

ARBITRATION OPINION AND AWARD

BEFORE

ROBERT B. MOBERLY, ARBITRATOR

IN THE MATTER BETWEEN

COMMUNICATIONS WORKERS OF AMERICA

Union

and

Wire Tech Surplus

B19-ALL-002

FULL ARBITRATION

BELLSOUTH TELECOMMUNICATIONS, INC.

Employer

REPRESENTATIVES

For the Employer: Steven T. Breaux, Esq., Assistant Vice President-Senior Counsel, AT&T Services, Inc.

For the Union: Robert M. Weaver, Esq., CWA District 3 Counsel

Pursuant to the contract between the above parties, the undersigned was designated as Arbitrator in the above dispute. An arbitration hearing was conducted in Atlanta, Georgia, on May 29, 2019, at which time the parties were given full opportunity to present evidence and arguments. The proceedings were transcribed, and both parties submitted post-hearing briefs, the last of which was received on June 28, 2019.

STATEMENT OF THE CASE

The above-named Employer and Union are parties to a Collective Bargaining Agreement (hereinafter “CBA”) effective from August 9, 2015 through August 3, 2019. On March 15, 2019 the Company notified the Union that it was implementing an “involuntary surplus” (i.e., reduction in force) in the Wire Technician job classification pursuant to Section 6.03 of the Network Addendum For U-Verse Field Operations. On the same day, the Union filed an “Executive Level” grievance alleging a “Violation of Section 6 of the UFO Addendum–Section 6.03,” and stating that the Company has “violated the true intent and meaning of the language of Section 6 of The UFO Addendum and the phrases ‘a process’ and ‘needs of the business’ contained in Section 6.03, and has also unilaterally imposed criteria never discussed let alone agreed to in bargaining.”

On March 18, the Company denied the grievance, stating:

“Section 6.03 of the Network Addendum U-Verse Field Operations language was bargained in 2012, and CWA proposed no change. The language clearly states, ‘Employees will be laid off in a process determined by the Company based on the needs of the business and all business needs being equal, such adjustments shall occur in inverse order of seniority.’ There was no challenge to the language when it was introduced in 2012 nor no challenge in 2015 bargaining. If the Company were required to reduce its forces by seniority only, there would have been no reason to include the above-mentioned language. The needs of the business requires the Company to have Wire Techs with good attendance performing quality work.”

The matter then proceeded to the instant arbitration.

ISSUE

The Union states the issue as follows: “Whether the Company must layoff Wire Technicians in inverse order of seniority.”

The Company states the issue as follows: “Did the March 2019 Wire Technician reduction in force violate the parties’ agreement?”

Based on the evidence and arguments, the formulation of the issue will be further considered below in the Discussion portion of this opinion.

PERTINENT CONTRACT PROVISIONS

NETWORK ADDENDUM FOR U-VERSE FIELD OPERATIONS

...

Section 6 – Force Adjustment

...

Section 6.03 – Force Adjustment

Whenever force conditions, as determined by the Company, are considered to warrant a surplus and the possible layoff of employees, the Company shall notify the Union in writing, prior to notifying the affected employees. Employees will be laid off in a process to be determined by the Company based on the needs of the business and all business needs being equal, such adjustments shall occur in inverse order of seniority. The surplus employees designated for layoff will be notified a minimum of *three (3)* weeks prior to the layoff date, unless otherwise provided by law.

A U-verse employee scheduled to be laid off shall for a minimum of *three (3)* weeks prior to layoff be allowed to submit the required form(s) to Staffing in an effort to be matched to available open positions for which they are qualified, in the appropriate order of consideration.

FACTS

Background

Certain facts are largely undisputed. In about 2007, AT&T began offering U-Verse telecommunications services through its subsidiaries, including in the nine Southeast states through BellSouth Telecommunications. At the time, the Company and other subsidiaries of AT&T began hiring employees in the Premises Technician job classification. They were non-management but unrepresented employees responsible for installing and servicing the Company’s U-Verse products inside the customer’s premises. In the years that followed they were incorporated into other AT&T bargaining units, but were not incorporated into the BellSouth bargaining unit in the nine southeastern states of CWA District 3.

Bargaining History Between BellSouth and CWA District 3

2012-2015 ADDENDUM. In 2010-2011 CWA organized the District 3 Premises Technicians, and in 2012 bargaining CWA and BellSouth negotiated terms and conditions for those employees. The negotiations were apparently contentious, stemming from concerns over the respective work jurisdiction of core technicians and Premises Technicians. The first tentative agreement reached by the parties was rejected by the membership. But after further bargaining, the parties reached agreement in December 2012. The Premises Technicians were given a new job title, Wire Technician. Wire Technicians (also called Wire Techs) travel to and enter customers premises to install and repair the Company's IP-based telephone, Internet and television service. The terms and conditions for the Wire Techs were established by an addendum to the core agreement, the Network Addendum for U-Verse Field Operations. Section 6.03 of the Addendum, the reduction in force provision, was proposed by the Company and agreed to by the Union on August 7, 2012, without any proposed changes. Mr. John Trageser, Assistant Vice president of Labor Relations for the Company, testified without contradiction that the Company modeled its proposals on the Midwest agreement between CWA and AT&T, and that the Company explained this to the Union at the time.

