UNITED STATES OF AMERICA
FEDERAL MEDIATION AND CONCILIATON SERVICE
IN THE MATTER OF GRIEVANCE ARBITRATION, BETWEEN:

UNFI (UNFI Wholesale, Inc.)

EMPLOYER

and

ARBITRATOR'S AWARD
FMCS Case No. 240111-02639
CONTRACT INTERPRERTATION

TEAMSTERS UNION LOCAL 120,

UNION

ARBITRATOR:	Rolland C. Toenges
DATE OF GRIEVANCE:	January 3, 2024
DATE ARBITRATOR NOTIFIED OF SELECTION:	February 14, 2024
DATE OF HEARING:	August 22, 2024
DATE HEARING BRIEFS DUE:	October 7, 2024[1]
DATE HEARING CLOSED:	November 18, 2024[2]
DATE OF AWARD:	December 16, 2024

[1] Briefs were received on October 7, 2024. However, both Parties filed several reply briefs, the latest received on November 4, 2024. The hearing was held open until November 18, pending further reply briefs. Being none, the hearing was closed on November 18, 2024.
[2] See footnote #1.

ADVOCATES

FOR THE EMPLOYER:

Lauren M. Emery, Attorney
Morgan, Lewis & Bockius, LLP
110 North Wacker Drive, Suite 2800
Chicago, Illinois 60606-1511

FOR THE UNION:

Nicholas S. Balatsos, Attorney
Feinberg, Dumont & Brenan
177 Milk Street, Suite 300
Boston, MA 02109

WITNESSES

James VanDusen, Director

Adam Purves, Union Steward

Doug Skelly, Driver

Mohamed Kaba, Bus. Agent

COURT REPORRTER

Liza Hutton

ALSO PRESENT

John Ring, UNFI Counsel, UNFI
Steve Boike, UNFI
Cam Trebbensee, UNFI
Meredith Dietle, UNFI
Liz Tiergola, UNFI

Scott Rombach, Union
Justin Sunboski, Union
Durham Byink, Union
Larry Brennan, Union

ISSUE IN DISPUTE

UNION: Did the Employer violate the Collective Bargaining Agreement by unilaterally changing Article 7 and requiring employees to use their bargained-for vacation time for sick time? If so, what shall be the remedy?

EMPLOYER: Did the Union meet its burden of proving the Company violated Article 7 of the collective bargaining agreement ("CBA") by allowing, but not requiring , employees to use up to 48 hours of paid vacation time for purposes covered by the Minnesota Earned Sick and Safe Time (ESST) law? If the Union proves a violation, what is the remedy?

JURISDICTION

The Arbitrator's authority is established by Federal Statute, State Statute, Rules and Regulations of the Federal Mediation and Conciliation Service along with terms and conditions set forth in the Collective Bargaining Agreement (CBA) between the Parties.

The hearing record shows that the grievance at issue was duly filed by the Union and processed through the CBA grievance procedure. The grievance not being resolved by the Parties was then advanced to arbitration. There being no procedural or substantive objections raised, the disputed matter is properly before the Arbitrator for resolution.

The Collective Bargaining Agreement (CBA) between the Parties provides in relevant part as follows:

"ARTICLE 14 – MANAGEMENT RIGHTS:"

"All rights, powers or authority the Employer had prior to signing this agreement with the Union are retained by the Employer, except those specifically surrendered or modified by this Agreement."

"Article 16. Arbitration:"

"16.01 Any grievance not settled through above-mentioned procedure shall, if it is to be processed further, be appealed by the aggrieved party to arbitration by serving written notice of intent upon the other party's designated representative(s) within thirty (30) calendar days from receipt of the step 4 answer and will simultaneously submit a request to the Federal Mediation and Conciliation Service for a 125-mile Metropolitan panel of seven (7) arbitrators. All grievances noticed for arbitration shall, unless settled, be heard by an arbitrator."

"16.02 To be timely, the Union and the Employer, will within fifteen (15) calendar days after receipt of arbitrator panel select an arbitrator with the moving party striking first."

"16.03 Within Thirty (30) calendar days following the selection of the arbitrator the arbitration date must be selected. Following the arbitration, transcripts must be submitted to the parties within ten (10) calendar days of the close of the hearing. Briefs must be submitted by the parties' Representatives within the time frame set by the arbitrator and the arbitrator must issue a decision within thirty (30) days of the submission of the briefs."

