

Opinion and Award

In Arbitration
Before
Richard L. Ahearn

AAA Case. No. 01-15-0003-6155
(Parking Fees)

Washington Public Employees Association,
UFCW Local 365

Union

and

Wenatchee Valley College

Employer

Appearances:

For the Union:

Marie Duarte
Schwerin, Campbell, Barnard, Iglitzin & Lavitt
Attorneys at Law
28 W. Mercer Street, Suite 400
Seattle, WA 98119

For the Employer:

Donna J. Stambaugh
Assistant Attorney General
1116 W. Riverside Avenue, Suite 100
Spokane, WA 99201

Background

The Employer is one of about 13 Community College Districts in the State of Washington that is party to a collective bargaining agreement with the Union.¹ The Employer has historically charged fees to staff, faculty, students and the public for parking their cars on its parking areas. In 2012, budgetary concerns with the State of Washington resulted in a decrease in pay for the classified staff employees represented by the Union. In an effort to address the resulting burden on those employees, the Employer unilaterally decided to not charge the represented employees for parking during the year ending June 2013. Likewise, for the year ending June 2014 the Employer acted unilaterally to not charge employees represented by the Union for parking.

In the fall of 2014, as the school year began, individuals represented by the Union learned that they would be charged a fee for parking for the school year ending June 2015. The Union subsequently filed the grievance that is the subject of this arbitration, alleging that the Employer violated Article 20.3 of the collective bargaining agreement by charging a parking fee to all bargaining unit members.

The hearing, in which each Party had full opportunity to present evidence and argument, was held in Wenatchee, Washington on September 22, 2015. The Parties stipulated that the matter was properly before me for a decision on the merits and that I would retain jurisdiction following issuance of my Opinion and Award to address any remedial issues that could arise. With the Parties' filing of post-hearing briefs on November 6, 2015, the record closed.

The Issue

The Parties differ slightly on the wording of the issue, but agree that I should formulate the statement of the issue based on their proposals and the record.

¹ The agreement was effective by its terms from July 1, 2013 through June 30, 2015.

The Union framed the issue as follows: Did the Employer violate the collective bargaining agreement by charging a parking fee to all bargaining unit members? If so, what shall be the appropriate remedy? The Employer proposed to modify the Union's formulation by incorporating Article 20.3 into the issue statement.

Based on the Parties' proposals and my review of the record, I agree with the Employer that the issue is properly expressed as follows:

"Did the Employer violate Article 20.3 of the collective bargaining agreement by charging a parking fee to all bargaining unit members?"

"If so, what is the appropriate remedy? "

Relevant Contract Provisions

The critical contract language from the Parties' 2013-2015 collective bargaining agreement is set forth below at Article 20.3 and is unchanged from the prior contract.

Article 20 COMMUTE TRIP REDUCTION AND PARKING

20.3 The Employer agrees not to make any changes to current parking conditions for the term of this Agreement unless it first meets its collective bargaining obligation.

Article 30 GRIEVANCE PROCEDURE

30.2D. Authority of the Arbitrator

1. The arbitrator will:
 - a. Have no authority to add to, subtract from, or modify any of the provisions of this Agreement.

The Evidence

As summarized above, for decades the Employer has charged parking fees to all its employees, its students and the public. The fees provide important support for maintenance of the parking lots.

On June 7, 2011, the Employer announced to all employees that the Board of Trustees had approved new parking fees that would be effective at the beginning of the fall semester in 2011. Following the Union's demand to bargain about the parking rates, the Parties subsequently met and reached agreement. On August 3, 2011, the Employer set forth a chart reflecting the agreed-upon parking rates for fiscal years 2012, 2013 and 2014.²

About one year later, on September 4, 2012, the Employer announced implementation of the parking rates for fiscal year 2013 that included the previously agreed-upon increases for employees represented by the Union. However, that same day by email Reagan Bellamy (Bellamy), Executive Director of Human Resources, informed the employees represented by the Union:

“For the 2012-2013 academic year all represented classified staff will receive their parking permits free of charge.”

