

**THE PUBLIC REVIEW BOARD
INTERNATIONAL UNION, UAW**

APPEAL OF:

MARINA M. SMITH, Member
LOCAL UNION 974, UAW
(East Peoria, Illinois)
Appellant,

-vs-

CASE NO. 1537

REGION 4, UAW
(THE UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA),
Appellee.

DECISION

(Issued September 27, 2006)

PANEL SITTING: Prof. Theodore J. St. Antoine, Chairperson,
Prof. Benjamin Aaron, Prof. Janice R. Bellace,
Prof. James J. Brudney, Prof. James E. Jones,
Jr., and Prof. Maria L. Ontiveros.

Marina Smith argues that International Representative John Bainbridge's decision to withdraw a grievance protesting her discharge by Caterpillar Logistics Services lacked a rational basis.

FACTS

Marina Smith was hired by Caterpillar Logistics Services (Caterpillar) on March 29, 2004, as a Material Specialist in a bargaining unit represented by UAW Amalgamated Local Union 974. Smith was hired as a supplemental employee pursuant to Letter of Agreement No. 27 attached to the collective bargaining agreement between Caterpillar and Local 974.¹ With respect to such employees, Paragraph I of Letter of Agreement No. 27 provides as follows:

¹ Letter of Agreement No. 27 describes the Company's right to hire supplemental employees as follows:

"The parties to the Central Agreement recognize that the Company's Business Units encounter fluctuations in employment needs due to the cyclical nature of their business. Therefore, within each Business Unit, in order to provide stable employment and job security to our regular employees, the Company may, as the need arises, in addition to sourcing of work in accordance with the provisions of Section 16.10, employ the services of supplemental employees to perform bargaining unit work." (Record, p. 3)

“Such supplemental employees may be terminated at any time for any reason. No claim of wrongful termination or discharge of a supplemental employee shall be taken up as a grievance, unless such claim is based on alleged personal prejudice or Union activity. Such grievances must be in writing and supported by written evidence. The foregoing provision shall not prohibit a supplemental employee from filing a grievance alleging a violation of other contractual provisions applicable to such employee.”²

On May 13, 2004, Smith dropped a steel cylinder on her right wrist and injured it. During the week of September 20, 2004, Smith called the Occupational Safety and Health Administration (OSHA) and complained that she was injured as a result of safety hazards at the Caterpillar workplace. OSHA contacted Caterpillar on September 24 and asked that it investigate Smith’s concerns. The Company responded on October 4, describing the proper procedures to be followed on the operation where Smith claimed she had been injured.³ On October 6, 2004, OSHA provided Smith with a copy of the Company’s response and advised her that it was closing the case on the grounds that the hazardous conditions she complained about no longer existed.⁴

Smith’s employment with Caterpillar was terminated on October 4, 2004.⁵ Smith filed a second Complaint with OSHA on October 28, 2004, charging that she had been fired because she had complained to OSHA about her working conditions.⁶ In a statement submitted to support this Complaint, Smith described her wrist injury and the Company’s response. Smith reported that she called in sick the day after she was injured and applied ice to the injury to reduce the swelling in her wrist. She stated that she consulted the Company doctor about her wrist injury on May 18, 2004. She gave the following description of her visit to the Company doctor:

“On May 18, 2004, I met with Dr. Just in the Medical Office. Dr. Just looked at my wrist and asked if I wanted any job restrictions. I asked her what she thought, since she was the doctor. Dr. Just said that there wasn’t much work available for employees with restrictions and sent me back to work with no restrictions. I worked my normal job from May 18, 2004, until June 15, 2004.”⁷

² Record, p. 4.

³ Record, pp. 28-30.

⁴ Record, p. 34.

⁵ Record, p. 40.

⁶ Record, pp. 37-41.

⁷ Record, p. 38.

Smith reported that she returned to Dr. Just on June 15, 2004, because her wrist was getting worse, and that Dr. Just restricted her to lifting 25 pounds.⁸ Smith stated that when she advised her Supervisor of this restriction, the Supervisor stated that he did not have any work within that restriction. Smith stated further that she asked if she would be receiving workers' compensation for the time that she was going to be off. She described the Company's response as follows:

"...Mr. Shoot told me that I would not be getting workers' compensation because the injury was not work related. Mr. Shoot stated that Dr. Just had not documented that the case was work related. On June 16, 2004, I called the Building C Medical Office. The nurse stated that the case had not been documented as work related. I told her I would come over and fill out an incident report. I went to the plant and was accompanied by a security officer to the Medical Office where I filled out a report."⁹

Smith reported that she was instructed to return to work on June 28. She explained that she had been told to put ice on her wrists after lifting parts in order to prevent swelling and that she was doing that. Smith further reported that on August 30 her Supervisor began to complain about her ice breaks. On September 15, 2004, Smith consulted a personal physician who put a cast on her wrist and increased her restrictions to left hand use only. Smith stated that she was reassigned to the third shift, because there was no work available on the second shift within her restrictions.¹⁰

On September 26, Smith filed a charge with the U. S. Equal Employment Opportunity Commission (EEOC) claiming that Caterpillar was discriminating against her on the basis of her disability.¹¹ In its response to this charge, the Company described its efforts to find work that Smith could do within her restrictions. It reported, however, that her restrictions kept increasing so that finally there was not enough work for her on the second shift. The Company stated that Smith was reassigned to the third shift on September 28, 2004, where she was given the light-duty task of labeling and packaging small parts.¹² According to the Company, even before the incident on May 18, Smith had requested to be assigned to an office job on the first shift because of a pre-existing wrist injury.¹³ The Company reported that Smith repeated her request to be transferred to an office job on the first shift to each of her supervisors. The Company

⁸ Record, p. 50.