"16.04 The Arbitrator shall have jurisdiction and authority only to interpret and apply the express provisions of this Agreement. The Arbitrator shall not have authority to alter, amend, subtract from, add to, or otherwise modify any of the terms of this Agreement. The Arbitrators decision, rendered in writing shall be final and binding upon the Employer, Union and

> Employees(s). The total cost of the arbitration shall be shared equally between the employer and the Union. In the event either party elects not to receive a copy of the transcript of the hearing, the cost of the reporter and transcript shall be borne exclusively by the party using such copy."
>
> "16.05 All time limits specified in this Article may be extended only by written mutual agreement of the Union and Employer."

The Parties selected Rolland C. Toenges as Arbitrator to hear and render a decision in the interest of resolving the disputed matter.

The Arbitration hearing was held in Minneapolis, Minnesota on August 22, 2024.

The arbitration hearing was conducted in accordance with applicable statutory provisions, Rules and Regulations of the Federal Mediation and Conciliation Service and the Collective Bargaining Agreement (CBA). The Parties were afforded full opportunity to present documented evidence, testimony, and argument in support of their respective case. Witnesses were sworn under oath and were subject to direct and cross examination.

The hearing involved the testimony of three witnesses, some 20 exhibits, plus multiple Post Hearing Briefs and submissions.

The Parties elected to file post hearing briefs due October 7, 2024. Per mutual request of the Parties, the filing due date was extended to October 15, 2024. The post hearing briefs were received on October 15, 2024. Thereafter, the Parties

filed several reply briefs and submissions, the latest received on November 4, 2024. The hearing was held open until November 18, 2024, pending further submissions from the Parties. The being no further submissions by the Parties, , the hearing was closed on November 18, 2024.

BACKGROUND

UNFI (UNFI Wholesale, Inc., Hopkins) has been a Minnesota business since the 1970's. It is a Subsidiary of UNFI, which operates some 650 food distributions facilities throughout the United States and Canada. UNFI handles organic, natural and conventional wholesale foods. UNFI is the largest publicly traded wholesale distributor delivering health and conventional foods to people through the United States. UNFI operates distribution centers across the United States and Canada offering coast to coast coverage in North America.

Teamsters Local 120 (Union), is the exclusive representative of UNFI employees, including warehouse workers, truck drivers and maintenance workers. The Employer and Union are signatories to a Collective Bargaining Agreement (CBA), which provides terms and conditions of employment for some 650 covered employees. The current CBA covers the period June 1, 2022 through May 31, 2026.

The matter in dispute involves interpretation of the CBA. Specifically, under the terms and conditions of the CBA, whether earned vacation benefit can be substituted for sick leave required by the Minnesota Earned Sick and Safe Time

law (ESST Law)[3]. The Law became effective January 1, 2024. The Employer proposed modifications to terms and conditions of the CBA that it thought would bring the CBA into compliance with the new ESST law. However, the proposed changes were not agreeable to the Union. The Employer unilaterally implemented its proposed CBS changes, resulting in a grievance filed by the Union.

The Parties processed the Grievance in accordance with the CBA Grievance Procedure. Unable to resolve the matter it was advanced to arbitration and now comes before the arbitrator for resolution.

EXHIBITS

JOINT EXHIBITS:

J-1. Collective Bargaining Agreement,– 6/1/2022 – May 31, 2026.

J-2. Grievance, 01/02/2024

J-3. Employer Grievance Response, 01/08/2024

J-4 Minnesota Statutes 2023, 181.032

J-5. FAQs, Earned Sick and Safe Time

J-6. 2022 & 2023 Grievant attendance sheets

J- 7. Proposals in negotiations modifying CBA to comply with ESST.

[3] The new law (MNESST Law) enacted in May 2023, become effective January 1, 2024. The law requires Employers to provide employees up to 48 hours of paid sick leave per year. The levee can be used for various purposes as specified in the law.

J-7A. Attendance Policy, Drivers

J-7B. Attendance Policy, Non-Drivers

J-8. Paid Time Off Report, Adam Purves

Employer Exhibits:

E-1A. Employer Opening Statement

E-1B. Email, 11/17/2023, Negotiations, 11/16/2023

E-2. Email, 11/22/2023, Negotiations

E-3. Email, 12/4/2023, Negotiations, Proposed CBA changes explained

E-4. Email, 12/7/2023, attached letter regarding ESST.