The Employer did not provide advance notice to the Union of this decision, nor did the Union seek to bargain.

The following year, on August 28, 2013, by a memo to the college community, in the context of a discussion about the upcoming budget, President Jim Richardson announced: “Parking will again be free for classified staff this year.” Once again there was no advance notice to the Union and no request to bargain. According to President Richardson, he unilaterally decided to waive parking fees for the

² As the designated fiscal year refers to the ending year, fiscal 2012 begins in 2011 and ends in July 2012. As the other fiscal years follow the same pattern, the agreement contained rates through July 2014.

bargaining unit members in order to provide some economic relief from the 3% salary reduction they had suffered during the biennium 2011 – 2013.

Next, on January 30, 2014, during a labor management meeting, the Parties discussed the Employer's intent to further raise parking rates as early as the summer of 2014.³ In response, on February 24, 2014, the Union wrote a letter to the Employer, in which it relied on Article 20.3 and expressed opposition to any changes in parking rates. On March 4, 2014, the Employer replied that no decision had been made on whether it would seek to raise parking rates and explained that if a raise were contemplated, the Employer, pursuant to Article 20.3, would provide the Union with notice of the proposed change. The Employer further asserted it would then be the Union's obligation to demand to bargain if the Union wished to discuss the proposed change.

On September 15, 2014, upon arriving at the college for the start of the fall semester, employees represented by the Union first learned that the Employer was requiring them to pay for parking permits for the 2014-2015 fiscal year. The Employer had not provided notice to the Union of this fact and did not seek to engage in bargaining with the Union. After the Union challenged the Employer's decision to require unit employees to pay for parking, Bellamy by email informed the Union:

“WVC did not change parking conditions last year, the college merely chose not to enforce the parking conditions for that year. Now we are going to enforce the conditions that previously existed. The College never promised that the free parking would continue.”

On September 26, 2014, the Union filed this grievance, alleging that the Employer's action requiring employees represented by the Union to pay for parking violated Article 20.3.

³ Article 39 of the Parties' collective bargaining agreement establishes the Labor/Management Communication Committee and makes clear that the purpose is to foster a constructive and cooperative relationship, but that the committee has no authority to negotiate or to bargain collectively.

The Employer's October 21, 2014 first step denial stated:

"WVC did not change parking conditions last year: the college chose not to enforce the parking conditions for the past two years. WVC is now enforcing the conditions that previously existed. The college never promised that free parking could continue."

Positions of the Parties Summarized

Union

The Union contends that the plain meaning of Article 20.3 compels the conclusion that in July 2013, when the Parties executed the collective bargaining agreement, the "current parking conditions" for employees represented by the Union constituted no fees. Accordingly, as Article 20.3 prohibits any changes to current parking conditions unless the Employer first meets its collective bargaining obligation, and as there is no contention that the Employer met its bargaining obligation, the Employer was not privileged to change employees' condition of free parking to paid parking. The remedy should include receipt of parking permits with no fees and reimbursement to all employees represented by the Union for the cost of any parking permits from September 2014 forward.

Employer

The Employer argues that it did not change any parking conditions; rather, it merely applied the paid parking conditions that long existed by electing not to continue a unilaterally granted fee waiver. Although it chose not to enforce the parking conditions for fiscal years 2013 and 2014, it never promised that free parking would continue beyond those two discrete years. Thus, as its unilateral benevolent actions

did not transform into a permanent change in parking conditions and fees, the grievance should be dismissed.⁴

Analysis

My task here, as in any contract interpretation matter, is to determine the Parties' mutual intent. Although arbitrators rely on various established approaches, the overriding principle involves a search for the meaning of disputed contract language in consideration of all the relevant circumstances. One principle of interpretation relevant here is that in the absence of either a particular contractual definition of the disputed terms, or extrinsic evidence that the parties intended some special meaning, arbitrators presume that the parties intended that terms used would be given their broadly accepted, popular meaning. Elkouri and Elkouri, *How Arbitration Works*, 9-3, (7th edition, 2012).

