THE PUBLIC REVIEW BOARD
INTERNATIONAL UNION, UAW

APPEAL OF:

JULIE CLAUS, Member
UAW LOCAL UNION 281
(Davenport, Iowa)
REGION 4,

Appellant

-vs- CASE NO. 1791

UAW AGRICULTURAL IMPLEMENT DEPARTMENT
(THE UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA),

Appellee.
______________________________________/

DECISION
(Issued May 6, 2019)

PANEL SITTING: Prof. James J. Brudney, Chairperson, Prof. Janice R. Bellace, Prof. Harry C. Katz, and Prof. Maria L. Ontiveros.

We consider Julie Claus's appeal of Representative Scott DeVrieze's decision to withdraw her grievance seeking compensation for losses resulting from the Company's failure to accommodate her disability. Claus has been arguing since February 2, 2016, that the Labor Agreement requires management to accommodate her disability by finding a job in the plant that she is capable of performing. Her appeal seeks the income she claims to have lost during the period between her request for an accommodation on February 2, 2016 and her actual placement in the plant on October 3, 2016.

FACTS

Julie Claus is an employee of John Deere Davenport Works ("the Company") in a bargaining unit represented by UAW Local Union 281. She has a seniority date of January 5, 2004. In April 2010, Claus suffered a work-related injury to her neck and

went on short term disability leave.[1] Her leave was eventually converted to a Long Term Disability (LTD) leave. While on leave, Claus attempted, without success, to obtain Social Security Disability Insurance (SSDI). On February 2, 2016, Claus described her efforts to obtain disability insurance in an email to the Company's Labor Relations Representative Brian Mosbaugh. She wrote:

> "As you will discover in my file, I have been on LTD since 2011 due to my disability/restrictions and have attempted through Deere's assistance and requirements to obtain SSDI through Brooks Law Firm, which was referred to me by John Deere, without success. I have been denied a total of four times, with the final denial in December of 2015. The firm decided they had done all they could and courts have deemed me not disabled."[2]

Claus went on to explain that she had contacted the Civil Rights Commission and learned that she could request an accommodation that would allow her to return to work. Claus wrote:

> "This brought me to research on my own, and contact the Civil Rights Commission and the ADA and to request assistance in discovering what my options are concerning my desire to return to work. This is why I am contacting you as suggested by them to exercise my right to return to work and have my accommodations honored by my employer, John Deere Davenport Works."[3]

Claus was given a Functional Capacity Evaluation (FCE) on February 26, 2016, and issued temporary restrictions.[4] On March 28, 2016, Claus wrote once again to Representative Mosbaugh seeking to be returned to work. Claus gave the following explanation of her situation:

> "Which leads me back to you and the reason for another email to you. I am wondering what our next step is and how long it will be before I will be back to work. The doctor had also stated they would have to find an open position that fits with my accommodations, but according to incapacitated language in the contract, even if there is not an 'open' position, we would then need to go to the seniority list and utilize that option accordingly."[5]

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[1] Record, p. 38.

[2] Record, p. 3.

[3] Record, p. 3.

[4] Record, pp. 7-8, 9-10.

[5] Record, p. 12.

Local Union 281 filed Grievance #16-29 on Claus's behalf on March 29, 2016, asking that Claus be returned to work under the Americans with Disabilities Act (ADA) and Article XIV, §18 of the collective bargaining agreement. The Grievance states:

> On 3/29/2016, Mrs. Claus was contacted by Katie Demaris and Mrs. Claus was told that there was no work for her within her restrictions. The Union is requesting to use the normal process of going through the incapacitated language to search for a job within the grievant's restrictions and make reasonable accommodations if needed. Grievant contacted the Company on Feb 2, 2016 to return to work and the Union is requesting all pay loss be dated back to that date." [6]

