BEFORE THE ARBITRATOR

In the Matter of the Arbitration
Of a Dispute Between

United Electrical, Radio, &
Machine Workers of
America, Local 1166

and

APL Logistics

**GRIEVANCE ARBITRATION AWARD**

Grievance No. 10312013
FMCS No. 141231-52245-A
NLRB Case No. 13-CA-121512

Arbitrator: **A. Henry Hempe**

Appearances:

For the Union: **Attorney Margot Nikitas,** One Gateway Center, Suite 400, Pittsburgh, Pennsylvania 15222-1416.

For the Employer: **Attorney Andrew J. Martone**, 1650 Des Peres Road, Suite 200, St. Louis Missouri, 63131

## ARBITRATION AWARD

Local 1166, United Electrical, Radio and Machine Workers of America, hereinafter referred to as Union, UE, or Local 1166 and APL Logistics, hereinafter referred to as the Employer, Company, or APL are parties to a collective bargaining agreement (CBA) for the term beginning April 8, 2013, through April 3, 2016. Said agreement provides for final and binding arbitration of grievances arising thereunder. The undersigned was selected by the parties to resolve a matter that has arisen between the parties. A hearing was conducted on May 16, 2014 in Hodgkins, Illinois The hearing was transcribed, and the parties filed post-hearing briefs.

## ISSUE:

The parties agreed on the following statement of the issue and read it into the record:

> **Did the Employer violate the collective bargaining agreement by requiring employees to pay the full cost of short-term disability insurance? If so, what shall the remedy be?**

## BACKGROUND

**2001 and Before**

The Company, APL Logistics, operates facilities at both Hodgkins and Bolingbrook, Illinois, as well as four additional facilities at other locations. At the Hodgkins and Bolingbrook locations, the Company runs a parts distribution operation for Electro Motive Diesel (EMD) a train locomotive manufacturer. UE is the exclusive bargaining representative for the bargaining unit whose members are employed at the Hodgkins and Bolingbrook operations.

The International Brotherhood of Teamsters (IBT) represents four separate bargaining units at the Company's other four facilities. Each of the additional bargaining units has a separate collective bargaining agreement with APL. Of the Company's approximate 1800 – 1900 workers, HR Director Thomas Cherry's "best guess" is that some 300 are in the five represented bargaining units, including the UE.[1]

In 2001, APL purchased the plant operations at Hodgkins and Bolingbrook from GATX Logistics. During the same year, UE's Local 1166, succeeded the Allied Production Workers (APW) as the exclusive bargaining representative for the bargaining unit consisting of all full time production and maintenance employees (including coordinators) at the Hodgkins and Bolingbrook facilities. However, both GATX and APW left a mutual footprint of their former relationship in the form of a Sick and Accident short-term disability plan originally established by GATX for its employees in 1994, and subsequently included as Article XIII in these parties' 1997-2001 collective bargaining agreement.[2]

In 2001, the new corporate owner and new bargaining unit representative then negotiated what has proven to be only the first of what has now grown to a collection of five successive collective bargaining agreements. The 3-year term of their initial contract ran from April 30, 2001 through April 4, 2004. The 3-year term has continued for the all of the subsequent successor CBAs. The parties' latest contract runs from April 8, 2013 through April 3, 2016.

**"Me Too" Philosophy**:

APL, the new owner, brought its version of a "me too" employment relations strategy regarding employee benefits *for a mixed work force of both represented and non-represented employees.* Under the Company's philosophy, employee benefits (including any employee contributions to their costs) should be the same for both represented and non-represented employees.[3]

Reaching its strategic "me too" benefit goal required implementation through collective bargaining. Over the past 13-years, under the aegis of the "me too" philosophy, the parties have

[1] Tr. 165.

[2] **Article XIII. Sick and Accident Benefits.** Effective April 10, 1994, the Company will provide at no cost to its employees, a Sick and Accident policy which will provide a benefit equal to 70% of current wage per week for thirteen (13) weeks, for employees with forty-five (45) days or more of service with the Company and to commence with the first day of an accident, or the fifth ($5^{th}$) day of illness, or on the first day that an employee enters the hospital.

[3] Tr. 113. (Testimony of APL HR Director, Thomas Cherry.)

agreed, in effect, that no separate group of Company employees would be intentionally provided either more or less than the benefits accorded to each of the other separate, identifiable Company employee groups, including not only each of the five bargaining units, but the non-represented Company employees, as well. Instead, represented employees are placed on the same benefit level as non-represented employees, so that whatever benefits one group might receive (or lose) would be provided in equal measure to each of the others.

The same "me too" approach to benefits applies both to benefit *reductions* as well as increases, *but only if done on a company-wide basis.* Under the "me too" language introduced in the parties' initial 2001 contract, any such benefit adjustment would be effective on the following January 1 each year, even if contrary to other specific contract language, again, provided the change was applied company-wide. The involvement of the non-represented employees appears to be a key feature of the Company's version of its "me too" philosophy.

At hearing, the Company explained it obtained Union agreement to the "me too" concept in its labor contracts in part with Company assurances to the Union that "there was almost no likelihood that [the Union] could get 'hosed' by the Company because if we [Company] were to mess with their benefits we would have to change them for all our managers as well . . . So that was their protection – that they would not be hurt by this unless we hurt the rest of our people."[4] Once a benefit change was initiated with any employees' group, including the non-represented employees, under the "same benefit/same cost" philosophy reflected in the CBA the change could then be extended to and implemented with all the remaining employees.

But Union agreement to the "me too" philosophy also rested on apparently sound economic considerations applicable to each party. Under the "me too" philosophy, represented employees could still (and did) present benefit demands of their own. As a practical matter, however, the benefits received by non-represented employees, particularly in major insurance benefit areas (e.g. medical, dental, vision), have become the standard or baseline that determines what benefits the members of the five bargaining units, including UE, would receive.[5] This is due, at least, in part to the economic reality that that insurance benefits in particular could be provided at a much lower cost for a large group as opposed to a much smaller unit.[6]

In summary, with UE acceptance of the "me too" system reflected in the parties' successive collective bargaining agreements, the Company holds a strong, stabilizing, normally controlling hand as to the benefit content, coverage and costs it provides for its employees, which includes the authority to make annual (January 1st) unilateral, company-wide benefit plan modifications as to benefit content, coverage and cost (including employee cost-sharing contributions). The Company also avoids the employers' *bete noire* of being "whipsawed" for increased benefits by five different bargaining units.[7]

Bargaining unit employees, on the other hand, receive the assurance that their benefits will not be eclipsed by more generous benefits paid to non-represented employees, combined

[4] Tr. 123-4. (Testimony of APL HR Director, Thomas Cherry.)
[5] Tr. 164.
[6] Tr. 123.
[7] Tr. 165.

with the hope that lower benefit costs for all employees will result in larger employee paychecks for the represented workers.