2015-2019 ADDENDUM. During the next round of bargaining, in 2015, the Union proposed to change section 6.03 to require layoff by seniority. It proposed that for Wire Technicians, "Layoffs shall occur in inverse order of seniority." The Company did not accept the proposal, and the language remained unchanged from the 2012 agreement to the 2015 agreement.

However, the parties (1) agreed to increase the notice period in Section 6.03 to three weeks; (2) agreed to a Union proposal that Wire Technicians could use seniority

in choosing to follow their work to new locations; and (3) agreed to use seniority in voluntary layoffs to resolve a 2017 surplus in Kentucky in an MOA under the current agreement.

The Company also notes that the relevant CBA on force adjustments, Article 7, contains a layoff system that uses seniority for all employees except Wire Technicians.

CWA-AT&T CBA's In Other AT&T Regions

The Company notes that in several other regional contracts between the CWA and AT&T, CWA proposed, and the parties agreed, to go by inverse seniority when laying off Wire Technicians, which are called Premises Technicians in those regions. The Union contests the relevance of those agreements, which will be considered below in the Discussion portion of this opinion.

- **West Region.** In their 2016 CBA, the CWA and AT&T agreed to new language saying that “if a layoff is necessary, affected employees shall be laid off by inverse seniority order.”
- **Southwest Region.** In their 2017 CBA, the CWA and AT&T agreed to new language saying that “if a layoff is necessary, affected employees shall be laid off by inverse seniority order.”
- **Midwest Region.** At the time of the instant arbitration hearing, the parties were negotiating to replace an expired contract. The expired contract contains the same language as in the Southeast contract at issue here: "Employees will be laid off in a process to be determined by the Company based on the needs of the business and all business needs being equal, such adjustments shall occur in inverse order

of seniority." The CWA has proposed that layoffs occur by "inverse order of seniority."

Company Declaration of Wire Tech Layoffs

Last spring, the Company determined that in a number of geographic locations, i.e., "exchanges," it had more Wire Technicians than it had work for, and that it needed to declare a layoff of Wire Technicians. Company Vice President Tracy Gamer testified that the telecommunications world has changed; that more customers are "cutting the cord" of their traditional television service, like cable companies and AT&T's U-Verse service; that more customers are cutting their landlines and packaged television services, and instead viewing video on their wireless devices or over the internet; that this has negatively impacted AT&T's business; that as a result, a surplus layoff was warranted in specific locations because the Company did not have enough work to keep all the Wire Technicians busy; that with decreasing work, business needs required management to concentrate on having employees with relatively better attendance and job performance to keep customers happy.

According to Company witnesses, AT&T designed a surplus process consistent with the needs of its business and identified employees with relatively poor attendance who did not meet the quality criteria that they are measured by. With regard to attendance, said the Company, it developed a "cut line" of absences; that for calendar year 2018, it identified employees with more than three days of absence, or three separate occurrences, or three tardies; that it also identified employees who had short term disability absences of two or more over a two year period, or three or more in five

years, or those who missed 10% or more of scheduled work days over a five year period; that it did not consider an absence if it was "protected" by FMLA or as part of an ADA accommodation or in the process of being considered for such treatment; that this was not based on discipline and differed from the Company's applicable Attendance & Punctuality guidelines; that management vetted the records three times to assure accuracy; and that it identified 247 employees who were not satisfactory for this surplus process.

Manager Sharon Wilmouth testified that management next looked at all 1,286 employees in affected exchanges to identify those who failed the criteria for quality, either installs or repairs; that if they missed the attendance criteria and one of the quality goals, these Wire Techs were prioritized in the process for layoff; and that of the 247 with relatively poor attendance, 158 also missed at least one of the quality goals.

Ms. Wilmouth further testified that management looked at the list of employees within each exchange; that if Wire Technicians had less than six months service, they were laid off as not having experience to perform the full aspects of the job; that management next looked at those who failed both attendance and one of the quality criteria; that if there were more employees who missed the criteria than were needed to satisfy the surplus, then-since the business needs of attendance and quality were equally unmet among them, management laid them off in order of inverse seniority; that if there were not enough employees who missed the mark to satisfy the surplus, all were laid off; that management then looked to the remaining employees, all of whom passed muster and thus equally met the business needs; and that management laid off enough of those employees in inverse seniority order to satisfy the surplus.