On July 21, 2016, the Company's Labor Relations Supervisor Andrew Ranson wrote to Claus to follow up on telephone conversations addressing her request to return to work. Ranson reported that the Company had been unable to find an accommodation that would allow Claus to return to the job she had before she went on leave in 2010 as a result of her temporary disability. Ranson explained that in order to locate a different job the Company would need to work with permanent restrictions.[7] Ranson acknowledged that Claus's long-term disability leave was coming to an end. Ranson offered to give Claus sixty additional days of unpaid leave to protect her seniority while the parties attempted to find a job Claus could return to. Ranson wrote:

> "Since your restrictions are temporary restrictions, we are willing to give you an accommodation of sixty (60) days of unpaid leave as a form of an accommodation. Pursuant to company policies you will not receive pay or benefits during that leave, but you will retain your seniority date if you are able to return to work, with or without reasonable accommodations, upon the expiration of that leave. Please contact me if anything regarding your restrictions should change during your leave so that we can evaluate whether you can return to your job, with or without reasonable accommodations, or if there are any other alternatives to consider. Additionally, please contact me if you have any ideas on accommodations the Company could provide to get you back to work in your job. Finally, if any open jobs become available during that time, you can work with your union representatives to maintain awareness and visibility to them and we would invite you to bid on any job that you feel you could do, with or without reasonable accommodations. I am copying your union representative on this letter to facilitate that process."[8]

On August 8, 2016, Claus sent a letter to Local 281 Chairperson Gus Mansker objecting to aspects of the arrangement described by Ranson. Claus reported that

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[6] Record, p. 11.

[7] Record, p. 17.

[8] Record, p. 18.

Ranson asked her to suggest accommodations that would allow her to return to her previous job. She described her response as follows:

> "…He asked if there were any suggestions regarding accommodations for the job I previously held, and I told him that job was what put me out of work. Due to the PSI pressure coming out of the air hose I had to operate, there probably isn't an accommodation that I was aware of for that particular portion of the job. …"[9]

Claus stated that based on her previous conversations with Mansker, she expected to be called back to a job within her restrictions in August. Claus wrote:

> "…When I talked to you on Thursday, July 21, 2016, you stated that you talked with them that morning and were under the impression that the company was intending to bring me back to work probably after shutdown, which would be August 8, 2016, pending communication with medical department at our facility (Deere Davenport Works). In your words, you mentioned that Mr. Ranson asked you what positions the company could look into that would fit my permanent restrictions I have and you replied with inventory positions, parts crib, and one or two others you forgot to mention to me when we talked that day. Andrew also asked if we were asking for back pay, to which you replied no, which I strongly disagreed with after you had this discussion with them and without conferring with me on that issue. However, you did tell them we would be expecting pay from the date of my separation on July 20, 2016, to the day I would be returning to work in a new position, and according to you, you stated they agreed to that. …"[10]

Claus argued that the Company was not properly applying the "incapacitated language" from Article XIV, §18 of the Labor Agreement or they would have located a job within her restrictions. She wrote:

> "Mr. Ransom continues to state in the same letter that he has looked throughout the factory for an 'open/vacant' position, and there aren't any. However, they are not utilizing the incapacitated language in the contract as we both are well aware. If they did, with my seniority, we know darn well that we could find a few viable positions to choose from. He then offers to be 'willing' to accommodate me with an unpaid leave of absence in order to maintain my seniority, but without any benefits! REALLY? What kind of accommodation is this? …"[11]

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[9] Record, p. 19.

[10] Record, p. 19.

[11] Record, p. 20.

Claus claimed that there were numerous individuals in the plant who had been accommodated because of their disabilities.

