

**IN THE MATTER OF ARBITRATION BETWEEN**

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

**And**

**Opinion and Award**

**FMCS Case No. 110202-53057-3**

**Cub Foods Duluth, a division of SuperValu,  
Inc.**

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**ARBITRATOR**

Joseph L. Daly

**APPEARANCES**

On behalf of U.F.C.W, Local 1189

Timothy W. Andrew, Esq. Duluth, MN

On behalf of

Cub Foods,

Chad Richter, Esq. Jackson, Lewis, Omaha, NE

## **JURISDICTION**

In accordance with the Collective Bargaining Agreement between Cub Foods – Duluth and U.F.C.W. Local 1189, and under the jurisdiction of the United States Federal Mediation and Conciliation Service, Washington, D.C., the above grievance arbitration was submitted to Joseph L. Daly, Arbitrator, on June 1, 2011 in Duluth, MN. The parties filed post-hearing briefs on July 13, 2011. The decision was rendered on August 8, 2011.

## **ISSUES AT IMPASSE**

The union states the issues as:

- 1) Whether the employer's layoff and demotion to part-time status of six full-time employees violates the Collective Bargaining Agreement when the employer continues to employ part-time employees with less date of hire seniority within the same seniority category?
  
- 2) Whether the employer's layoff and demotion to part-time status of four full-time employees violates the Collective Bargaining Agreement when the employer continues to employ part-time employees with less date of hire seniority amongst full-time employees within the same seniority category?
  
- 3) Whether the employer's layoff or deduction in hours of six full-time employees violates Article 16.2? [Post Hearing Brief of Union at 4-5].

The employer states the issues as:

- 1) Did Cub Foods, Duluth correctly reduce the hours of six full-time employees in accordance with the terms of party's Collective Bargaining Agreement?

2) If not, what is the remedy? [Post hearing brief of employer at 1]

**Potentially Relevant Collective Bargaining Agreement Provisions are:**

**ARTICLE 1, INTENT AND PURPOSE**

1.2 All Employer rights, functions, responsibilities and authority, not specifically limited by the express terms of the Agreement, are retained by the Employer and remain exclusively within the rights of the Employer. These include, but are not limited to, the right to plan, determine, direct and control store operations and hours, the right to study and introduce new methods, facilities and products, the right to direct and control the work force, including the determination of its size and composition, scheduling and assignment of work, and also including the right to hire, assign, demote, promote and transfer, to lay off or reduce the hours of work because of lack of work, to discipline, suspend or discharge for just cause, and to establish and maintain reasonable rules and regulations covering the operation of the store.

**ARTICLE 4, HOURS OF LABOR**

4.4 No employee shall be schedule for less than eighteen (18) hours per week, except by mutual agreement. This minimum does not apply if the employee has restricted his/her availability to work.

4.7 Work schedules for all regular full-time and part-time employees shall be made up for a two (2) week period. These schedules shall be posted for a period not less than two (2)

weeks prior to the first working day covered by that schedule. When posting the schedules, the Employer shall show the employee's first and last name on the schedule in ink. All employees shall have the opportunity prior to the posting of the schedule to request of the Company, in writing, a particular day or days off. If the requested day or days off are for a justifiable reason, the Employer will make every effort to schedule the employee so he receives his requested day or days off without loss of hours, based on seniority. Once the schedule for any period is posted, there shall be no change in the schedule for that period, except for emergencies. Where the Employer knows in advance that the scheduled hours will not be available, the Store Manager will make every effort to notify the employees. Employees will notify the Employer in advance when they will not be available for work.

## **ARTICLE 8, VACATIONS**

8.1 Full-time employees who have been employed by the Employer for a period of one (1) year or more shall receive one (1) week's vacation with pay. Full-time employees who have been employed by the Employer for two (2) years or more shall receive two (2) weeks' vacation with pay. Full-time employees with seven (7) years of service or more with the Employer shall receive three (3) weeks' vacation with pay. Full-time employees with fifteen (15) years of service or more with the Employer shall receive four (4) weeks' vacation with pay.

8.2.1 Full-time and part-time employees hired before June 21<sup>st</sup>, 2005, with six (6) months or more of continuous service with an Employer who quit, are laid off or dismissed, except dismissed for cause, shall be entitled to pro-rated vacation. Such pro-rated vacation to be based on the length of time an employee served from the date of employment during the first year and thereafter the length of time an employee served since his last anniversary date of employment, pro-rated.