**Five Successive Collective Bargaining Agreements**

The parties' successful negotiating efforts that had blossomed into their **2001 – 04** labor contract were followed by four successor 3-year labor contracts that covered the following four periods: **April 5, 2004 – April 1, 2007**; **April 2, 2007 - April 4, 2010**; **April 5, 2010 - April 7, 2013**; and most recently, **April 8, 2013 - April 3, 2016**. HR Director Thomas Cherry estimated that he negotiated, drafted and wordsmithed virtually all of the "Benefit" Article 16 language in each of the five APL-UE agreements he negotiated.[8]

**2001 – 04**

The parties' initial 2001–04 labor contract with the UE partially reflected a significant opening step to implement the Company's "me too" labor strategy. Presented by Company Chief Negotiator and HR Director Thomas Cherry during the parties' contract negotiations for their first collective bargaining agreement, the "me too" philosophy won Union acceptance that was reflected in three of the Company's major benefit plans (medical, dental and vision[9]) contained in Article 16[10]. Each of these benefits, Medical, Dental, and Vision, headed separate sections that begin with the announcement that a plan in the pertinent benefit area "will be provided."

These opening words were followed by identical "me too" words in each section, pledging that the particular plan being provided would be " . . . *the same as that provided* for salaried employees at this location." To the Company, these words were the magic words that signaled a "me too" benefit. The second and final sentence of each of the three benefits directly dealt with responsibility for the cost of the benefit, employee contributions, and opened the door to future mid-contract modifications of the plan and its cost.[11]

In its 2001 contract negotiations with UE, APL had made no immediate attempt to disturb the short term disability plan that had been first provided for all the employees as Sick and Accident, Article XIII in the old 1997-2000 GATX-APW labor contract between the former owner and former union representative. In fact, although the old Article XIII in the former CBA was reworded, the essence of the short-term disability benefit it had provided was essentially

[8]Tr. 111.

[9] Sections 16.2, 16.3 and 16.4.

[10] A Life Insurance Plan and a 401(k) Plan were also benefits listed in Article 16, but employee participation in them was voluntary. However, apparently consistent with the "me too" philosophy, at the Union's request, its bargaining unit members were specifically included in APL's current Education Assistance Program under Sec. 16.8.

[11]In its entirety, this sentence read: "Changes in weekly employee contributions and any plan changes will be effective on January 1 each year," and then, again inserting its "me too" words, the Company further pledged any plan change and the employee contribution rate "will be the same as the plan and the employee contribution rate for salaried employees at this location."

maintained, though renumbered as Section 16.5 of Article 16,[12] in the initial 2001-04 CBA between the two newly arrived parties.

**2004-07**

The 2004-07-successor contract continued the two-sentence Section 16.5 wording without change from the previous 3-year contract. (See f.n. 12)

However, during the term of the 2004-07 contract, the Company did make several unilateral modifications to UE contract benefits. For example, in 2007 the Vision Plan was transformed from a 50% to a 100% voluntary employee pay plan, which the Union did not grieve.[13] (However, the Union reopened the topic during contract negotiations for a 2007-10 successor contract that shortly followed and was able to negotiate a Vision cost rollback to 50%, by April 2007.[14]) Other Company unilateral changes during the term of the 2004-07 contract included increasing 13-weeks of potential disability payments to 26-weeks of potential payments, with disability payments to commence with the 7th$^{th}$ day of illness instead of the 5$^{th}$ day of illnesses.

Each of these changes, of course, affected all APL employees, non-represented and bargaining unit members alike, but did not appear in Sec. 16.5 of the printed UE CBA until the 2007-10 agreement had been negotiated, printed and distributed. Each is justified by the Company as its duly negotiated "me too" CBA right with UE, applicable to its non-represented employees (over whom the Company presumably has maintained traditional management rights and controls) followed by implementation of its collective bargaining agreements with its five bargaining units.

**2007-10: Short-Term Disability Plan**

As indicated above, APL had made no immediate attempt to disturb the short-term disability plan that had been first provided for all the employees in the old 1997-2000 GATX-APW labor contract, and a reworded version had continued in the parties' written collective bargaining agreements from 2001 to 2007. In fact the Company's bargaining restraint appears partly to have reflected a skillfully choreographed effort by the Company to maintain UE trust and confidence in the operation of the Company's "me too" philosophy. Though still making minor benefit adjustments consistent with its "same benefit/same cost strategy," the Company appears to have walked back its more major attempt in 2007 to convert the Vision Plan to a 100% voluntary employee payment system by agreeing to a Vision cost rollback to the previous 50% payment level, in collective bargaining sessions for a 2007-2010 successor agreement.[15]

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[12] **Section 16.5 Short term Disability.** The Company will pay the full cost of a Short-term Disability Plan. The Plan pays 70% of base weekly compensation for thirteen (13) weeks to commence with the first day of an accident, or the fifth (5$^{th}$) day of illness on or the first day that an employee enters the hospital. (Union Exhibit 9.)

[13] In its Opening Statement, the Company acknowledged that change was the same type of unilateral change the company made to the Short Term Disability Plan seven years later that launched the subject grievance. Tr. 14, 15.

[14] Tr. 117-19.

[15] *Ibid.*

Although the Company viewed all its benefits as "me toos," nevertheless it still felt a strong specific need to get the clause " . . . same as provided for other hourly employees" into the 2007-10 contract in written form as specifically applicable to the short term disability benefit, according to Company HR Director Thomas Cherry.[16]

Director Cherry commented that during the term of the earlier (2004-07) contract, "We had already unilaterally implemented the 26-weeks STDP provision in Section 16.5 [to replace 13 weeks], and to follow up on that, to make sure that the substitution was "me too" language, we wanted to add "the same as provided for other hourly employees at this location."[17] During the 2004-07 contract the Company did unilaterally change the Plan to provide coverage after the seventh calendar day instead of the fifth day.[18] The target in which to place the desired written "me too" assurance language had become the 2007–10 Collective Bargaining Agreement.