Claus's restrictions were evaluated at the Integrative Pain Centers of America on August 25, 2016, and determined to be permanent. The examining doctor's letter states:

> "After reviewing the Functional Capacity Evaluation that was performed at Rock Valley Physical Therapy by Greg Monson PT, OCS and examining the patient, I have determined that patient has reached maximum medical improvement and will permanently remain at this level of functionality."[12]

The Company changed Claus's restrictions from temporary to permanent on September 14, 2016. The Company evaluated positions in the factory and placed Claus in a permanent position on October 3, 2016, based on Article XIV, §18 of the Labor Agreement.[13] A Joint Appeal Board Fact Sheet reports the following positions of the Union and the Company on Claus's Grievance #16-29:

> "**Union Position:** The Union contends the grievant should have been returned to work on 02FEB16. The Union requests the grievant be made whole for earnings lost from 02FEB16 – 03OCT16.
>
> **Company Position:** The Company acknowledges the grievant contacted the Company and requested to return to work on 02FEB16 with temporary restrictions. Temporary restrictions are accommodated within an employee's current classification and once the grievant's restrictions became permanent, the Company placed the grievant in a position based on Article XIV, §18 of the Labor Agreement."[14]

On February 22, 2018, International Representative Scott DeVrieze of the UAW Agriculture Implement Department appeared before the Joint Appeal Board to present the Union's case on behalf of Claus. Based on the Company's presentation, DeVrieze concluded that the Company was not in violation of the Labor Agreement.[15] DeVrieze sent a certified letter to Claus on March 1, 2018, informing her of his decision to withdraw Grievance #16-29.[16] Claus appealed DeVrieze's decision to the International Executive Board (IEB) in a letter dated April 4, 2018.[17]

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[12] Record, p. 22.

[13] Record, p. 24.

[14] Record, p. 24.

[15] Record, p. 39.

[16] Record, p. 27.

[17] Record, pp. 32-35.

Claus argued that the resolution of Grievance #16-29 did not compensate her for the losses she incurred as a result of the Company's failure to return her to work on February 2, 2016, as she requested. After describing all the steps she took to be reinstated, Claus wrote:

> "Finally, as the original grievance states, I requested to be made whole and to be compensated for ALL losses (wages, paid vacation, personal time, sick days, profit sharing, etc.) Health insurance was in place, so obviously was not an issue up to the point of returning to work, all above mentioned avenues SHOULD have been addressed and resolved, and I do not believe that to be the case."[18]

Representative DeVrieze responded to an inquiry from the International President's office regarding Claus's appeal on May 1, 2018. DeVrieze provided the following history of Claus's grievance:

> "Ms. Claus's long-term disability benefits expired on July 20, 2016 (**Exhibit 6)**. Deere & Company extended her an unpaid leave for sixty days on July 21, 2016, as an accommodation to her benefits expiring. During the sixty day leave her restrictions became permanent (**Exhibit 7),** which made her an incapacitated employee per the CBA. She was returned to work October 3, 2016, with her seniority uninterrupted."[19]

DeVrieze wrote that he explained his reason for withdrawing the grievance to Claus during a telephone conversation on March 6, 2018. DeVrieze wrote:

> "On March 06, 2018, I returned a phone call to Ms. Julie Claus. I explained to her my reasons why I decided to withdraw her grievance. I told her that since her restrictions were temporary that the company did not violate Article XIV, Section 18, because it refers to permanently incapacitated employees and that Deere & Company's extension of her unpaid leave for sixty days on July 21, 2016, as an accommodation to her long term disability benefits exhausting July 20, 2016, is a reasonable accommodation. I also explained to her, that in the Joint Appeal Board meeting I asked the Local Union and Deere & Company if she had any unpaid medical bills during this time, trying to find any liability, and they both answered no. So, with no liability to be made whole and her being back to work with her seniority uninterrupted, I decided to withdraw her grievance. …"[20]

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[18] Record, p. 35.

[19] Record, p. 38.

[20] Record, p. 39.