8.8.2 Seniority during the vacation sign-up period shall be based on the following categories:

- (1) Stockers (including frozen food, dairy, grocery)
- (2) Non-food handling employees
- (3) Cashiers (including service center employees)
- (4) Pricing clerks
- (5) Produce clerks
- (6) Cake decorators
- (7) Part time bookkeepers
- (8) Deli
- (9) Bakery
- (10) Meat Cutters
- (11) Meat helpers

Grocery Department employees are defined as being in 1 – 9. Meat Department employees are defined as being in 10 – 11.

## **ARTICLE 10, SENIORITY**

10.1 DEFINITION – Seniority shall be defined as the length of continuous service with the Employer while working under the jurisdiction of this Agreement.

10.2 Seniority shall prevail in regard to laying off and recalling, provided the employee is qualified to do the work available and works at the Contract rate. Seniority may be exercised for layoff and rehire against the most junior employees in the following manner.

(A) Among the employees within each seniority group, as provided for in Paragraph 10.7 [section 10.6.1] with each shore

10.3 The Employer may, in its sole discretion, select and place employees in classified positions without regard to seniority. No Employer shall be required to establish all the classified positions described in this Agreement. However, once an Employer establishes such a classified position, the Employer must maintain and keep that position filled, unless otherwise agreed to, in writing, by the Union. All classified employees, as provided for in this Agreement, shall acquire super seniority in the store where they are employed. During the first six (6) months of an employee's service in a classified position, the employee will be regarded as probationary, subject to removal from that classified position by the Employer in its sole discretion, without recourse to the grievance or arbitration procedure. Once an employee has completed a six (6) month probation period in a classified position, the employee may be removed from that position only for grounds for removal shall be subject to the grievance and arbitration procedures in Article 14 of this Agreement. The Employer has the right to appoint employees from time to time as leads; employees appointed as leads will receive an hourly pay premium as set forth below. The Employer will have no continuing obligation to continue their lead status or any premium pay. During the first year of service in a lead role for the Employer, the employee will receive a fifty cent (.50¢) per hour premium; during the second year of service, the employee will receive a fifty-five cent (.55¢) per hour premium; during the third year, a sixty-five cent (.65¢) per hour premium; during the fourth year, a seventy-five cent (.75¢) per hour premium. Employees already serving in lead positions at the time of ratification of the premium pay schedule will be given credit for the time they have served in a lead position to date in calculating premium pay.

10.4 A full-time employee reduced in a few hours to below forty (40) hours per week may elect to, (1) displace a less senior full-time employee's hours in the same seniority category on a weekly basis within his store; or (2) displace a less senior full-time employee's hours in the same seniority category within the city on a weekly basis; or (3) displace the most senior part-time employee within the store in the same seniority category on a weekly basis. Such full-time employee must be qualified and available to perform such work in each instance.

10.5 No less senior part-time employee in a seniority category will be schedule for more hours than a more senior part-time employee in that same category, unless the employee has restrict his/her availability, except that night stockers may be schedule on a weekly basis for more or less hours than other part-time employees.

10.6.1 A separate seniority list shall be prepared for full-time employees and one (1) for part-time employees in the following seniority categories:

- (1) Stockers (including frozen foods, dairy, grocer, meat helpers)
- (2) Non-food handling employees
- (3) Cashiers (including service center employees)
- (4) Pricing Clerks
- (5) Produce Clerks
- (6) Cake Decorators
- (7) Part-time Bookkeepers
- (8) Bakery/Deli
- (9) Meat Cutters

10.6.2 Because the Employer has the ability to introduce pre-packaged meat items into the store, the parties agree to “meatcutter protection” language as follows:

- (1) Meatcutters will be utilized in the meat/fish department areas until all grocery workers are no longer being used
- (2) Instead of a layoff, the employer may use meatcutters in other grocery areas of the store if further hours reductions are needed.
- (3) Meatcutters utilized in grocery will be by inverse seniority.

It is understood that the above seniority categories define the principal duties of employees working in those categories. However, nothing herein prevents the Employer from assigning any employee to perform any and all available work in order to keep the employee fully occupied during his workday and to ensure efficient store operations.

Any employee who voluntarily transfers from one seniority category to another shall retain seniority in their seniority category from which he/she transferred for six (6) months and will not establish seniority in the new category until he/she has been continuously employed in the new category for at least six (6) months. After being continuously employed in the new category for at least six (6) months, the employee’s seniority date shall then be established in the new seniority category only. Any employee who is involuntarily transferred from one seniority category to another shall continue to hold seniority in the category from which he/she was transferred. It is understood that the Employer may temporarily transfer employee from one seniority category to another without regard to seniority for purposes of efficient store operations and to provide necessary training to the particular employee. It is expected that no employee will be temporarily transferred to a new seniority category for purposes of training in excess of six (6) months.