On the other hand, if the contractual language is reasonably susceptible to more than one meaning, arbitrators generally find it ambiguous. In such circumstances, in attempting to discern the parties' intent, arbitrators frequently turn to evidence that might reveal the meaning, such as past practice or bargaining history. Further, arbitrators follow the presumption that the parties in negotiations were aware of generally accepted arbitral jurisprudence and that they expect the arbitrators will rely on established arbitral principles in interpreting language in their agreement. *The Common Law of The Workplace*, 76,77 (St. Antoine, 2nd. Ed. 2005). Another important principle is that the arbitrator's authority "is legitimate only so long as it draws its essence from the collective bargaining agreement." *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Indeed, Article 30.2D of the

⁴ Although at hearing the Employer contended that if I found a violation of Article 20.3, the remedy should be limited to the named grievant, it did not advance this argument in its post-hearing brief. As I therefore assume that the Employer is not pursuing that position, I am not addressing it in the body of my Opinion. In any event, I am persuaded that the grievance, which requested a remedy for "all bargaining unit members," properly extends to all such employees who were adversely affected.

collective bargaining agreement specifically prohibits the arbitrator from adding to, subtracting from, or modifying any terms in the contract. Further, as the moving party in this matter, the Union bears the burden of establishing that the Employer violated Article 20.3.

As explained in more detail below, based on a careful review of the language of Article 20.3 and applying well-established standards of contract interpretation, I am persuaded that the clear and unmistakable contractual language at issue supports the Union's position. In that regard, as the Employer's actions at issue here were unquestionably unilateral, there is no dispute that bargaining did not occur. Further, the terms "any changes" and "current conditions" are neither defined in the contract nor of a technical nature, and there is no indication that the Parties intended a special meaning. My research also revealed no prior arbitral interpretations of similar disputed language, nor did either Party rely on any such precedent in its arguments. In the totality of these circumstances I find it appropriate to examine below the common and well-accepted meaning of the terms "any changes," and "current parking conditions."

In seeking common meaning, dictionary definitions often provide arbitrators reliable and broadly accepted definitions. *How Arbitration Works*, supra at 9.3.A. i. b. One such highly regarded source defines "any" as "to any degree or extent," and "change" as "a transformation or transition from one state, condition or phase to another." In addition, "current" is defined as "belonging to the present time" and "condition" as "a mode or state of being, existing circumstances." *The American Heritage Dictionary of the English Language*, 5th Edition, 2011. Although mechanical, literal reliance on a dictionary can be problematic, I am persuaded that the above definitions are consistent with common usage of the terms, do not have contrary dictionary definitions and thus serve as helpful rather than ill-advised aids of interpretation. Further, the Union's brief proffered definitions of "condition" from two other respected dictionaries that are consistent with the above meaning, further buttressing the widespread acceptance of the definitions. In the totality of these

circumstances I am persuaded that free parking constituted the “state of being” or “existing circumstances” that employees enjoyed at the effective date of the 2013-2015 collective bargaining agreement. In addition, I am further persuaded that the admonition against “any changes” prohibited transformation of the “state” of no fees for parking to a “state” that included parking fees.

For its part, the Employer argues that its benevolent, unilateral waiver of parking fees for the academic years 2012-2013 and 2013-2014 cannot be construed as establishing a permanent change in parking conditions for the unit employees. In that regard the Employer highlights the evidence that on both occasions its announcement of free parking referred to only the upcoming academic year; at no time did the Employer express an intention to make such condition permanent. Relying on the principle of contract interpretation “expressio unius est exclusio alterius” (to express one thing is to exclude another), the Employer contends that by limiting free parking to the specified years, it thereby excluded any other periods of time. However, as explained below, I am not persuaded, as this argument fails to account for the specific, restrictive language of Article 20.3.⁵

In support of its argument, the Employer cites *Iowa Meat Processing Co.*, 84 LA 933, (Madden, 1985) and *Davenport v. Washington Educ. Ass’n.*, 147 Wn. App. 704, 197 P.3d 686 (2008). Although both cases rely on the principle of interpretation put forth by the Employer, the critical question here is the proper application of Article 20.3. Indeed, failure to give effect to Article 20.3 would violate the principle that contractual clauses should be given effect unless no reasonable meaning is possible. *How Arbitration Works*, supra at 9-35. As explained above, Article 20.3 specifically