Acting on behalf of International President Gary Jones, Rick Hoffman and Max Jeffrey formed an appeals committee to conduct a hearing on Claus's appeal on September 27, 2018.[21] The appeals committee prepared a report to the IEB that described the correspondence between Claus and the Union during the period from February 2, 2016 to October 3, 2018, regarding her return to work.[22] The report of the appeals committee mentioned that Claus introduced the testimony of three witnesses who testified that the Company had accommodated them when they had temporary restrictions, but the hearing officers concluded that the past accommodations were insufficient to establish a pattern. The report to the IEB states:

> "The appellant brought three witnesses to the appeal hearing who testified that the Company had made an accommodation for them in the past when they had temporary restrictions. Even if you accredit each of their testimonies as factual and meritorious, their testimony aggregately is *de minimis* given there are over 900 union employees in the Company."[23]

The hearing officers also concluded that Claus's appeal was untimely because it was not postmarked until April 10, 2018, and her conversation with Representative DeVrieze showed that she knew about his decision to withdraw her grievance on March 6, 2018. Their report states:

> "The appellant was informed by Representative DeVrieze by phone on March 6, 2018, that he withdrew her Grievance No. 16-29 because her grievance lacked merit and he could find no violation on the part of the Company. This date and conversation were corroborated by the appellant's testimony on several occasions. UAW International Constitution Article 33, Section 4(b) states that the time limits of Section 4(c) begin to run from the time the appellant first becomes aware, or reasonably should have become aware, of the alleged action or decision appealed. The appellant was again notified by certified mail, return receipt requested, on March 6, 2018, because she contacted the post office on March 6, 2018, to see if her letter was there. Her letter was there, but she testified she couldn't pick it up until March 12, 2018, because of a personal procedure.
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> In the instant case, the appellant had until April 4, 2018, to have her appeal in the UAW President's office in a timely fashion. Her appeal wasn't (postmarked) until April 10, 2018."[24]

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[21] Record, p. 49.

[22] Record, pp. 51-59.

[23] Record, p. 60.

[24] Record, p. 64.

The hearing officers denied Claus's appeal based on their conclusion that it was untimely.[25]

The IEB adopted the report of the appeals committee as its decision. President Gary Jones provided Claus with a copy of the IEB's decision on November 15, 2018.[26] Claus appealed the IEB's decision to the Public Review Board (PRB) on December 13, 2018.

ARGUMENT

A. Julie Claus:

The Constitutional time limits should have been triggered by the certified mail I received and signed for, not a statement made during a private phone call that was only partially connected to my grievance. We had been discussing the merits of the decision continuously up until the day I filed my appeal and no one mentioned the applicability of any time limit on the matter. If I am to be deprived of my Constitutional right to appeal over a few days' difference, why weren't these concerns raised until months after I filed my appeal to the IEB. I trust you to review the facts and supporting evidence. I believe there has been an egregious miscarriage of justice and denial of due process throughout this entire appeal and review process.

I learned from consulting the Civil Rights Commission that I had the right to request management's assistance in identifying a job within the plant that would accommodate my disability. I wrote to John Deere Labor Relations Representative Brian Mosbaugh on February 2, 2016, and asked him to start the process described in the Labor Agreement for finding a job to accommodate an employee with disabilities. On March 29, 2016, Local Union 281 filed Grievance #16-29 asking to apply the normal process described in Article XIV, §18 of the Labor Agreement, "the incapacitated language" to find a job for me.

I was eventually placed in a job on October 3, 2016, after my restrictions were determined to be permanent. I believe I am still entitled to be reimbursed for the income I lost while I was on disability leave during the period from February 2, 2016 through October 3, 2016. The Company's refusal to use the "incapacitated language" to find a job in the plant that I could perform when I first made my request on February 2, 2016, violated my rights under Article XIV, §18 of the Labor Agreement as well as my rights under the Americans with Disabilities Act (ADA).

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[25] Record, p. 64.

[26] Record, p. 48.

I disagree that Article XIV, §18 only applies to permanent disabilities. There are numerous individuals in the plant who have been accommodated because of their temporary disabilities. During the hearing on my appeal, I presented the testimony of three such individuals. The hearing officers' report to the IEB does not identify these three witnesses or describe their testimony. In fact, the International Union has never offered a rational basis for its decision to withdraw my Grievance #16-29 without obtaining any compensation for the income I lost as a result of management's violation of my legal and contractual rights.