If an employee holding seniority in a seniority category is unable, with reasonable accommodation, to perform the essential functions of his/her regular job due to a disability, a

reasonable effort will be made to place the employee in another seniority category where he/she is able to perform the essential functions with reasonable accommodation, provided there is an opening in the seniority category.

The effort will be made in a lateral or lower category. Such transfers may be permanent when, in the judgment of the Employer based on competent medical evidence, the employee will not again be capable of performing the essential functions of the employee's regular job. In the event such a transfer is temporary when, in the judgment of the Employer based on competent medical evidence, the employee is again capable of performing the essential functions of the employee's regular job, the employee will return to his/her regular job, seniority permitting.

10.7.1 When an opening occurs for full-time employees, part-time employees shall be given the first opportunity to fill such opening, provided they have the ability available to perform the work. All full-time openings (exclusive of classified positions) shall be posted. All posting must remain posted for a period of not less than one (1) week. Interested and available employees shall acknowledge their interest in filling the position by signing the posting. Part-time employees within the seniority category who have signed the posting and have the qualifying abilities and are available will receive fifty percent (50%) of all full-time job openings in that particular seniority category based on seniority. If no such part-time employees in the category apply who are qualified and available, the Employer is free to pick whoever it chooses to fill the vacancy. Seniority will not apply to the rescheduling of hours of work of part-time employees, except as provided herein. No part-time employees shall have his hours reduced in an effort to discriminate against said part-time employee. Part-time non-food handling employees will be given the opportunity for part-time food handling positions within their store, based on their seniority, provided they have the qualifying abilities and are available. The Employer shall give part-time non-food handling employees who have the qualifying abilities and are available, fifty percent (50%) of all part-time food handling job openings are based on seniority. If no part-time non-food handling employee has the qualifying abilities or is not available, the Employer may hire a new part-time employee. If a new employee is hired, the next part-time food handling position must be offered to the part-time non-food handling

employees based on seniority, who are available and have the qualifying abilities to perform the work. Part-time non-food handling employees moving to part-time food handling positions shall receive the next higher food handling employee part-time rate above the rate last received by that employee as a part-time non-food handling employee.

10.7.2 It is understood under paragraph 10.7.1 that while part-time employees who apply and have the qualifying abilities will receive 50 percent of all full-time job openings based on seniority in a category, this 50 percent of previous openings based on seniority in the category, subsequent openings can be awarded in the Employer's discretion until such time as it is necessary to award the next opening based on seniority in order to maintain that at least 50 percent of the full-time job openings have been filled based on senior in the category.

10.8.1 Full-time employees shall be any employee who works (30) hours or more per week for four (4) consecutive weeks.

10.8.2 Part-time employees shall be any employee who works less than thirty (30) hours per week for four (4) consecutive weeks.

10.12 New employees or employees who seniority has be terminated in accordance with Section 10.13 shall obtain seniority after thirty (30) days from the date of employment, at which time their seniority shall take effect and date back to their last date of hire. The date of employment or hire shall be the date when the employee first punched in for training. Where two (2) or more employee have the same date of hire or employment, relative seniority shall be established by the order in which employees first punched in on that date with the earliest time being the most senior.

10.13 An employee shall cease to have seniority if the employee:

- (A) Quits;
- (B) Is discharged for cause;
- (C) Fails to return to employment after layoff, and reasonable notice of recall;
- (D) Is absent for any reason, except military service, for a period of one (1) year or more;
- (E) No employee shall lose seniority because of sickness or accident or for any reason beyond the control of the employee, subject to this one (1) year limitation, except as provided for in Article 19.1(B), as long as the employee complies with all medical restrictions and requirements; or
- (F) After six (6) months as a supervisory employee.

10.14 Seniority listings of all employees employed by the company in each individual *store* shall be posted in a conspicuous place in each store and kept current. [Emphasis in original].

## **ARTICLE 16, SHELF STOCKING**

16.1 Employer shall be allowed to utilize suppliers, vendors, and salesmen to stock products that they represent, stocking of these products will be held at the minimum consistent with a good operation. Further, the Employer shall be allowed to utilize retail merchandisers for

the purpose of doing resets. The above reference individuals shall be utilized in addition to, not as a replacement of, bargaining unit employees. All other products will be stocked by members of Local 11.16, only, except that the Store Manager, and Assistant Managers, (but no other supervisor) may stock products.

