management that Grievant was not capable of cashier work. Nevertheless, her assertion was fatal to Grievant’s re-employment chances. His second letter delivered on August 12, 2010, expressing a willingness to take any available job was filed away by the store manager, this time based on second hand knowledge of “Heather’s” single remark.

I believe the Employer acted in good faith. The local managers, while very sympathetic to Grievant’s position, obviously felt handcuffed by broad-brush and inflexible lay-off and rehiring criteria imposed from above. “Heather” came to the June 18th meeting with Grievant and his father. She was apparently introduced as Grievant’s “Job Coach.” Her negative comments were evidently delivered with emphasis. At that point, believing the position to be for full time cashiering, Grievant did not protest. Given the context, its difficult to fault Rainbow’s local management for assuming their duties to Grievant were at an end.

Only two months later did he express a willingness to take, “...*any part time*

²¹ Joint Exhibit 1, Article 4, Section 4.6 D 3.

²² Employer Exhibits 1, 2, 10 and 11.

²³ Employer Exhibits 5 and 6.

position that is available.”²⁴ Relying on second hand information, the new store manager did not even pass Grievant’s second letter to the Human Resources department. The Employer’s Human Resources Director testified that Grievant would have been re-interviewed had she seen the letter. As a result, Grievant has never been given the opportunity for re-employment.

I find the CBA requires the Employer to do more. There are infinite degrees of autism and disability, ranging from profound retardation to those with a savant’s skills. I have no idea where Grievant falls on this continuum. However, he was clearly a valued, successful employee for 24 years. He performed his duties on time and in accord with the instructions given. At hearing, witness after witness expressed a belief that he could handle grocery clerk duties and even cashier duties with the proper training. Even those expressing doubts also showed uncertainty. While recognizing these to be lay opinions of friends and co-workers who may be driven more by emotion than logic, there is simply no evidence that they are more or less qualified than “Heather.” We have no idea if she is a licensed psychologist, a trained job skills counselor, or merely an untrained group home supervisor. Whether due to trial tactic or unavailability, neither party called her to testify. Consequently, the bases for her damaging assertions about Grievant’s capabilities could not be examined.

The ultimate answer to this conundrum lies in strict application of the CBA. Adding cashier qualification to all hires, even grocery clerks, is a new requirement, obviously necessitated by the Employer’s need for cost reductions and assignment

²⁴ Union Exhibit 7.

flexibility. However, the Employer does not require previous cashier experience. All new hires are given in-store training, often with one-on-one coaching, for cashier skills.²⁵ Also, it is unclear that all new hires have actually had to perform cashier duties even when required to take the requisite training.²⁶ As the most senior Utility worker laid off from the Larpentaur store, Grievant should be given the same opportunities. The evidence before me left large doubts about his actual skill level. Those doubts can only be finally resolved by giving him the cashier training with one-on-one coaching and allowing him to take the cashier test up to the three times. Both sides must then live with the results, no matter what they be.

In fashioning this remedy, I have taken into account Grievant's seniority, his sterling work record, and his 24 years of service to Rainbow. On the other hand, I also have taken into account the Employer's good faith in initially denying his application. In view of this, back pay will not be ordered.

²⁵ Joint Exhibit 1, p. 59.

²⁶ Union Exhibit 11.

AWARD

The grievance is SUSTAINED. The Employer shall offer Grievant the next available regular part-time grocery clerk position at the Larpentaur store. In due course, Grievant can be given cashier training and allowed to take the cashier's test up to three times. Should Grievant ultimately fail the test after three tries, the Employer will have no obligation to continue his employment. Back pay will not be ordered. Jurisdiction is retained for a period of 60 days from this date to resolve any disputes that may arise regarding the ordered remedy.

Dated: June 13, 2011

Richard A. Beens, Arbitrator