E-5. Document, 12/5/2023, Minnesota Paid Sick & Safety Leave

E-6. Talking Points for Local 120.

E-7. Frequently asked questions, ESST.

E-8. Minnesota Employee Wage Notice,
Abraham De Luna-Espinoza

E-9. Minnesota Employee Wage Notice, Dolton L. Lomax

E-10. Minnesota Employee Wage Notice, Marcell Williams.

E-11. Human Resources Policy, Family & Medical Leave.

E-12. Employer statement of issue in dispute

Union Exhibits:

U-1. Unions Statement of Issue in Dispute

POSITION OF THE PARTIES

THE EMPLOYER SUPPORTS ITS POSITION WITH THE FOLLOWING:

This case is very straightforward and the facts for the most part are undisputed.

The CBA, with a few minor exceptions, already requires the paid leave required under the new law, which began effective January 1, 2024.

The Employer's proposed CBA changes, for which it has discretion, all add benefits and greater flexibility for bargaining unit employees.

The Employer met with the Union to address areas where the CBA needed to be aligned with the new law.

The Union refused to discuss modification of the CBA and, consistently taking the position that the leave required by the new law is in addition to what is provided by the CBA.

The Union contends it is entitled to the 48 hours of additional leave in addition to the generous leave already provided by the CBA.

There is nothing in the CBA or new law (ESST) to support the Unions position.

The official guidance provided is clear that the new law does not require an additional paid sick leave policy or entitlement.

Existing paid leave , including paid vacation, can be used to comply with the new law.

Additional paid sick leave is not required if an employer is already providing sufficient paid leave.

A paid time off (PTO) plan or other type paid leave (including sick or vacation time) can satisfy the new law (ESST) if the plan meets requirements.

DLL guidance specifically references vacation time that can be used to satisfy requirements.

Both the new law and interpretive guidance are clear that employers are not required to promulgate separate and distinct sick leave policy.

Other forms of paid leave, including vacation, may be used to satisfy requirements of the new law.[4]

[4] Minnesota Statue, Section 181.032 and
Section 181.9445 through Section 181.9448.

The DLL guidance specifically references vacation time as a type of paid leave that can be used to satisfy the new law requirements.

The name of the employers paid leave does not matter, it does not have to be called “earned sick and safe time” to meet requirements.

The Employer already provides employees paid leave, which included vacation as well as some other types of paid leave, including four personal holidays

The Employers proposal to align CBA with the new law liberalized use of vacation under circumstances provided in the new law.

The Union would not agree to the Employers proposal, so the Employer informed the Union it was implementing the proposed CBA changes.

The CBA change implemented by the Employer provide:

Employes to be charged up to 48 hours annually of their CBA vacation when on sick leave and safe time leave (ESST).

Employees not already receiving 48 hours of vacation would be provided 48 hours.

The Union was unwilling to agree to the Employers proposal, its position for the 48 hours of ESST be in addition to leave under the CBA.

For the foregoing reasons, the Employer has not violated the CBA.

The Union cannot establish a violation.

The Employer respectfully submits that the grievance should be denied.

THE UNION SUPPORTS ITS POSITION WITH THE FOLLOWING:

On January 1, 2024, the Employer unilaterally implemented a policy using up to 48 hours of employees CBA earned vacation for sick leave and safe time leave (ESST)

When employees call in sick (ESST Leave), the Employer, by default, deducts the employee's CBA earned vacation.

The Employers policy clearly violates Articles 7 and 18 of the CBA.

Under ESST, the Employer must provide employees with one-hour ESST for every 30 hours work, which can accumulate to 48 hours.

The ESST law does not obligate Employers to deduct earned CBA earned employee vacation.

Nothing in ESST law shall be construed to "limit the right of parties . . . to bargain . . . or to diminish the obligation of an employer to comply with any . . . collective bargaining agreement."

Clear unambiguous terms of CBA Article 7, pertain only to vacation benefits.

There is no CBA language permitting vacation to be used as sick leave

Unlike other befits, employees earned vacation, is an entitlement based on years working for the Employer.