16.2 As a condition of this Article, the participating Employer agrees that there shall be no layoff or reduction in hours of any full-time employee on the Employer's seniority list for the duration of the Collective Bargaining Agreement. If such an employee is laid off or suffers a reduction in hours during this period, the Employer shall lose its right to operate under the terms of this Article.

It is understood and agreed that this provision regarding layoffs and reduction in hours shall have no application in the event of store closure, proven loss of business, excluding seasonal fluctuations, retirement, voluntary quit, discharge for just cause, inability to perform the essential functions of the job due to disability, termination prior to the completion of the probationary period, interruption of business due to "act of God", or death. Moreover, it is understood that the employees intended to be protected by this provision do not include retired employees working on a part-time basis, "Sunday-only" employees or employees working on waivers.

[Joint Exhibit Number 1]

### **FINDINGS OF FACT**

1. By letter January 31, 2011 Union Representative Daniel Hudyma filed a grievance against Cub Foods-Duluth stating in applicable part:

Re: Full Time Employees, UFCW Local 1189, and CUB-Duluth

Mr. Land,

This grievance is filed on behalf of all the Full Time Employees that were given the option to be reduced to Part Time or be on layoff, that are employed at the CUB-Duluth located at 615 West Central entrance Duluth, MN.

On or about January 21<sup>st</sup>, 2011, 6-8 Full Time Employees were given the option to be reduced to Part-Time or to be on layoff.

The above action is a violation of the current Collective Bargaining Agreement including but not limited to Article 10, Section 10.2.

We are seeking a make whole remedy including but not limited to the effected Employees being returned to his former positions without any loss of seniority as well as being made whole for all lost wages and benefits.

To effectively represent the effected Employees and evaluate this grievance, please provide us with any and all information and documentation relied upon by the employer for their decision.

If you have any questions, please feel free to contact us at 218.728.5174.

Sincerely,

Daniel Hudyma

UFCW Local 1189

Union Representative

Cc: All effected Employees

[Joint Exhibit Number 2]

The basis of the union's complaint is that Cub Foods wrongly laid off six full-time employees. The union alleges that its grievance is based on "straight forward and natural reading of the contract." [Union Post-Hearing Brief at 1]. "Section 10.1 of the contract provides that seniority is based on when an employee gets hired in a position covered by the contract. The next section (10.2) states that seniority then is used for layoff within the seniority groups listed in 10.6. Section 10.6 in turn lists nine separate seniority groups that include both part-time and full-time employees within each group." [Id.].

2) The union contends that Cub Foods –Duluth should have looked at the seniority order within each seniority group when making layoffs. Cub did not do so. Instead, it split each seniority group in two and made layoffs on a classification seniority basis, thus violating the contract in two distinct ways. Specifically, Cub Foods violated the contract when it laid off the six full-time grievants before first laying off part-time employees in the same seniority classifications with less date of higher seniority. It also violated the contract with respect to four of the six grievants by continuing to employ full-time employees in the same seniority category with less date of higher seniority than the grievants.

As a result of Cub Foods contract violation, argues the union, a number of senior full-time employees were forced to part-time. The union seeks a remedy that makes the grievants whole for their reduced hourly wages when working part-time, the reduction in hours work, and their increased out-of-pocket benefit cost during the period they worked part-time. [Id. at 1-2].

3) The employer contends that there had been a steady decline in sales from the commencement of the Collective Bargaining Agreement in 2008 through the date of arbitration hearing on June 1, 2011. Store Manager James Nelson testified at the arbitration hearing that the loss of business took into account ordinary seasonal fluctuations.

Prior to 2011 the employer had never laid off any bargaining union employees. On January 21, 2011 Store Manager Thomas Land told six full-time bargaining union employees they had their choice to either take a layoff or be reduced to part-time within the same seniority category beginning February 6, 2011. The employer contends that "customer traffic had decreased for a few years. Cub maintained the same staffing levels in an effort to keep the store looking good and, hopefully, to weather the lull in sales not affecting employees." "In late summer and early

full 2010, however, it became apparent that staffing levels need to be drastically decreased in order to remain competitive in the market place. Accordingly, Cub-Duluth reduced all part-time employees scheduled to 18 hours per week, the minimum hours of any employee (regardless of full-time or part-time classification) permitted by the agreement.” [Post Hearing Brief of Employer at 5, emphasis in original].