The written **2007–2010** successor collective bargaining agreement reflected the Company's increase of the number of compensable weeks from 13 to 26 in Section 16.5 (clearly a beneficial change for the Union) which, as Director Cherry recounted in his hearing testimony cited above, had been already unilaterally implemented by the Company several months before. Of greater significance was the proposed insertion in the contract of the new phrase now regarded as important by the Company.

During the ensuing negotiations for the 2007-10 successor contract, agreement was reached to tacking the Company proposed phrase on the end of the second sentence of Section 16.5. The new phrase read: " . . . the same as provided for other hourly employees at this location and ended with a semi-colon;" the semi-colon was followed by the independent clause, "currently the Plan provides coverage after the seventh ($7^{th}$) calendar year." [19]

With the addition of a final last sentence primarily pertaining to medical leave and requested by the Union,[20] Sec. 16.5 of the parties' 2007-10 CBA then read:

> "The Company will pay the full cost of a Short Term Disability Plan. The Plan pays 70% of base weekly compensation for twenty-six (26) weeks, the same as provided for other hourly employees at this location; currently the Plan provides coverage after the seventh ($7^{th}$) calendar year. At the expiration of Short Term Disability Pay, a disabled employee may apply for a Medical Leave, as set forth in Section 18.2."

No changes in Section 16.5 appear in the two successor labor agreements that followed, 2010 **– 13** and **2013 – 16**. Thus, with the additional wording in Section 16.5 to which the parties agreed in their **2007–10 CBA,** the two successor contracts contained the same Section 16.5 language as that to which the parties had agreed in their 2007 negotiations.

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[16] Tr. 140-141.
[17] Ibid.
[18] Tr. 149-50.
[19] Calendar year was a typo later corrected by the Company to calendar day.)
[20] According to Director Cherry, the medical leave language was proposed by the Union to ensure that at the "expiration of 26 weeks employees could then apply for medical leave as set forth in Section 18.2." Tr. 156-7

The Company is adamant that in the course of these negotiations it advised the Union that the Company considered the short-term disability benefit to be a "me too" plan. Specifically, HR Director Thomas Cherry averred:

> "We have always talked about it at the table, that the benefit plans were "me toos,' and at various times we have had proposals from the Union to change some of the healthcare plans. And we always explained to them that to write a separate insurance plan or medical plan for a group this small, 100 people, would certainly increase the cost to the bargaining unit since it was a much smaller group versus approximately 3,000 people within APL. And that would reduce the financial amount or the wages that they could get, since the cost of their benefits would go up."[21]

Currently, for benefit assessment purposes, the parties informally recognize six separate employee groups: the UE bargaining unit, four IBT represented units, and all the remaining, non-represented employees, including managers. From time to time, Company administration of this system has provided bargaining unit members with certain benefits not listed in the CBA on the same terms as provided to the non-represented and other bargaining unit employees, but the absence of any UE grievances are some indication that in fact the Company was trying to maintain its goal of same benefits/same costs for both represented and unrepresented employees.

At the hearing in this matter, in connection with the Company's self-acknowledged unilateral change to the "vision" benefit, Director Cherry testified that during the negotiations for the 2007-10 contract, "we explained to the Union that all the benefit sections were "me toos," and discussed with the Union the "me too" concept for benefits in general. Short-term disability? I'm sure we did, when we first put it in. But frankly, other than this change, where we have talked about it, it doesn't come up every contract."[22]

When asked whether the Union ever indicated to the Director or said anything to him that led him to believe the Union understood that the same benefit/same cost rule also applied to the short term disability plan, the Director responded, "They never said that it would not. We explained that was the way that we wrote the language and that is what they accepted."[23]

In October 2013, the Company unilaterally announced that effective January 1, 2014 employees who wanted to continue STDP insurance would be required to pay the full premium cost of the benefit.

On October 31, 2013, the Union filed a grievance alleging contract violations by the Company that included "changing the Short Term Disability Plan scheme."

On January 1, 2014 the Company began deducting the full STDP premium costs from their

[21] Tr. 123
[22] Tr. 125.
[23] Tr. 126.

employees' weekly paychecks, including the non-represented employees.

On November 15, 2013 HR Director Cherry was present at the only grievance meeting on this matter with the Union Committee and told the Committee that the "history had been "me too" on benefits, and although the short-term disability had not changed, it was a "me too" benefit and we (Company) were making the change throughout the company."[24]

On or about January 29, 2014, the Union filed an Unfair Labor Practice allegation against the Company, contending the Company's actions in this matter violated Sections 8(a)(1) and (5) of the National Labor Relations Act (NLRA). By letter dated March 4, 2014, the NLRB, pursuant to its *Deferral Policy*, deferred the matter to the parties' grievance procedure, stating the the facts constituting the alleged unfair labor practices as:

> **On or about the end of October 2014, the above named employer, through its officers, agents and representatives, unlawfully unilaterally changed the terms and conditions of employment by requiring bargaining unit employees to pay for short term disability insurance, in violation of Section 8(a)(1) and (5) of the Act.**

Neither party introduced any bargaining session minutes for any of their negotiating sessions.

Other facts will be related as may be helpful.

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**RELEVANT CONTRACT LANGUAGE, Collective Bargaining Agreement, 2013 – 16.**

**ARTICLE 1 – SCOPE OF THE AGREEMENT**

**Section 1.3. Waivers to Collective Bargaining**

> During the negotiations resulting in this Agreement, the Company and the Union each had the unlimited right and opportunity to make demands and proposals with respect to any subject matter as to which the National Labor Relations Act imposes a duty to bargain. Except as specifically set forth elsewhere here in this Agreement, the Company expressly waives its right to require the Union to bargain collectively, and the Union expressly waives its right to require the Company to bargain collectively, over all matters as to which the National Labor Relations Act imposes an obligation to bargain, whether or not: (a) such matters are specifically referred to in this agreement; (b) such matters were discussed between the Company and the Union during the negotiations which resulted in this Agreement ; or (c) such natters were within the contemplation or knowledge of the Company or the Union at the

[24] Tr. 137-8.

time this Agreement was negotiated and executed. As used in this Section 3, the waiver of the right to "bargain collectively" includes the waiver of the right to require the other party to negotiate and the right to obtain information from the other party for the purpose of collective bargaining.