The governing CBA language is the direct result of years of negotiations.

When the CBA was negotiated, neither party contemplated use of vacation for ESST leave.

In fact, CBA Article 7 contains language and requirements that prevent employees from using vacation leave for paid sick leave.

Employees generally schedule all of their vacation early in the year, and any remaining vacation only be used if the employee provides enough notice and not too many employees are already using vacation.

The Employers reliance on ESST law to justify its policy is misplaced.

The ESST law was passed after the Parties executed the CBA.

CBA Article 18, provides “the Employer agrees that all conditions of employment in its individual operations related to wages, hours of work and overtime shall be maintained at not less than the highest minimum standard in effect at the signing of this Agreement.”

Now the Employer automatically docks an employee’s vacation when they call in sick, which could result in losing up to 48 hours of their CBA earned vacation per year.

The Employer cannot be allowed to abruptly and unilaterally dimmish the CBA provisions.

The Parties did not agree to this.

Arbitrators have consistently determined that employers violate the CBA by unilaterally implementing a policy that requires employees to use their CBA earned vacation for sick leave.

In implementing its ESST Policy, the Employer unilaterally re-wrote CBA Article 7.

Nothing in ESST requires employers to deduct accrued vacation benefits from employees.

The Arbitrator must apply the plain meaning of the CBA, which is clear and unambiguous.

CBA, Article 16, limits the Arbitrators authority to interpreting the express terms and conditions of the CBA.

The Arbitrator's Award must draw its essence from the express terms and conditions of the CBA.

CBA, Article 18, prohibits the Employer from diminishing terms and conditions in effect when signed.

ESST does not excuse the Employer from its obligations under the CBA.

The Union did not have a legal obligation to bargain to impasse over a mid-term proposal.

The Employer should immediately rescind its ESST Policy and restore vacation taken for ESST leave.

For all the foregoing reasons and the record as a whole, the Union request the Arbitrator sustain the grievance.

DISCUSSION

The instant case arises due to a dispute regarding implementation of a new law. The new law requires Minnesota employers to provide employees with at least one hour of "paid sick and safe time leave" for every 30 hours worked, up to at least 48 hours of accrued (ESST) a year. The new law, "Earned Sick and Safe Time" (ESST),[5] became effective January 1, 2024. An Employers existing paid leave benefits *may* fully or partially meet the ESST requirements. Employers are responsible for following the ESST requirements most favorable to their employees.[6] The ESST applies to a wide variety of health, family and related circumstances. In the instant matter, the Employer sought to utilize the existing earned vacation leave benefits provided by the Collective Bargaining Agreement (CB) to accommodate ESST requirements. There is no provision in the CBA for sick leave, only vacation.

On November 17, 2023, the Employer proposed the following changes in the CBA to use earned vacation leave as a means of accommodating ESST requirements:[7]

O An employees using ESST leave will have their vacation leave charged for time on ESST leave.

0 Employees receiving less than 48 hours vacation per year to receive supplemental vacation to 48 hours annually.

[5] See footnote #4 above.
[6] Joint Exhibit #4.
[7] Joint Exhibit #6.

O Delete language that defines vacation as “consecutive weeks of vacation.”

O Remove or relax certain advance notice requirements.

O Employees may use the first 48 hours of vacation allotment of not less than one hour for purposes defined under

Section 7.17 (ESST).

O Limit on number of employees on vacation does not apply to employees using vacation hours for purposes defined

under Section 7.17 (ESST).

O Vacation formula in Appendix D & G not to apply to employees using vacation for purposes defined under Section

7.17 (ESST).

O Remove language identifying certain employees as ineligible for full time benefits.

On November 22, 2023, the Union responded to the Employer proposal: “We respectfully decline.”

On December 5, 2023, the Employer notified the Union: “The Company intends to implement its proposed changes December 13, 2023 . . .”

The Union responded by filing a grievance on January 3, 2024, stating as follows:

> “The Company violated and continues to violate the contract when it refused to grant employees proper safe and sick time, as required by the

ESST Law. Specifically, the Company is violating Article 7, as well as any/all other applicable articles or provisions, by failing to comply with the statute and disturbing a separately and collectively bargained
Vacation Article."