After analyzing the store’s labor composition, District Manager James Nelson determined that the store was significantly overstaffed in full-time ranks. Approximately 43% of Cub Foods-Duluth staff consisted of full-time employees which is higher than Cub’s other stores which ordinarily hover around 25%. This “top heavy ratio” reduced the flexibility of store management to schedule employees from these to higher minimum hour requirements and contributed to higher labor costs. “If the store was to remain competitive, Nelson needed to reduce staff in several areas of the store and find a way to improve the full-time to part-time ratio.”[Id.]

After obtaining input from Cub’s Labor Relations and Labor Standards Division, Mr. Nelson decided to reduce six (6) employees from full-time to part-time status in the following seniority classifications: (1) Stockers; (2) Cashiers, [sic]; (3) Produce; (4) Bakery/Deli [Id.]. “Mr. Nelson believed such a move would increase operational flexibility and lower the store’s labor cost.” [Id.]

Accordingly, Cub Foods-Duluth selected the following six (6) employees for reduction, who are the least senior full-time employees in each classification: Mark Sturdevant – Stocker; Scott Rones – Stocker; Cynthia Haynes – Cashier; Jed Sajec – Produce; Jodi Eales – Bakery/Deli; Debra Pettersen – Bakery/Deli. [Id. At 5-6].

4) Essentially the union contents:

A. The employer’s layoff and demotion to part-time status of six (6) full-time employees violates the Collective Bargaining Agreement when the employer continued to employ part-time employees with less date of hire seniority within the same seniority classification.

1. Sections 10.1, 10.2, and 10.6 of the CBA require layoffs based upon an employee's length of continued service within nine (9) separate seniority categories, categories that include both full-time and part-time employees.

2. Sections 10.4 supports the union's argument and does not support the actions taken by the employer.

B. The employer's layoff and demotion to part-time status of four (4) full-time employees violates the collective bargaining agreement when the employer continued to employ full-time employees with less date of hire seniority amongst full-time employees within the same seniority category. In other words four of the six grievants were laid off when the employer also continued to employ full-time employees with less store wide or date of hire seniority in the same seniority category. Cynthia Haynes, Debra Pettersen, Jed Sajec and Mark Sturdevant all had more store wide seniority than the full-time employees who continued to work.

"The requirement to layoff based upon seniority or length of continuous service is again contained in sections 10.1 and 10.2. Section 10.1 gives an unequivocal definition of seniority, commonly referred to as plant-wide (or in this case "store-wide") seniority that simply looks at how long an employee has continuously worked within the bargaining unit." [Id. At 14]. "Section 10.2 contains an equally clear statement that seniority prevails in regards to layoff provided that the employees qualify." [Post Hearing Brief of Union at 14].

In other words, the union contends that seniority is based upon an employee's first day of hire within the store and not entry into a new classification. This interpretation, contends the union, is reinforced by sections 10.12 and 10.13, which defines seniority by day of last hire and lists the reasons for termination of seniority, none of which include transfer into another seniority classification.

The union agrees that classification seniority as described in 10.6.2 is dependent on specific circumstances. That is why, argues the union, it is set forth in the contract. "But the mere fact it applies to some circumstances, does not mean that it applies to the layoff protections found in 10.2." [Id at 16]. Business Representative Daniel Hudyma testified that the classifications seniority described in Section 10.6.2 is used for the following purposes: (1) vacation sign-up; (2)

by classification seniority according to Section 8.8.2; (3) requesting days off pursuant to section 4.7; and the amount of scheduled hours under Section 10.5.

“Under the employer’s interpretation the classification seniority described in Section 10.6.2 would trump and render meaningless the store-wide seniority defined in Section 10.1 and Section 10.1.2.” [Id]. The union contends “ this absurd interpretation should...be rejected.” [Id].

C. Section 16.1 and Section 16.2 further demonstrate the distinction and importance the parties place on layoff protection for full-time employees.

5) The essential contentions of the employer are:

A. The CBA permits Cub Foods-Duluth to reduce the hours of full-time employees without regard to part-time employee hours. Section 10.2 of the agreement requires Cub Foods-Duluth to exercise seniority for purposes of layoff and rehire against the most junior employees “[a]mong the employees within each seniority group as provided for paragraph [10.6.1].” Section 10.6.1 of the agreement provides for a separate seniority list for full-time employees and part-time employees in nine categories: stockers, non-food handling employees, cashiers, pricing clerks, produce clerks, cake decorators, part-time book keepers, bakery/deli, meat cutters. Because Cub-Duluth contends the employer, must create a separate seniority list for full-time employees and part-time employees this means “Cub-Duluth may layoff or reduce hours of employment from the full-time seniority list in a specific seniority category without regard to the part-time employees in the same category.” [Post Hearing Brief of Employer at 8].