This Agreement contains the entire understanding and agreement of the Company and the Union, after exercise of the right and opportunity referred to in the first sentence of this Section 3 and finally determines all matters of collective bargaining for its term. Agreement whether by addition, waiver, deletion, amendment or modification, must be reduced to writing and executed by both the Company and the Union.

## ARTICLE 3 -- RECOGNITION

**Section 3.1 Description of Bargaining Unit**

The Company hereby recognizes the Union as the sole and exclusive bargaining agent for all full time production and maintenance employees including coordinators employed by the Employer at its operations in Hodgkins and Bolingbrook, Illinois, excluding office clerical employees, plant clerical employees, data entry employees, professional and technical employees, outside truck drivers.

## ARTICLE 16 – BENEFITS

**Section 16.1 – Life Insurance**

The Company will pay the full cost of Basic Life Insurance and AD & D in the amount of 2080 hours X hourly rate (set each September 1) for both Basic Life and AD & D. Employees may purchase additional Life Insurance for themselves, spouses and children through the Group Voluntary Life Insurance Plan.

**Section 16.2 Medical Plan**

A Group Medical Insurance plan will be provided the same as is provided for salaried employees at this location. Changes in employee weekly contributions and any plan changes will be effective on January 1 of each year, and will be the same as the plan and the contribution rate for salaried employees at this location.

**Section 16.3 Dental Plan**

A Dental Plan(s) will be provided the same as is provided for salaried employees at this location. Changes in employee weekly contributions and any plan changes will be effective on January 1 of each year, and will be the same as the plan and the contribution rate for salaried employees at this location.

**Section 16.4 Vision Plan**

A Vision Plan will be provided the same as is provided for salaried employees at this location. Changes in employee weekly contributions and any plan changes will be effective on January 1 of each year, and will be the same as the plan and the contribution rate for salaried employees at this location.

**Section 16.5 Short-term Disability**

The Company will pay the full cost of a Short-term Disability Plan. The Plan pays 70% of base weekly compensation for twenty-six (26) weeks, the same as provided for other hourly employees at this location; currently the plan provides coverage after the seventh (7th) calendar day. At the expiration of Short-term Disability Pay, a disabled employee may apply for Medical Leave, as set forth in Section 18.2.

**Section 16.6 Eligibility**

Employees are eligible for the above benefits after completion of ninety (90) days of employment.

**Section 16.7 401(k) Plan**

Employees may participate in the 401(k) SMART PLAN; Details of the plan are set forth in the plan booklet and are the same as the plan for salaried employees at this location.

**Section 16.8 Education Assistance**

Bargaining unit members are included in the current APL Logistics, Education Assistance Program.

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## POSITIONS OF THE PARTIES

### UNION:

The Union alleges, avers and argues as follows:

The parties had completed negotiating a successor 3-year CBA only some six months prior to the Company's unilateral announcement in October 2013 that effective January 1, 2014, employees opting for the STDP would pay the full cost of the STDP insurance that the Company had paid since the inception of that benefit sometime in the 1990's, and had confirmed in the 2001-2004 CBA negotiated with the Local 1166. As foretold by the October pronouncement, on January 1, 2014, the Company began to deduct STDP premium payments from the weekly

paychecks of their employees. The amounts of the paycheck deductions vary per employee and range from $7.50 to $13.08 per week.

APL had made no proposal in the recently concluded successor contract negotiations in late March 2013 that related to shifting the STD premium payments from the Company to the employees. Neither did it offer to negotiate the change it unilaterally announced and imposed.

Since its purchase of the GATX operations, APL has paid the full cost of the STDP benefit. This pattern of employer payment was initially established by APL's predecessor, GATX, which not only offered and implemented the benefit, but verified the employer's premium payment obligation in its 1997-2000 collective bargaining agreement with Local 1166's predecessor union at APL. The obligation consists of the opening sentence of Sec. 16.5: "The Company will pay the full cost of a Short-term Disability." Identical language has been in each prior agreement negotiated by the parties.

The Union grieved the Company's unilateral change, and for the first time heard the Company's "me too" defense that alleged the Company had the right to make changes at will.

The Union charges the Company has violated the express terms of the CBA.

According to the Union, the plain language of the CBA clearly and unambiguously requires the Company to pay the full cost of the STDP. The Union contends the parties' mutual intent must be drawn from the language alone, citing Elkouri and Elkouri, *How Arbitration Works,*7th ed. at 9-8 (BNA, 2012). The first sentence of sec. 16.5 expressly states the Company will pay the full STDP cost, and the Union finds nothing remotely ambiguous about this. Because the language is clear and unambiguous, the Union argues extrinsic evidence, including industry custom, bargaining history, practice and usage have no role here, citing *City of Canton,* 131 LA 51, 63 (Szuter, 2012) in support.

Yet, the Union continues, the Company argues that the clear language in the opening sentence of Sec. 16.5 does not really mean what it says, and points to the Company's Director of Employee Relations testimony[25] that "will pay" – the future tense of the verb "to pay" – refers only to the current condition and does not create a future obligation. In fact, the Union notes, the Director testified that the sentence, "The Company will pay the full cost" actually means only that the Company "currently" pays the full cost of short-term disability insurance but has no obligation to continue to do so in the future.

Actually, the Union finds the word "currently" does appear in the *second* sentence of Sec. 16.5, where it demonstrates to the Union that if the parties had intended to incorporate "currently" into Sec. 16.5's first sentence they easily could have done so, e.g: "*Currently*, the company pays the full cost of the short-term disability plan." But the first sentence does not contain the word "currently," and uses the future tense to refer to the Company's obligation, not the present tense, the Union concludes.

[25] Tr. 143-4.

The Union finds the Company's interpretations of the first sentence of sec. 16.5 create ambiguities in the language that are not actually present and argues that Director Cherry's use of the words "current condition" and 'currently" insert another false ambiguity into the plain language of Sec. 16.5, rhetorically asking to what period of time does 'currently' refer? The time of contract execution? Shortly before or after contract execution? Some other time? The ambiguity, says the Union, must arise from the language, not creative contentions of the parties.