B. International Union, UAW:

The IEB properly applied the time limitations from Article 33, §4(c) to conclude that Claus's appeal was untimely. Claus admitted at the IEB hearing that she knew DeVrieze had withdrawn her grievance when they spoke on March 6, 2018, and he explained to her that he had done so and why. This case is very similar to *Chappell v. UAW International President,* PRB Case No. 1776 (4/20/2018). The appellant in that case argued that the time limits should not have begun to run until she actually retrieved her notice from the post office, even though the decision had been delivered and available for over a week before she picked it up. The PRB rejected that argument with the following observation:

> "…The IEB's decision was delivered to Chappell on May 15, 2017. That was the day she received notice of the decision, regardless of when she collected her mail. The time limit for appeals is 30 calendar days. Her appeal to the CAC was due, therefore, on June 14, 2017. That is how time limits generally work."

In this case, Claus was verbally informed on March 6, 2018 that her grievance was withdrawn, and on the same day she knew that there was a letter available for pickup at her local post office stating the same. Her failure to retrieve the letter until March 12 did not extend the time limits. Accordingly, the IEB's decision was correct and should be affirmed.

DISCUSSION

We do not believe Claus's appeal was appropriately rejected as untimely under the facts of this case. DeVrieze and Claus discussed their disagreement about the resolution of Grievance #16-29 during a telephone conversation on March 6, 2018. As often occurs during the grievance process, the discussion was part of an extended telephone conversation that Claus described as only partly connected to her grievance. She was advised that a written communication "should arrive any day" but in the interim Claus underwent a procedure and was unable to collect the letter until March 12.[27] Given these unusual circumstances, Claus's appeal from DeVrieze's decision to

[27] Record, p. 34.

withdraw the grievance, postmarked on April 10, 2018, was within the 30-day time period for filing appeals to the IEB stated in the UAW Constitution. We agree with Claus that a UAW member's right to appellate review of serious questions regarding the proper interpretation of labor agreements should not be lightly dismissed based primarily on an oral conversation with her representative.[28] The rejection of Claus's appeal on the basis of untimeliness was particularly inappropriate in this case where the appellant had been pursuing her argument diligently over a period of many months.

On the merits, however, the grievance settlement was not arbitrary. Claus is seeking income she claims to have lost because of management's failure to apply the Labor Agreement to find an open position for her in the plant. Claus argued that Article XIV, §18 of the Labor Agreement and the ADA required management to use the seniority list to search in the plant for a job that can accommodate her disabilities. But Claus was never entitled to such compensation because her understanding of the Labor Agreement was mistaken from the beginning.

The "incapacitated language" in Article XIV, §18 does not apply to employees with temporary disabilities. Prior to September 14, 2018, Claus's disabilities were temporary. Claus always disputed this distinction between permanent and temporary disabilities. She insisted throughout her pursuit of a resolution for Grievance #16-29, that the Company was applying the "incapacitated language" improperly, and that the Company had in the past followed a practice of accommodating employees with temporary disabilities.

The hearing officers' report to the IEB does not address the Company's general practice in applying Article XIV, §18 to find an accommodation for an incapacitated employee.[29] Following our initial consideration of this appeal, we asked the International Union to describe in greater detail the parties' customary practice in applying Article XIV, §18 to search for a job in the plant to accommodate an employee's disability. We asked if the "incapacitated language" is ever applied to temporary disabilities. We also asked the International Union to identify the three witnesses referred to in the IEB's decision and to describe the content of their testimony in more detail.

In response to this inquiry, Local 281 Shop Chairperson Gus Mansker wrote a letter to the Public Review Board explaining the Company's customary practice in placing employees with restrictions. He asserted that the Company consistently determines whether the restrictions are permanent or temporary. He reported that there

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[28] Record, p. 64.