⁹ Record, p. 38.

¹⁰ Record, p. 39.

¹¹ Record, pp. 9-10.

¹² Record, pp. 58-61.

¹³ Record, p. 56.

stated that its practice is to assign supplemental employees as needed across all shifts.¹⁴ The Company argued that Smith had not established that she was disabled, and that she had produced no evidence that she was discriminated against on the basis of a disability or for any other reason.¹⁵

Smith's EEOC Complaint was ultimately dismissed based on the investigator's determination that the evidence was unlikely to establish a violation of the relevant statutes. Smith was advised of the EEOC's decision on January 19, 2005.¹⁶ OSHA dismissed Smith's second Complaint based on a similar finding on January 18, 2005.¹⁷

Local Union 974 filed Grievance No. 04-MOR-124 protesting Smith's termination on October 7, 2004. The grievance states that Smith was terminated for unsatisfactory attendance without just cause.¹⁸ The Company responded to Smith's grievance on October 21, 2004, as follows:

"In accordance with Letter of Agreement #27, subsection I, of the Central Agreement, the instant grievance is not an appropriate subject for the grievance procedure, is not properly in the grievance procedure, and is not arbitrable. In any event, there was no violation of the sections cited. Ms. Smith, #328427, was terminated properly."¹⁹

Local 974 referred Smith's grievance to the UAW Moline Sub-Regional Office for review on November 15, 2004. In its Statement of Unresolved Grievance, the Local Union described the nature of the grievance as follows:

"Grievant was terminated w/out cause and for personal reasons, prejudice and because of her Union activity, her workers' comp. proceedings, etc."²⁰

Servicing Representative John Bainbridge of the Moline Regional Office withdrew Smith's grievance from the procedure on December 1, 2004.²¹ On December 3, Local 974 Bargaining Chairperson Bill Scott advised Smith that her grievance had been withdrawn. Scott informed Smith that the Servicing Representative had concluded that

¹⁴ Record, p. 57.

¹⁵ Record, p. 62.

¹⁶ Record, p. 65.

¹⁷ Record, pp.127-128.

¹⁸ Record, p. 35.

¹⁹ Record, p. 36.

²⁰ Record, p. 46.

²¹ Record, p. 48

an arbitrator would not reverse the Company's last answer and grant the relief requested.²²

Smith appealed the decision to withdraw her grievance to the International Executive Board (IEB) on December 29, 2004. Smith argued that although she was a supplemental employee, her termination was the result of personal prejudice and Union activity. She argued that she was terminated for exercising her right to file a workers' compensation claim after she was injured at work.²³ In response to Smith's appeal, Representative Bainbridge stated that he did not believe the evidence supported Smith's claim that she was fired as a result of personal prejudice or Union activity. Bainbridge attached to his letter a copy of an Arbitration Award in which Arbitrator Fredric Dichter upheld Caterpillar's right to fire supplemental employees for any reason. In that decision, Arbitrator Dichter ruled that the Union has the burden of establishing a claim that the actual reason for termination of a supplemental employee was personal prejudice or Union activity.²⁴

On June 22, 2005, John D. Hunter and Charles Stewart conducted a hearing on Smith's appeal on behalf of President Gettelfinger and submitted a report of their findings to the IEB. According to the hearing officers, Smith testified that the Company would not give her a reason for its decision when it terminated her on October 4, 2004; it only insisted that it did not need a reason.²⁵ The hearing officers reported that Chairperson Scott testified that he was not aware of Smith's complaints to the EEOC and OSHA until after her grievance had been withdrawn. He pointed out, however, that during the time that Smith worked at Caterpillar, the Company terminated over twenty-five other supplemental employees. He stated that during the period that he served as Chairperson the Company had never found a supplemental employee a medical placement job.²⁶

Representative Bainbridge stated that he had taken other cases to arbitration on behalf of supplemental employees, but the Union had not prevailed. He supplied the hearing officers with copies of two arbitration awards involving supplemental employees at Caterpillar. The hearing officers included the two awards in their report to the IEB. In *Caterpillar Inc. v. UAW Local 145*, (March 29, 2002), the grievant claimed that he had been terminated in retaliation for filing a grievance. In that case, Arbitrator Elliot I. Beitner ruled that the question was arbitrable, but that the Union had not established that the Company had terminated the grievance for engaging in Union activity. The Arbitrator ruled that the term "Union activity" as used in Letter of Agreement No. 27 suggested a more active Union role than that of an employee filing a grievance.²⁷ In

²² Record, p. 49.