But the contract language governing which party pays the cost of STDP is not a "me too," and the Company's argument has no basis in grammar or in fact, the Union contends. A "me too" means that one group of employees gets the same benefit as another group. While some of the benefits in the CBA are "me too" benefits, the issue of who pays the cost of the STDP benefits is not.

For example, the Union continues, according to the plain language of Section 16.2, bargaining unit employees receive whatever medical plan salaried employees receive and pay the same contribution rate as the salaried employees. Nearly identical benefit provisions appear in 16.3 (dental) and 16.4 (vision). In addition, it is clear that the 401(k) plan (Section 16.7) in which bargaining unit member participate is the same 401(k) plan in which salaried employees participate.

The Union concedes that the description of the benefit may be a "me too," but adamantly insists the issue of who pays the cost of that benefit is not.

The Union suggests that if the parties had intended "the same as provided for other hourly employee at this location" to refer back to the first sentence of Section 16.5, they could have placed them within the same sentence, e.g: "The Company will pay the full cost of a Short Term Disability Plan, the same as provided for other hourly employees at this location."

According to the Union, the Company has not produced one scintilla of evidence supporting the Company's claim that payment responsibility for the cost of STDP is part of its "me too." The Company first announced this defense at the 4th step of the grievance procedure, but produced no documents in support of its position, though requested to do so by the Union. Contrary to the company's claim, the dependant clause "the same as provided for other hourly employees at this location" does not modify the first sentence of sec. 16.5 that states," The Company will pay the full cost of a Short-term Disability Plan." The word "same" refers to the Plan described in the same sentence. If the parties had intended the "same as provided for other hourly employees in this location" to refer back to the first sentence of sec. 16.5, they could have placed both in the same sentence.

But even if the language is found to be ambiguous, the Union argues the grievance should still be sustained because the long standing past practice since 2001 is that the Company pays the full cost. The practice has existed for almost twenty years. For nearly twenty years the employer (first GATX, then APL) has paid the full cost of the STDP as long as that benefit has been in effect. APL cannot ignore almost twenty years of past practice when it decides it does not like the practice any more. When the Company wanted to change the practice of who pays the cost of the STDP it should have formed its desire into a proposal at the bargaining table, the

Union instructs, adding, it had the opportunity to do so six months earlier.

NLRA Section 8(a)(1) and (5)

The Union asserts that by unilaterally changing the terms and conditions of employment and requiring employees to pay the full cost of STDP the Company violated Section 8(a)(1) and (5) of the National Labor Relations Act. The NLRA guarantees employees certain rights, including the right to self-organize, form, join or assist labor organizations, bargain collectively through representatives of their own choosing, and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The Union avers that Sec. 8(a) (1) makes it an unfair labor practice for any employer to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Sec. 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with its employees' representatives.

Thus, the Union posits an employer violates Sec. 8(a)(1) and (5) when it makes unilateral changes to the employees' terms and conditions of employment. In this case the Company failed to notify or bargain with the Union prior to unilaterally changing the short-term disability insurance plan from a 100% employer-paid to a 100% employee-paid benefit.

According to the Union, if the Company wanted to change who pays the cost of the STD plan, the Union insists, the Company should have made a proposal during bargaining, instead of waiting until bargaining for a successor agreement had been completed, then announcing its unilateral change. Its failure to do so and subsequent action to make the change through unilateral action is an indication of bad faith. The Company should not be permitted to gain through the arbitration procedure what it should have submitted to the collective bargaining process.

**COMPANY:**

The Company alleges, avers and argues as follows:

The Grievance

The Company maintains it did not violate the contract when it decided to offer its short-term disability plan on what it calls "a voluntary basis," because that plan is a "me too" benefit.

The Company notes the Union has the burden of proving the alleged contract violation "When the grievant offers only a plausible interpretation of the parties' contract, the Union fails to carry its burden of proof." *Marin Community College Dist.*, 09-1 ARB 4575 (Hoh, 2008)

The Company posits the arbitrator is obligated to construe the agreement so that the parties' intent is enforced, *Presto Casting Co*., 94-1 ARB 4049 (Calhoun, 1993) arguing that although language imperfections frequently make knowledge of the parties' intention impossible without examining the circumstances and the parties' objectives, contract purposes may be found

by examining the parties' bargaining history and prior administration of the contract, in addition to the language used.

In this case, the Company argues, the words describing a benefit as "the same as provided other hourly employees" used in Section 16.5 of the collective bargaining agreement means the benefit being described is a "me too" benefit provided on the same basis to the Company's represented employees as to its unrepresented employees. The Company finds this interpretation to be supported by the parties' bargaining history, the language used in the other benefit provisions of Article 16 and the parties' prior administration of the contract. On the other hand, says the Company, the Union's interpretation would render the "same as" language meaningless, create disharmony with the contract's other provisions, and is contrary to the parties' prior understanding and interpretation.

Contract language, the Company maintains, cannot be read in isolation, but must be read in context to determine the parties' meaning. Citing *Beacon Journal Publishing Co.*, 04-2 ARB 3945 (Fullmer, 2004) for that proposition, the Company also notes the *Beacon Journal* arbitrator concluded a simple second sentence immediately following a seemingly obligatory provision converted the provision in question into a "me too" benefit. The sentence merely stated the offered coverage could at no time be less than that which was offered to the Company's non-union employees.

As was the case in *Beacon Journal*, the Company argues in this matter that the seemingly obligatory language in the first sentence of Section 16.5 is modified by the "me too" language in the second sentence, which "clarifies" the extent of the Company's obligation. That sentence specifies that the short-term disability plan will be "the same as provided for other hourly employees."

The Company describes the Union's interpretation of the Section 16.5 language as a "hyper-technical and constricted interpretation of the phrase 'will pay' in Section 16.5." The Company perceives the Union view without merit, for it mandates a continuation of the Section 16.5 benefit for the entire future duration of the contract. The Company argues it is commonly accepted that the use of the word "will" is not a command, such as "shall" or "must" but an indication of desire or willingness for something to happen or continue to happen."

The Company urges, "the arbitrator should read the language of Section 16.5 as a whole, consistent with its construction and find that it provides short-term disability benefits on a "me too" basis with the Company's unrepresented employees."

Moreover, the Company contends, Union witnesses even admitted at hearing that the "same as" language in Section 16.5 indicates the Company's short-term disability benefits are provided on a "me too" basis with the Company's unrepresented employees.