B. The union’s argument that date of hire seniority (combining full-time and part-time) must be used instead of category seniority lacks merit. The employer contends there is nothing in the Collective Bargaining Agreement that supports the unions claim. “The union’s argument is an obvious attempt to create ambiguity where there is none.” [Post Hearing Brief of Employer at 10]

C. Cub-Duluth followed the appropriate order of seniority when selecting individuals for the reduction in hours. “It is important to note, the individuals selected for layoff and reduction in hours were most junior full-time employees within each classification.” [Id. at 12].

D. Cub-Duluth did not violate the agreement by continuing to use vendors for shelf stocking during the period reduced hours. The proven loss of business exception applies in this case.

(See Section 16.2 of the Collective Bargaining Agreement).

E. The union's "fairness" argument lacks merit. The contract language is clear on its face. The union's argument at the arbitration that it is illogical to have two separate seniority lists for full-time and part-time employees within each classification lacks merit. It is logical to the employer. "Cub Foods require the flexibility of part-time employees to meet the needs of its customers. If it did not, the part-time classification would not be in the contract, or would the Agreement contemplate a reduction full-time employees may occur before part-time employees are reduced as it does in Section 10.4." [Id at 15].

Based on the above arguments "Cub Duluth requests the arbitrator deny the union's grievance and uphold its decision to reduce the hours of six (6) full-time employees in accordance with the plain language of the party's agreement." [Id at 16].

### **DECISION AND RATIONALE**

In the late summer/early fall of 2010 Cub Foods – Duluth did an economic analysis which led Store Manager James Nelson and Corporate to conclude that staffing levels needed to "drastically decrease in order to remain competitive in the market place." [Post Hearing Brief of Employer at 5]. "The stores sales volume had decreased significantly." [Id.]. Management of Cub Foods-Duluth decided to wait until after the Christmas holiday season in hopes of a sales rebound. However, sales did not rebound "and the need to make further cuts became inevitable." [Id.].

Store Manager James Nelson, determined that Cub Foods-Duluth was "significantly overstaffed in the full-time ranks." [Id.]. Cub Foods-Duluth consisted of approximately 43% full-time employees to 57% part-time employees. Cub Foods stores "ordinarily hover around 25%. This top heavy ratio reduced the flexibility of store management to schedule employees (due to higher minimum hour requirements) and contributed to higher labor costs. If the store was to remain competitive, [Mr.] Nelson needed to reduce staff in several areas of the store and to find a way to improve the full-time to part-time ratio." [Id.].

Cub Foods decided to reduce six (6) full-time employees to part-time status in various seniority classifications including: 1). Stockers; 2) Cashiers; 3) Produce; 4) Bakery/Deli. Mr. Nelson's reasoning was that he "believed such a move would increase operational flexibility and lower the store's labor costs." [Id.]. Mr. Nelson consulted the Collective Bargaining Agreement and Cub Labor Relations and Labor Standards Division. He concluded that "the agreement clearly permits Cub Foods- Duluth to reduce the hours of full-time employees - without reducing any part-time employees – based on seniority within each job classification." [Id at 7]. Mr. Nelson's rationale was that Section 1.2 explicitly states that Cub Foods-Duluth retains "the right to direct and control the work force, including the determination of its size and composition, scheduling and assignment of work...[and] to layoff or reduce the hours of work due to lack of work."

Mr. Nelson further reasoned that Section 10.2 of the Collective Bargaining Agreement requires Cub Foods - Duluth to exercise seniority for purposes of layoff and rehire against the most junior employee "among the employees within each seniority group as provided for in paragraph [10.6.1]."

By referring to 10.6.1 Mr. Nelson concluded that since a separate seniority list is prepared for full-time employees and one for part-time employees in the following seniority categories, he determined to make layoffs based on the full-time category list in stockers, cashiers, produce and bakery/deli areas.

Mr. Nelson further concluded from reviewing the language of Section 16.2 that Cub Foods-Duluth retains the right to reduce the hours of full-time employees and does not list any other restrictions or requirements. [Post Hearing Brief of Employer at 8-9].

Mr. Nelson finally concluded that he had a right to continue to use vendors for shelf stocking during the period of reduce hours because there was a "proven loss of business" which is an exception to Article 16.