²³ Record, p. 64.

²⁴ Record, p. 76.

²⁵ Record, p. 80.

²⁶ Record, p. 81.

²⁷ Record p. 90.

Caterpillar Inc. Track-Type Tractors v. UAW Local 2096, (November 10, 2003), Arbitrator Fredric R. Dichter upheld the termination of a supplemental employee even though the decision to terminate was based on questionable information. Arbitrator Dichter commented:

“This case has been extremely troubling for this Arbitrator. The entire manner in which the Employer dealt with this situation leaves much to be desired. Mr. Marshall did not attempt to find out the basis for the Grievant’s complaints. He did not seek to determine if the discrimination claim to which she referred might actually be meritorious. He did not ask Grievant whether she was working in conjunction with others to displace Mr. Kubitz. He questioned her and on the basis of her limited answers he terminated her. He did so without even talking to Kubitz to determine whether there really was a problem, and whether perhaps, he was the cause of that problem. It is indeed very fortunate for the Employer that the burden is on the Grievant and the Union and that the threshold from their perspective is very high. It is not enough that they show that the evidence to support the reason given was severely lacking, they must also show that the reason is bogus and that the real reason is based on personal prejudice. ...”²⁸

Based on the testimony given at the hearing and the two arbitration awards presented by Representative Bainbridge, the hearing officers concluded that the decision to withdraw Smith’s grievance was not devoid of a rational basis or improperly motivated. The hearing officers denied Smith’s appeal, and their report was adopted by the IEB as its decision. The IEB notified Smith of its decision on December 1, 2005, and she has now appealed to the Public Review Board (PRB).

ARGUMENT

A. Marina M. Smith:

Caterpillar treated me with prejudice and discriminated against me after they received the letter from my attorney stating that I had filed a workers’ compensation claim against the Company. I am appealing on the grounds that I was fired due to personal prejudice and Union activity. I was watched, harassed and treated differently than other medical injury cases.

²⁸ Record, p. 107.

B. International Union, UAW:

Smith made no claim that she was terminated as a result of personal prejudice or Union activity until her grievance was withdrawn. She has provided no evidence to support that claim in her appeal to the IEB. Both OSHA and the EEOC determined that Smith had not supported her claims that her discharge was the result of her Complaint to OSHA or discrimination as the result of her injury. Two previous arbitration awards upheld Caterpillar's right to terminate supplemental employees without establishing any reason. The Union must prove that the reason was a prohibited one, and the evidence did not support that conclusion in this case. Therefore, the decision to withdraw her grievance was rational.

C. Response by Marina M. Smith:

I did inform Chairperson Bill Scott of my claim of personal prejudice and Union activity the week that I was fired. I also provided him with paperwork and copies of the EEOC and OSHA formal complaints, and the workers' compensation suit filed by my attorney.

DISCUSSION

In order to obtain Smith's reinstatement, the Union had the burden of establishing that the reason for her termination was personal prejudice or Union activity. Smith argues that she was fired because she filed a worker's compensation claim and complained to OSHA and the EEOC about her treatment at Caterpillar. It is apparently Smith's position that these actions constituted Union activity within the meaning of the Letter of Agreement in the collective bargaining agreement. It is questionable whether such a position could be sustained. In his reading of Letter of Agreement No. 27, Arbitrator Beitner seemed to conclude that the kind of activity protected by the language was limited to organizing and concerted activities of the type described in Section 7 of the National Labor Relations Act, 29 U. S. C. §157.²⁹ The kinds of claims and complaints filed by Smith would not appear to qualify as Union activity, at least as that term was interpreted by Arbitrator Beitner.

In any event, Smith has not produced any evidence that her termination had any connection with the complaints she filed. The coincidence of Smith's complaints and her termination would not meet the standard of proof established by the two arbitration awards interpreting Letter of Agreement No. 27. Furthermore, the Company's response to Smith's EEOC Complaint demonstrates that it continued to make every effort to

²⁹ Section 7 states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

accommodate her physical limitations even after her complaint to OSHA. There is no evidence in this record of personal prejudice on the part of any member of management that might have motivated the Company's decision to terminate her employment.

We are not authorized to overturn the decision of a union representative to withdraw a grievance unless the appellant is able to establish that elements of fraud, discrimination, or collusion with management affected the decision or that it was devoid of any rational basis.³⁰ There is no claim that Representative Bainbridge's decision to withdraw Smith's grievance was motivated by fraud, discrimination, or collusion with management, so the only question presented by this appeal is whether the decision lacked a rational basis. The two prior arbitration decisions interpreting Letter of Agreement No. 27 of the collective bargaining agreement between Caterpillar and UAW Local 974 have established a high standard of proof for the Union where the claim is made that personal prejudice or union activity motivated the termination of a supplemental employee. The arbitrators' interpretation of the applicable language provided a rational basis for Bainbridge's conclusion that Smith's grievance could not be successfully arbitrated.

The decision of the IEB is affirmed.

³⁰ UAW Constitution, Article 33, §4(i).