According to the Company, the parties' bargaining history, the remaining sections of Article 16 and the parties' past administration of benefits further demonstrate the parties intended the short term disability plan to be a "me too" benefit. In addition, the Company says, testimony of a witness who participated in the relevant contract negotiations should be credited

over other witnesses' testimony as to contract language interpretation. In this case, the Company finds that description fits Thomas Cherry, the Company's chief negotiator for each of the Company's past collective bargaining agreements with UE. Cherry testified at hearing he always explained to the Union that the Company provides the benefits to the union employees on the same basis as it provides them to non-represented employees.

The Company also points to Cherry's testimony that he explicitly told the Union that in the negotiations for the 2007-10 contract, the "me too" aspect included the employee costs, and added that if there were changes made to the costs of the short-term disability plan for the hourly employees, those costs would also apply to the UE bargaining unit members.

According to the Company, Cherry's testimony supports the conclusion that the parties' insertion of the "same as" language into Section 16.5 of the parties' collective bargaining agreement demonstrates their intention the short term disability plan to be provided on a "me too" basis with the Company's unrepresented employees.

The Company asserts that the parties' past administration of Article 16 also evidences their understanding that Section 16.5 provides short-term benefits on a "me too" basis. The Company states the parties have always understood that the benefits described in Article 16 are "me too" benefits subject to Company unilateral change so long as the change is Company-wide.

The Company asserts that under the same benefit/same cost understanding it had established with the Union, the Company had made several unilateral midcontract benefit changes during its relationship with the Union, each without Union objection: The changes include: 1) modifications to the 401(k) contribution-matching program, Company-wide in 2003 and 2007; 2) another unilateral mid-contract change that resulted in a 50-50 shared cost of vision insurance becoming a 100% employee cost, effective January, 2007; and 3) a unilateral tightening of eligibility qualifications for benefits under the Company's Educational Assistance program. The Company is clear that each of these unilateral, mid-contract changes in benefits were justified as identical to those the Company had imposed on its unrepresented employees, and emphasizes that all were met with Union acquiescence.

The Company argues that the Union's Section 16.5 language interpretation should be rejected because it would render Section 16.5 language "same as provided for other hourly employees at this location" meaningless and contrary to how the Union witnesses admittedly interpret similar language within the same Article. Asserting that all language of a contract should be given meaning, the Company contends that a word or phrase used by the parties in one sense should be interpreted in the same manner throughout the contract. The Company finds its own "reasoned" interpretation to be consistent with the parties' intentions and understandings reached in negotiations with HR Director Cherry and with how the parties previously administered their contract.

The Company claims it has almost identical language in its current four CBAs with the Teamster-represented bargaining units as it now has with its UE CBA.[26] Under these words, the

[26] Tr. 136.

Company believes any benefit plan and/or cost expressed in a CBA with a represented bargaining unit can be changed and unilaterally implemented by the Company, effective January 1 each year, provided the implementation is applied Company-wide, even if the change in plan or cost or employee contribution is contrary to specific language contained in the parties' collective bargaining agreement.

In summary, the Company reiterates its view that since the Union's interpretation would render Section 16.5 "same as" language meaningless and further fails to apply the same meaning to similar language used in the same Article, the Union's interpretation should be rejected.

NLRA Sections 8(a)(1) and (5).

After filing its grievance, the Union filed an unfair labor practice (ULP) charge against the Company, alleging the Company violated Sections 8(a)(1)(5) of the National Labor Relations Act by its illegal, unilateral change to the short term disability plan set forth in Section 16.5 of the parties' CBA.

The Company denies the accusation and claims its unilateral change of which the Union complains was authorized under the "me too" language of Section 16.5. The Company argues that when, as here, a union's ULP charge under Sections 8(a)(1) & (5) of the NLRA essentially amounts to a dispute of contract interpretation, the employer is not guilty of violating the Act so long as it had a "sound arguable basis" for its interpretation of the contract. In support of this view, the Company cites *Phelps Dodge Magnet Wire Corp.*, 346 NLRB 949, 951 (NLRB, 2006) in which the Board denied the union's ULP accusation on the grounds that both the employer's and the union's interpretation of ambiguous contract language were plausible.

The Company finds that analogous to the instant case, arguing that in this matter also the Company had sound, reasoned grounds for its interpretation and good faith belief that Section 16.5 recognizes and permits "me too" benefits. The Company has always tried to provide benefits to all employees on a "same basis/same cost and the parties' CBA indicates that the benefits provided will be the "same as" those provided to unrepresented employees.

The Company asserts that under the same benefit/same cost understanding it had established with the Union, it had made unilateral benefit changes on several occasions, including. one in 2003 and one in 2007. One change involved modifications to the 401(k) employer-employee contribution ratio that the Union did not challenge and ultimately accepted. The other changed the dollar maximum amount of educational reimbursement the company would provide under the Educational Assistance program.

The Company claims it has almost identical language in its current four CBAs with the Teamster-represented bargaining units as it now has with its UE CBA.[27] Under these words, the Company believes any benefit plan and cost expressed in a CBA with a represented bargaining unit can be changed and unilaterally implemented by the Company, effective January 1 each year, provided the implementation is applied Company-wide, even if the change in plan or cost

[27] Tr. 136.

or employee contribution is contrary to specific language contained in the parties' collective bargaining agreement.

Matter in Dispute Already Covered in Parties' CBA.

The Company posits the duty to bargain does not prohibit parties from negotiating contract terms that make it unnecessary to bargain over subsequent changes in terms or conditions of employment. Citing Company *NLRB v. Postal Service* 8 F.3d 832, 836 (D.C. Cir, 1993) for this proposition, the Company cautions that an arbitrator cannot abrogate the parties' agreement merely because one party becomes unhappy and would prefer to negotiate a more favorable agreement.

The Company asserts the parties specifically bargained and agreed that the short-term disability be provided on a "me too" basis and clarified this agreement by inserting "same as" language into Section 16.5 of the parties' CBA. The parties further agreed that neither party has an obligation to require additional negotiations over such benefits.

Union Waived Right to Bargain Over the Parties' STDP Benefits.

In fact, the Company argues that in this case the Union waived its right to bargain over the Company's changes to its short-term disability benefit both through specific contract language (Section 1.3 of the CBA) and by acquiescing to similar prior unilateral changes that included reducing the Company's 401(k) contribution-matching benefits, eliminating Company contributions to the employee' vision plan, and restricting employees' educational assistance benefits.