The Union's requested remedy is as follows:

"Cease and desist and follow the statue immediately. More evidence to be given at time of Hearing."

On January 8, 2024, a Step 2, grievance hearing took place. The Company continued to deny the grievance stating:

> "As an initial matter, the grievance is not substantively arbitral as it concerns the Company's implementation of Minnesota Law in line with the guidance provided by the Minnesota Department of Labor and Industry.[8] Moreover, in implementing its policies to comply with the MN ESST requirements as further detailed in its December 5, 2023 letter to the Union, the Company is not violating the parties' CBA."

[8] FAQS: EARNED SICK AND SAFE TIME (ESST) STATES: ". . . Furthermore, these answers do not contemplate the impact of provisions contained in a collective bargaining agreement. . ."

To provide guidance in implementing the statute (ESST), the Department of Labor Ind Industry prepared "FAQS: EARNED SICK LEAVE AND SAFE TIME(ESST)" The guidance includes the follows qualification:

". . . these answers do not contemplate the impact of provisions contained in a collective bargaining agreement."

The Employers position is to use employee CBA earned Vacation benefits as Earned Sick and Safe time (ESST). The CBA provisions for vacation are specific and different than those for ESST. The Employer proposed to modify the CBA provisions to accommodate using CBA earned vacation as ESST. The Union denied the Employers proposal. The Employer then unilaterally implemented its position and, via default, charged an employee their CBA earned vacation for ESST. The vacation charged by default is subject to be cancelled if the employee filing an objection.[9]

The Parties both cite arbitral presidence in support of their respective position.

FINDINGS

Implementation and administration of ESST is responsibility of the Employer.

Existing paid leave benefits *may* be used to comply with ESST.

[9] Employer testimony at hearing

Vacation benefits are provided via the CBA are subject to terms and conditions thereof .

CBA provisions for the application and administration of vacation benefits differ from Paid Sick leave and Safe Time under ESST.

The Union denied the Employers proposed CBA changes to integrate CBA earned Vacation for ESST.

The Union had no legal obligation to re-open and renegotiate the CBA mid-term.

Use of CBA earned Vacation for ESST conflicts with the CBA purpose and conditions for Vacation.

The Employer unilaterally implemented use of CBVA earned Vacation for ESST.

Unilateral application of CBA vacation benefits applied as ESST is in violation of the CBA.

The Employer agreed that CBA conditions of employment . . . "shall be maintained at not les than the highest minimum standards in effect at the signing of this Agreement."[10]

[10] Joint Exhibit #1, Article 18, Minimum Standards

"The Employer agrees to ". . . hereby recognize the Union as the exclusive bargaining agent for purposes of collective bargaining . . ."[11]

Nothing in Sections 181.9445 to 181.9448 shall be construed to ". . . dimmish the obligation of an employer to comply with any contract, collective bargaining agreement. . ."[12]

The Employers has a right to unilaterally make changes ". . . except those specifically surrendered or modified by this Agreement."[13i]

Implementation of Employer proposed CBA changes would, "alter, amend, subtract from, add to or otherwise modify any of the terms of this Agreement.[14].

The Arbitrator is without authority to "alter, amend, , subtract from, add to or otherwise modify any of the terms of this Agreement."[15]

Awarding the Employers proposed CBA changes would exceed the Arbitrators authority under Article 16, of the CBA.[16]

[11] Joint Exhibits #1, Recognition and Union Shop
[12] Joint Exhibit #4, MN Statutes 181.02 to 181.9448.
[13] Joint Exhibit #1, Article 14, Management Rights
[14] Joint Exhibit #1, Article 17, Arbitration.
[15] Joint Exhibit #1, Article 16, Arbitration,
[16] Joint Exhibit #1, Article 16, Arbitration

AWARD

The Grievance is sustained.

The Employer shall cease and desist from taking by default, or otherwise, CBA earned Vacation benefits for ESST Leave.

The Employer shall make whole any employee from whom CBA earned Vacation benefits were taken for ESST.

The Arbitrator will retain jurisdiction over implementation of this Award for 60 days.

CONCLUSION

The Parties are commended on the professional and thorough manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issued this 16th day of December 2024 at Edina, Minnesota.

_____

ROLLAND C. TOENGES, ARBITRATOR

[i] Joint Exhibit #1, Article 14, Management Rights