Management considers the surplus process to have been successful and focused on employees who come to work when scheduled and perform well while here. Ms. Wilmouth testified that the 247 people identified with relatively poor attendance missed 5.31 days on average, compared to 0.55 for the other Wire Technicians; that put another way, they worked nearly one week less in 2018 than their fellow Wire Technicians; and that after the layoff, the average seniority for the remaining Wire Technicians increased.

Union Critique of the Company Process.

The Union is critical of the process by which the Company evaluated the performance and attendance of Wire Techs. It states that the Company's review of Wired Tech attendance and performance was flawed, and that the Company abandoned its established attendance and performance policies in favor of stricter policies.

Attendance. With respect to attendance, the Union states that the Company identified as less than satisfactory Wire Techs with more than three occurrences of absence or more than three days of absence in calendar year 2018, even if those days were a single occurrence; that it made no difference to the outcome of its "process" if a Wire Tech with a single occurrence in 2018 of four consecutive days due to the flu had been absent only one time in his entire career; that simply because he missed more than three days in 2018, his attendance was considered unsatisfactory, regardless of his overall attendance history; that the Company's own attendance policy would not allow it to fire an employee for a single occurrence of four days, or even three such occurrences; that doing so in the guise of a layoff does not create a different result for the Company; and that the Company's "process" regarding attendance is arbitrary and irrational

The Union further states that the Company's process interfered with the contractual right of employees to take five sick days per year; that the only exception was that the Company did not count days covered by FMLA; that a discharge for taking paid sick days

would be subject to the grievance procedure, and a just cause analysis would protect that employee's job; but that under the Company's surplus process, that employee's attendance would be deemed unsatisfactory for purposes of layoff, without protection of just cause for discharge.

Performance. The Union states that in past years, as with attendance, the Company published standards for what constituted satisfactory performance: that It used those standards to evaluate Wire Techs job performance, and used them in annual appraisals to rank Wire Techs as either failing to meet, meeting, or exceeding, expectations; and that the effect was to require an average that balanced install and repair.

The Union states that in implementing the surplus "process," however, the Company imposed a different standard for job performance; that it did not use the "ESM" standard that was used to assess Wire Tech. job performance in 2015, the second half of 2017, and in 2018 (the year reviewed for the layoff decision); that it did not use the "AIQ" standard used to assess job performance in 2016 and the first half of 2017; that both ESM and AIQ combine Service Promise/install metrics with Loyalty Commitment/repair metrics to generate a single performance score; that the effect was to require an average that balanced install and repair; that in all years, the Company also measured performance by Efficiency and Dispatch Efficiency; that for the layoff, however, the Company used a different standard, requiring Wire Techs to meet 90% in Service Promise and 90% in Loyalty Commitment separately; that requiring Wire Techs to meet the two 90% standards separately removed the balancing effect of the ESM or AIQ combined average; that the Company also removed the Efficiency and Dispatch Efficiency metrics from its evaluation of performance; and that in order to avoid layoff, a Wire Tech. had to meet different install and repair standards, of which they had been given no notice; that they got

no credit for high efficiency; that by counting all install and repair revisits within thirty days against the Wire Techs regardless of the circumstances giving rise to the revisits, the Company punished Wire Techs for reasons beyond their control. for which the testimony provided myriad examples.

POSITION OF THE UNION

The Union's arguments are as follows:

1. "Needs of the Business" and "Process" must be read in context.
2. Absent clear contract language to the contrary, seniority prevails.
3. The "Process" was arbitrary, irrational, and inconsistent with established policy, including the Company's flawed review of Wire Techs' attendance and performance.
4. The "Process" was not calculated to serve the Company's asserted business need.

In conclusion, the Union argues that the covenant of good faith and fair dealing requires that management discretion be exercised reasonably and not in an arbitrary manner; that because this was not done in this case, the grievance should be sustained; and that as a remedy, the matter should be remanded to the parties until a date certain in order that the parties fashion a remedy.

POSITION OF THE COMPANY

The company's arguments are as follows:

1. The Union has the burden of proving that the Company's actions violated the Working Agreement.
2. The Collective Bargaining Agreement does not require layoff by seniority.
3. The Company correctly addressed its business needs.
4. The Company accurately and fairly captured the employees' attendance and quality.

In conclusion, the Company states that the Union failed to meet its burden of proof to establish that the Company has violated the contract, and the Arbitrator should deny the grievance.

DISCUSSION

The Union states that the issue is “Whether the Company must layoff Wire Technicians in inverse order of seniority.” For the reasons stated below, the answer to that question is in the negative. Accordingly, the grievance must be denied.