According to the Company, a union may waive its rights expressly by agreeing to specific contract language or impliedly by consciously yielding its interest in the matter after it was fully discussed and consciously explored at the bargaining table. *Georgia Power Co.,* 325 NLRB 420, 421 (NLRB 1998).

The Company finds *Rockford Manor Care Facility*, 279 NLRB 1170 (NLRB, 1986) as analogous. In *Rockford Manor,* the Board held the union had waived its right to bargain over midterm adjustments to the company's health insurance program. The Board found that the relevant health insurance language did not address such changes. The relevant language simply provided that full time employees will participate in the Company's health and life programs on the same basis as other employee members of the group . . ." (Emph. supplied by Company) The Company adds the *Rockford Manor* contract also contained a detailed "zipper" clause that waived both parties' rights to bargain over any matter not specifically referred to in the contract.

The Company also relies on *Omaha World Herald*, 357 NLRB No, 156 at *3-1 in which the Board found the parties' contract language significant as well as the union's acquiescence to similar prior unilateral changes in concluding that the union waived its right to require bargaining changes to the company's pension plan.

The Company asserts that under the same benefit/same cost understanding it believed it

had with UE, it has made other unilateral changes in the middle of a CBA with the Union on several occasions, including: one in 2003 and one in 2007 that involved changes to the 401(k) employer-employee contribution ratio that the Union did not challenge and ultimately accepted; the Vision Plan (during 2007 contract term) after which the Union came back and negotiated a different contribution;, changing the dollar maximum amount of educational reimbursement the company would provide under the Educational Assistance program.

The Company claims it has almost identical language in its current four CBAs with the Teamster represented bargaining units as it now has with its UE CBA.[28] Under these words, the Company argues, any benefit plan and cost expressed in a CBA with a represented bargaining unit can be changed and unilaterally implemented by the Company, effective January 1 each year, provided the implementation is applied Company-wide, even if the change in plan or cost is contrary to specific contract language.

In summary, the Company avers the parties' bargaining relationship has always included administering benefits on a "me too" basis, in some cases even contrary to the language of the CBA. The Company says it has provided benefits to represented employees on the same basis as its unrepresented employees under its "same benefits/same costs" philosophy "ever since the inception of this bargaining unit."

The Company asserts the Union understood the benefits described in Article 16 of the CBA are provided on a "me too" basis, and has never objected to or grieved the Company's mid-contract, unilateral changes to those benefits as long as the changes applied Company-wide.

## DISCUSSION

This is a contract interpretation case. The parties agreed their mutual statement of the case be defined by the following statement of the case:

> **Did the Employer violate the collective bargaining agreement by requiring employees to pay the full cost of short-term disability insurance? If so, what shall the remedy be?**

The Union, charged with the burden of proof, has relied for the most part on what it perceives as a clear and unambiguous first sentence of Section 16.5. The Company finds the Union proof unconvincing and inadequate to carry the issue the case presents.

The essential facts are not in dispute. A brief recap may be helpful.

In short summary, in October 2013 the Company had announced to the Union that effective January 1, 2014 the Short-Term Disability Plan (STDP) provided in Sec. 16.5 of the parties' CBA would be modified to a "voluntary" plan in which any bargaining unit member could participate, but would be required to make a *pro rata* contribution to the cost of the insurance premium covering the Plan. The contribution would be deducted from the employee's

[28] Tr. 136.

weekly paycheck.

Beginning January 1, 2014 the Company carried out its expressed intention, and since then each bargaining unit employee that wanted to remain (or enroll) in the STD voluntary Plan has made his/her required individual *pro rata* weekly insurance premium contribution to the cost of the modified voluntary Plan through payroll deduction. By month's end following the Company's announcement, the Union filed a grievance objecting to the Company's intended course of action.

Sec. 16.5 provides as follows:

> The Company will pay the full cost of a Short-term Disability Plan. The Plan pays 70% of base weekly compensation for twenty-six (26) weeks, the same as provided for other hourly employees at this location; currently the plan provides coverage after the seventh (7th) calendar day. At the expiration of Short-term Disability Pay, a disabled employee may apply for Medical Leave, as set forth in Section 18.2.

The Union's proof consists, in main, of the Union's unrelenting, narrow focus on the opening sentence of Sec. 16.5 of the parties' 2013-16 Collective Bargaining Agreement, together with testimony of Union witnesses describing the Company's unilateral action that the Union believes constitutes a contract violation. Collective bargaining agreements between the parties from 2001 to the present were also introduced as evidence of the Company's alleged past practice in continuing to pay the full cost of the short-term disability plan for almost fourteen years.

The Union primarily relies on its perception of Section 16.5's first sentence as reflecting a plain, unambiguous statement of the parties' intent with respect to the STDP benefit – an intent that requires no further clarification, according to the Union. Citing basic hornbook rules of contract interpretation, the Union argues the first sentence is plain and unambiguous and thus resistive to extrinsic or parole evidence offered to interpret, modify (or confuse) what the Union finds to be a complete and pellucid expression of the parties' intent.[29] To the Union the short, 13-word opening sentence places a payment obligation on the part of the Company to subsidize the short-term disability plan for the duration of the parties' labor agreement.

The Company, on the other hand, readily acknowledges its unilateral action in this matter, but contends it was company-wide, and directly affects not only UE and four-IBT bargaining unit members, but also the Company's entire array of almost 2,000 non-represented employees. The Company denies any contract violation and views its action as being in total compliance with the conditions set out in Section 16.5 of the parties CBA.

[29] In fact, with some justification, the Union finds one of the Company's explanations as muddying, not clarifying the waters of fair interpretation when the Company suggests that the opening words of Section 16.5 do not really mean what they say, contending that that the words "will pay" in the first sentence actually describe the current situation, not a future obligation – all without even citing Lewis Carroll as the source.

The Company looks for its contractual justification to the phrase in Sec. 16.5 that reads " . . . *the same as provided for other hourly employees at this location* . . .", These words, argues the Company, identify the STDP as a "me too" benefit and provide a rational, plausible expression of the parties' intent that significantly clarifies and completes the parties' intent that had begun to be expressed in Section 16.5's first sentence. Furthermore, says the Company, that phrase allows benefits to be increased or reduced, even in midcontract, and even if seemingly contrary to other specific CBA language, if the adjustment is company-wide and results in the "same benefit/same costs" being accorded to represented and non-represented (salaried) employees, alike.