Based on the above reasoning Mr. Nelson selected full-time employees to layoff or reduce hours. They were the most junior full-time employees within each of the classifications he chose. The six (6) individuals selected were the least senior full-time employees by job classification seniority (i.e. union seniority date) within each category.

The employer contends “the agreement clearly permits Cub Foods – Duluth to reduce the hours of full-time employees without reducing any part-time employees – based on seniority within each job classification.”[Post Hearing Brief of Employer at 7]. The employer requests the Arbitrator to “uphold this decision to reduce hours of six (6) full-time employees in accordance with the plain language of the party’s agreement.”[Id at 16].

The union does not agree with the employer that the contract “clearly permits” or has such “plain language” to allow the employer to reduce the hours of six (6) full-time employees in such a way. The union contends that its grievance is based on “a straight forward and natural reading of the contract.” [Post Hearing Brief of Union at 1]. The union highlights Section 10.2 of the Collective Bargaining Agreement which provides that seniority is “when an employee gets hired into a position covered by the contract.”[Id.]. Further, Section 10.2 states that seniority then is used for layoffs within the seniority groups listed in 10.6. Section 10.6 lists nine sets of seniority groups that include both part-time and full-time employees within each group.

The union contends that “here, Cub should have looked at the seniority order within each seniority group when making layoffs. Cud [sic, Cub] did not do so; instead it split each seniority group in two and made layoff on a classification seniority basis, thus violating the contract in two distinct ways.” [Id]. The union argues that “specifically, Cub Foods violated the contract when it laid off the six (6) full-time grievants before first laying off part-time employees in the same seniority classification with less date of hire seniority. It also violated the contracts in respect to four (4) of the six (6) grievants by continuing to employ full-time employees in the same seniority category with less date of hire seniority than the grievants.”[Id.]. “As a result”, contends the union, “a number of senior full-time employees were forced to work part-time.”[Id. At 10]

The union seeks a remedy that makes the grievants whole for their reduced hourly wages when working part-time, the reduction in hours worked, and increased out-of-pocket benefit cost during the period they worked part-time. At present all of the full-time employees who had faced reduction to part-time or faced laid off have returned to their full-time positions. Only one of the employees chose not to return.

It is well recognized that the Collective Bargaining Agreement provides a source for employees' seniority rights. Elkouri and Elkouri, **How Arbitration Works, BNA, 6<sup>th</sup> ed.**, pgs 839-841. Cub Foods-Duluth had never previously laid off employees. This was the first. This layoff forced both the employer and the union to carefully examine the Collective Bargaining Agreement. "The very purpose of collective bargaining [is] to constrict such rights of management, and reciprocally, to gain for the workers job-security rights based on seniority and to insure such rights contractually." *Allan Woods Steele Company*, 4 LA 52, 54 (1946). In this case the Collective Bargaining Agreement must be used to resolve this conflict.

The union contends that Sections 10.1 and 10.2 of the Collective Bargaining Agreement both define seniority as length of continuous service with the employer and require that store wide seniority be used for all layoffs.

The union then argues Section 10.2 is "the key provision in the contract violated by the employer here." [Post Hearing of Union at 6]. "Section 10.2 grants employees layoff rights based on store wide seniority (as defined in the immediately preceding section 10.1), and then specifies that seniority protections for layoff for junior employees, 'employees within each seniority group, as provided for in paragraph 10.7[sic 10.6.1] within each store'." [Id.at 7].

The union contends that Sections 10.2 and 10.6.1 should be interrupted to include full-time and part-time employees within the same nine seniority groups or categories. "Through its specific language, Section 10.6.1 makes it clear that full-time employees and part-time employees are combined together in the following seniority categories." [Id.]. Those seniority categories, which include both full and part-time employees, only separate the full and part-time employees for the purpose of preparing a "separate seniority list" for full-time and part-time employees.

Daniel Hudyma, the President of the union since 2004, explained at the arbitration hearing that the seniority lists which separate full-time and part-time employees within a seniority category "are only necessary for scheduling purposes". [Testimony of Mr Hudyma at Athe Arbitration Hearing]. That is why the contract requires their preparation. Mr. Hudyma testified this is consistent with the structure of the contract.

Section 10.6.1 is the only reference in the contract where full-time employees and part-time employees are separated by lists in the same seniority category. “If the drafters of this contract meant separate full and part-time employees by seniority for layoff purposes they would have specifically used the phrase ‘seniority list’ in 10.2 as oppose to ‘seniority group’. It is significant that ‘seniority lists’ was not used in section 10.2 (and it easily could have been).”[Post Hearing Brief of Union at 8].