[29] In fact, the report of the appeals committee does not contain a complete copy of the incapacitated language. Union Exhibit 5 in the Appeals Committee's report is meant to be the entire text of Article XIV, §18 of the collective bargaining agreement, but the decision omits the second page of Exhibit 5, which is most of the text of Article XIV, §18. Record, p. 55. The Board requested and obtained a complete copy of Article XIV, §18, describing the placement of an employee who has become permanently incapacitated and included it in the official record. Record, pp. 25-26

are two different sets of contractual language applied to the accommodation of disabilities depending on whether the restriction is permanent or temporary. Mansker asserted that Article XIV, §18 is only applied to place employees with permanent restrictions. Mansker stated that he is unaware of any situation where an employee with a temporary restriction used the process described in Article XIV, §18 to displace a seniority employee in the plant.[30] If there is no work available for an employee with a temporary restriction, Mansker reported that the Company generally sends the employee out on what is referred to as Weekly Indemnity (WI) or short term disability. Mansker reported that the placement of these employees with temporary disabilities is covered by Appendix C, Article IV of the Benefits Plan.[31] Mansker denied that Claus's witnesses used Article XIV, §18 to displace seniority employees in the plant. He wrote:

> "3) The witnesses Claus used to support her claim did not displace other employees; they were not relocated to other classifications or positions, nor was Article XIV, Sec. 18 used. Rick Behnke was provided the opportunity for training and education during a time he was on "WI" with temporary restrictions. The other three witnesses, Lisa Declercq, Tammy Newcomb, Michelle Lodwick was provided work under Workers Compensation/Light Duty. …"[32]

Also in response to the Board's supplemental inquiry, the IEB's hearing officers Rick Hoffman and Max Jeffrey prepared a memorandum addressed to Presidential Assistant Mark Liburdi explaining how the Company applies the contractual language to deal with temporary disabilities caused by injuries at work. According to the hearing officers' memorandum, Claus's witnesses Rick Behnke, Tammy Newcomb, and Lisa Declercg were all given light duty assignments during the period of their temporary disability.[33] The hearing officers described the accommodation provided to these three witnesses as follows:

> "<u>Response:</u> These employees were brought in and essentially paid not to work. It was the conclusion of the Appeals Team that this was a somewhat common practice by the companies looking to minimize their on the job injury experience rating in order to keep their Workers' Compensation insurance premiums lower. The Appeals Team felt that what the witnesses were describing fell under collective bargaining agreement (CBA) – Article II, Section 4(c) and not under Article XIV, Section 18, or ADA."[34]

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[30] Record, p. 127.

[31] Record, p. 124.

[32] Record, p. 127.

[33] Record, p. 121.

[34] Record, p. 122.

It now seems clear that when Labor Relations Supervisor Andrew Ranson wrote to Claus on July 21, 2016, asking her to identify a job she could do in the plant, he was prompting her to identify some light duty work that she could perform in the manner of Rick Behnke, Tammy Newcomb, and Lisa Declercg. Claus's perception of her rights was based on her observations of what people did in the plant, not on any understanding of the contract or law. Throughout the period of responding to Claus's grievance, the parties were searching for a way to find work for her within the context of their less formal accommodation system.

The International Union's response to our inquiry about the testimony of Claus's witnesses revealed that the parties have adopted a flexible approach to placing employees who are temporarily disabled due to on the job injuries. The three witnesses called by Claus who received light duty assignments did so under a different article of the Labor Agreement than Article XIV, §18. They were placed under Article II, Section 4 which described Non-Traditional Work Assignments. Paragraph D of Section 4 describes "Special assignments given to employees to accommodate temporary medical restrictions."[35] As recounted above, the Union's description of this process indicated this may have been done by the Company to reduce its job injury experience rating so as to keep its WC insurance premiums lower.

Claus's position reflects that she did not fully understand the accommodation process at first. The parties in this case eventually found a job in the plant that Claus could perform. The final resolution of Claus's grievance was not irrational or based on any kind of bias or discrimination.

The appeal is denied.

[35] Record p. 124.