* * *

It is well established that the obligation of the arbitrator is to construe the contract to the end that the parties' intent is enforced. *Presto Casting Co*., 94-1 ARB 4049 (Calhoun, 1993). In properly discharging this obligation:

> "It is axiomatic in contract construction that an interpretation that tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no meaning."[30]

Thus, contract language cannot be read in a vacuum, isolated from the context in which it appears. *Beacon Journal Publishing Co*., 04-2 ARB 3945 (Fullmer, 2004). A specific provision must be read in context to ascertain the parties' intent. *YP Texas Region*, 13-2 ARB P 5932 (Holley Jr., 2013). Cherry picking only an isolated word or words of a document without regard to context is not usually a reliable means of determining the intent of the parties. Extrinsic evidence that includes the context in which the disputed language appears, as well as contract administration, and bargaining history can offer helpful guides to more accurately ascertain the parties' intent with respect to seemingly ambiguous or conflicting language.

In this case, agreement with the Union's interpretation requires either overlooking the conflicting language in Section 16.5, or in effect, dismissing it as superfluous. In either case, the words of the phrase are not credited for the consideration they merit and what I find the parties intended. Parties do not insert words intended to have no effect. *Girard School District*, 13-1 ATB P 5770, (Felice, 2012).

Under these circumstances, consideration of the context in which Section 16.5 makes its Article 16 appearance offers a helpful and accepted means of interpreting the Section's included phrase, " . . . same as provided . . ." A review of the Article reveals not only the appearance of Section 16.5, but several additional benefits, as well, consecutively numbered Sections 16.2, 16.3, 16.4, 16.7, and 16.8. Each of these sections also contains a "me too" phraseology that includes a phrase remarkably similar to an almost identical phrase in Sec. 16.5 – a context that

[30] Elkouri & Elkouri, *How Arbitration Works*, 7th Ed., 9-35,(BNA, 2012), citing *John Deere Tractor Co*, 5 LA 631, 632 (Updegraff, 1946). Elkouri adds; "the principle extends not only to entire clauses, bit also to individual words.

strongly suggests the "me too" similarity among all of them that is not coincidental, but quite intentional as a means of overt signaling that the STDP in Sec. 16.5 is also a "me too" benefit.

Bargaining history should also be considered. As related above in greater detail, the parties' "me too" bargaining history actually starts with the parties' initial agreement in 2001 when the medical, dental and vision benefits first became "me too" benefits.

In fact, the parties' last three collective bargaining agreements offer further evidence of the parties' intent to continue its travel with their benefits on their "me too" benefit road begun in 2001. Beginning with the 2007-10 contract, each of the subsequent CBAs includes the same "me too" phrase in their respective Section 16.5 STDP provisions. This provision, on which the Company relied in late 2013 for announcing its modification of that benefit, had not only been specifically included as Section 16.5 of the parties' 2007–10 collective bargaining contract to which the parties' had agreed in April 2007, but was continued in identical wording that appeared in the two successor collective bargaining agreements that followed.

Prior contract administration by the parties of the designated "me too" benefits set forth in Article 16 demonstrate various mid-contract benefit "adjustments" described in hearing testimony that were made within the "me too" framework. I find particularly noteworthy that these administrative actions resulted in no grievance being filed by the Union, another positive basis for interpreting the contract language under current scrutiny as indicating a mutual intent that the STDP benefit be added to the list of "me toos" in the parties collective bargaining agreements.

Moreover, unrefuted hearing testimony attests to multiple Company explanations to the Union of how the "me too" benefit system worked, as well as the Union's own brief experience of unilateral Company surgery on the "me too" Vision benefit in 2007 (later repaired during negotiations for a successor contract). In the absence of any testimony to the contrary I find this convincing evidence the Union had received both abundant information as to Company "me too" STDP benefit authority and prerogatives and timely collective bargaining opportunities to address any concerns it may have had well before the Company took its unilateral action modifying the STDP in accordance with the contractual authorization provided by Sec. 16.5.

The Union speculates that if the parties had intended the " . . . same as provided for other hourly employees at this location" phrase to refer back to the first sentence of Section 16.5, they could have joined them in the same sentence, e.g.: " The Company will pay the full cost of a Short Term Disability plan, the same as provided to hourly employees at this location." While the Union's reconstructed sentence structure reflects a much improved grammatical syntax of the first sentence that also appears to eliminate its former structure ambiguity, I am not persuaded that the parties' failure to find a more expeditious and plainer manner of expressing what I am led to perceive as their mutual intent has rendered their work product incapable of rational, logical interpretation of the parties' intent to include the STDP as a "me too" benefit.

Finally, in this case it is also helpful to remember that the phrase " . . . same as provided . . ." on which the Company principally relies for its defense in Section 16.5 was not *unilaterally, arbitrarily* inserted by the Company into the parties' 2013-16 collective bargaining agreement.

That language was inserted into the collective bargaining agreement by *both* parties, only after the parties had mutually and carefully considered and approved it. The phrase continues to appear only because *both* parties agreed to its insertion as Section 16.5 in their current collective bargaining agreement. Under this thrice-repeated circumstance, it is difficult to avoid the conclusion that the Union was not only aware of the meaning of Section 16.5, but also fully intended to define the STDP as another "me too" benefit.

Consistent with these considerations of context, bargaining history, and contract administration, I am persuaded that the " . . . same as provided . . ." phrase in Section 16.5 reflects the intent of the parties to clarify and more sharply define their mutual intent that the Short-Term Disability Plan listed in Section 16.5 is a "me too" benefit.

Accordingly, I conclude that the Employer did not violate the collective bargaining agreement by requiring employees to pay the full cost of short-term disability insurance. Assuming the Employer's modification of the STDP benefit was Company-wide in application, it appears to have complied with the relevant terms of the parties' collective bargaining agreement.

Given the result I reach, I deem it unnecessary to explore other arguments raised by the Company.

## AWARD

Based on the testimony, and evidence submitted and received, the arguments of the counsel and the entire record herein, the grievance is dismissed.

Dated this 6th day of November in Madison, Wisconsin.

/s/
**A.** Henry Hempe, Arbitrator