The union argues that the employer’s “strained interpretation” is the only way it can defend itself in laying off more senior full-time employees where there are part-time employees working within the same seniority category. But the contract does not say in Section 10.2a that layoffs were to be done among each seniority list.” [Id.].

Further the union contends that the employer’s interpretation would make Section 10.7.1 “meaningless”. “10.7.1 grants part-time employees certain rights to fill the coveted full-time employees’ openings.” Id.]. Under the employer’s interpretation, contends the union, the senior qualified part-time employee who successfully receives a promotion to a full-time position within his or her same seniority category, would lose job security by virtue of her/his promotion. Under the employer’s interpretation, argues the union, the most senior part-time employee (likely immune from layoffs) would become instantly subject to layoff when he or she received the promotion to full-time status since the employer argues that it can layoff from any one of the eighteen (18) separate sub-groupings whenever it chooses. [See, Union Post Hearing Brief at 9]. “Why would the union negotiate a guarantee of promotion of part-time to full-time if through the promotion the full-time instantly lost his or her seniority for layoff purposes? This absurd result should be rejected by the arbitrator.”[Post hearing brief of union at 9].

Arbitration law makes clear that “[w]hen one interpretation of an ambiguous contract would lead to harsh, absurd, or nonsensical results, while an alternative interpretation, equally plausible, would lead to just and reasonable results, the latter interpretation will be used.” [Elkouri and Elkouri, **How Arbitration Works, BNA, 6<sup>th</sup> ed.**, pgs 470-471]. This was the first time the Cub Foods-Duluth had laid off any employee. Cub Foods-Duluth and the Union had to try to interpret this ambiguous and confusing contract. Section 10.1 defines seniority as “the length of continues service.” Section 10.2 states “seniority shall prevail in regard to layoff and recall”.

And there is a mistake in 10.2(A) which makes reference to “Paragraph 10.7”. The union and Cub Foods-Duluth agree that “10.7” should read “10.6.1”.

The contract language is confusing, ambiguous, and, in one important section, mistaken. It’s not surprising Store Manager Nelson had difficulty interpreting the contract. The union calls for “a common sense reading of the labor agreement.” [Post Hearing Brief of Union at 6]. The union characterizes the employer’s interpretation as “strained”. It also contends that the employer’s interpretation would make section 10.7.1 “meaningless”. Further, the union contends the employer’s contention that sections 10.2 and 10.6.1 should be interpreted to reference eighteen (18) separate seniority sub-groupings is inconsistent with the language elsewhere in the Collective Bargaining Agreement. [See Post Hearing Brief of Union at 8].

The union’s interpretation --that using the employer’s interpretation a senior part-time employee that successfully receives a promotion to a full-time position within the same job category would actually lose job security with this promotion-- is convincing. “Under the employer’s interpretation the most senior part-time employee would instantly become subject to layoff when he or she received the promotion.”[ Post Hearing Brief of Union at 9]. The union asks “Why would the union negotiate a guarantee of promotion from part-time to full-time if the newly promoted full-time employee instantly lost his or her seniority for layoff purposes?” [Id.]. The union characterizes the employer’s interpretation as an “absurd result.” [Id.]. “[T]he chief purpose of a seniority plan... is to promote maximum security [for] workers with the longest continuous service.” [Elkouri and Elkouri, **How Arbitration Works, BNA, 6<sup>th</sup> ed.**, pg 837, citing *Darin and Armstrong*, 13 **Labor Arbitration Awards** 843, 845, (Arb. Platt 1950)].

Because the contract defines seniority as the length of continuous service; and, this definition of seniority is specifically used for layoffs in Section 10.2 among the full and part-time employees within the seniority groups or seniority classifications listed in section 10.6.1, it is held that the employer violated the Collective Bargaining Agreement when it laid off six (6) employees before laying off part-time employees in the seniority classifications with less date of hire seniority.

The employer also violated the contract with respect to four of the six grievants by continuing to employ full-time employees in the same seniority category with less date of hire than the grievants.

Finally, the employer did not prove by a preponderance of the evidence “a proven loss of business”. Therefore the employer was also in violation of Section 16.2 of the CBA.

Based on the above reasoning the grievance is sustained. Each of the affected employees will be made whole for their losses including the difference in wages they received based on their part-time status, the hours of their work and the additional the payments they were required to make to retain their benefits.

August 8, 2011

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Joseph L. Daly

Arbitrator