The primary reason for this conclusion lies in the language and negotiation history of the relevant contract language. Both parties rely on Section 6.03 of the Network Addendum for Universe Field Operations, entitled “Force Adjustment.” That section states in relevant part as follows:

“Whenever force conditions, as determined by the Company, are considered to warrant a surplus and the possible layoff of employees....Employees will be laid off in a process to be determined by the Company based on the needs of the business and all business needs being equal, such adjustments shall occur in inverse order of seniority.”

The above language does not expressly or impliedly state that all layoffs will be in inverse order of seniority. Rather, it expressly states that employees will be laid off “*in a process to be determined by the Company based on the needs of the business.*” The lone exception is that when “*all business needs being equal,*” layoffs or other adjustments will occur in inverse order of seniority.

This language is clear and unambiguous, in two ways. First, it sets forth the process to be used for layoffs, and that process is not by seniority. Rather, it is expressly based on the “needs of the business as determined by the Company.” Second, the language shows that the parties expressly considered what role, if any, seniority would play in the layoff process. They determined that seniority would apply in only a limited way, when all business needs were equal.

The fact that the parties agreed to a layoff process other than seniority, with only a limited exception when all business needs were equal, indicates there was no mutual agreement that *all* layoffs would be done in “inverse order of seniority.”

Further, the above interpretation is supported by negotiation history. As discussed above, in the first negotiation regarding the Wire Techs, the parties reached an agreement as an addendum to the 2012-2015 core agreement, called the Network Addendum for U-verse Field Operations. The undisputed testimony was that Section 6.03 of the Addendum, the reduction in force provision, was proposed by the Company and agreed to by the Union, without any proposed changes.

During the next round of bargaining for the 2015 – 2019 Addendum, the Union proposed to change section 6.03 to require layoff by seniority. It proposed that for Wire Technicians, "Layoffs shall occur in inverse order of seniority." The Company did not accept the proposal, and the language remained unchanged from the 2012 Addendum to the 2015 Addendum.

The 2012 result indicates that both parties accepted a process other than seniority for layoffs. The 2015 result indicates that the Union proposed seniority in layoffs; that the Company did not accept this proposal; and that the parties ultimately agreed to language without seniority, with the limited exception discussed above regarding equal business needs. Considered together, these outcomes demonstrate that seniority was not agreed to as the general basis for layoffs; rather, the parties agreed that employees would be laid off “in a process to be determined by the Company based on the needs of the business.”

The Company notes that in several other regional contracts between the CWA and

AT&T, CWA proposed, and the parties agreed, to go by inverse seniority when laying off Wire Technicians, which are called Premises Technicians in those regions. The Union contests the relevance of those agreements, since they were for contracts other than the one involved in the instant dispute. The Undersigned has considered these arguments. However, since the Arbitrator concluded above that both the contract language and negotiating history between the parties in the instant case support the Company's position, it is unnecessary to determine whether contracts in other AT&T regions might be relevant.

The Union is critical of the process by which the Company evaluated the attendance and performance of Wire Techs. The Union argues that in the Company's review of Wire Tech attendance and performance, it abandoned the Company's established attendance and performance policies in favor of stricter policies regarding surplus layoffs.

It is true that the Company did not utilize attendance and performance policies and standards applied in other contexts. However, Section 6.03 established that the Company has the right to determine a different process in surplus layoff situations, one that is "based on the needs of the business," not on attendance and performance policies applied in other contexts.

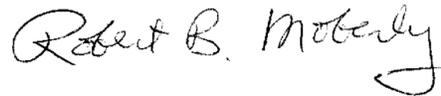
The Union contends that the "process" regarding attendance and performance was arbitrary and irrational, and also was in violation of the "covenant of good faith and fair dealing" that requires management discretion to be exercised reasonably and not arbitrarily. However, the Arbitrator cannot so conclude. As permitted by Section 6.03, the Company determined that the "needs of the business" required that it keep employees with relatively better attendance and performance. It established attendance and performance criteria designed to achieve this goal that was different from other contexts, but Section 6.03 allows wider latitude than exists in those

other contexts. After a full review of the record, the Undersigned cannot conclude that the criteria developed was unreasonable, or that its application was arbitrary or in bad faith. Moreover, the process seems to have established its goals. According to undisputed testimony, the 247 people identified with relatively poor attendance missed 5.31 days on average, compared to 0.55 for the rest of the employees; that they worked nearly one week less in 2018 than other Wire Technicians; and that after the layoff, the average seniority for the remaining Wire Technicians increased.

Upon a careful review of the evidence and arguments, and for the reasons stated above, the Arbitrator cannot conclude that the March 2019 Wire Technician reduction in force violated the parties' agreement. Accordingly, the grievance must be denied.

AWARD

For the reasons set forth above, the grievance is denied.

A handwritten signature in cursive script that reads "Robert B. Moberly". The signature is written in black ink and is positioned to the right of the center of the page.

Robert B. Moberly, Arbitrator
July 15, 2019