⁵ Further, to the extent that the Employer contends that longstanding parking fees constituted the “current parking conditions” of July 2013, I am unable to agree. Rather, any such interpretation is inconsistent with the clear and unequivocal meaning of the controlling contractual terms and no evidence supports a contrary conclusion. Indeed, both the Employer’s September 17 email and its October 21 grievance response acknowledged that it was enforcing conditions “that previously existed.”

addresses the issue here and its meaning is clear and unambiguous. In the totality of these circumstances I am persuaded that Article 20.3 is controlling and that the Employer's statements limiting each fee waiver decision to only the upcoming year is therefore inapposite to a proper determination of this grievance.

In addition, with regard to other precedent cited by the Employer, various factors compel me to conclude that they are likewise not supportive of the Employer's position. For instance, in *Alcoa Mill Products*, 125 LA 1565, (Petersen, 2008), the arbitrator relied upon a letter that had been incorporated in the contract and that set forth the disputed vacation policy. The outcome of that matter thus pivoted on the long-accepted principle that whether benefits, such as typical gratuities, can be unilaterally withdrawn depends on whether they are incorporated in the collective bargaining agreement. See *Fawick Airflex, Inc.*, 11 LA 666, (Cornsweet, 1948). As Article 20.3 incorporates clear contractual evidence of the Employer's obligation to avoid "any changes" to "current parking conditions," I am persuaded that the requisite factual premise underlying *Alcoa* is likewise present here. Indeed the presence of such an express provision in the collective bargaining agreement itself arguably provides a more compelling argument than did the letter in *Alcoa*. Under such circumstances, I am persuaded that the reasoning of *Alcoa* supports the Union's position rather than that of the Employer.

In *Emery Industries*, 89 LA 603, Duff (1987), also cited by the Employer, the arbitrator dismissed a grievance that contended that over 50 years of past practice of giving Christmas baskets to employees compelled the employer to continue that tradition. Although recognizing that employees hoped and indeed expected that the practice would continue indefinitely, the arbitrator found:

"However, there is nevertheless an insurmountable obstacle to the Union's attempt to win this case: there is simply no vehicle through which the Company has bound itself to continue it."

In the absence of the restrictive language in Article 20.3, I would likely be persuaded that the rationale of *Emery* is relevant to our circumstances.⁶ However, unlike *Emery*, the Employer's commitment here is established in Article 20.3, rather than through unilateral decisions and announcements. Based on this critical factual distinction, I am compelled to conclude that the reasoning of *Emery* is inapposite here.

Conclusion

Based on the evidence described above and for the rationale set forth above, I am compelled to conclude that the Union has met its burden of demonstrating that Employer's September 2014 action of charging a parking fee to employees represented by the Union violated Article 20.3.⁷

⁶ Indeed, were I confronted with determining whether the Employer's unilateral actions created a binding practice by themselves, I likely would be persuaded that the various necessary elements, such as mutuality and consistency over time, were lacking.

⁷ I recognize that the Employer considers that this matter reflects the maxim that "no good deed goes unpunished." However, my Opinion here must not rest on competing equities, but rather on the clear and unambiguous controlling contractual language of Article 20.3. *How Arbitration Works*, supra at 9-52.

ARBITRATOR'S AWARD

AAA Case. No. AAA 01-15-0003-6155

(Parking Fees Grievance)

For the reasons set forth in the Opinion that accompanies this Award, the grievance must be and is sustained. As a remedy, the Employer shall:

1. Restore the status quo that existed on July 1, 2013 with respect to free parking for employees represented by the Union unless it first meets its collective bargaining obligation.
2. Reimburse the employees represented by the Union for parking fees paid since September 2014.

Pursuant to Article 30.2E of the collective bargaining agreement, the Parties will share equally the expenses and fees of the arbitrator.

Respectfully submitted,



Richard L. Ahearn

Arbitrator

November 16, 2015