IN THE MATTER OF THE ARBITRATION)
)
between)
)
CLEVELAND-CLIFFS STEEL LLC,)
INDIANA HARBOR)
)
and)
)
UNITED STEEL, PAPER AND)
FORESTRY, RUBBER,)
MANUFACTURING, ENERGY,)
ALLIED INDUSTRIAL AND)
SERVICE WORKERS)
INTERNATIONAL UNION,)
LOCAL 1010)

OPINION AND AWARD

RONALD F. TALARICO, ESQ.
ARBITRATOR

GRIEVANT

Carl Hart

ISSUE

Pension/Permanent Incapacity

VIDEO HEARING

August 11, 2021

APPEARANCES

For the Employer
Nathan Kilander
CLEVELAND-CLIFFS STEEL, LLC
INDIANA HARBOR

For the Union
Jacob Cole
Staff Representative
USW DISTRICT 7, SUB-DISTRICT 5

ADMINISTRATIVE

The undersigned Arbitrator, Ronald F. Talarico, Esq., was mutually selected by the parties to hear and determine the issues herein. A video evidentiary hearing was held on August 11, 2021 at which time the parties were afforded a full and complete opportunity to introduce any evidence they deemed appropriate in support of their respective positions and in rebuttal to the position of the other, to examine and cross examine witnesses and to make such arguments that they so desired. The parties gave closing arguments at the conclusion of the hearing at which time the record was closed. No jurisdictional issues were raised.

PERTINENT PROVISIONS OF THE PENSION AGREEMENT

2.5 Permanent Incapacity

(a) Any participant who shall have had at least 15 years of continuous service and who shall have become permanently incapacitated shall be eligible to retire and shall upon his retirement (hereinafter "permanent incapacity retirement") be eligible for a pension. A participant shall be considered to be permanently incapacitated (as "permanently incapacitated" is used herein) only if

(1) He has been totally disabled by bodily injury or disease so as to be prevented thereby from engaging in any employment of the type covered by the Basis Agreement and

(2) After such total disability shall have continued for a period of five consecutive months and (a) in the opinion of a qualified physician, it will be permanent and continuous during the remainder of his life or (b) notwithstanding anything herein to the contrary, a participant has been granted disability benefits under social security with an award effective date during the period he was accruing continuous service.

(b) Incapacity contracted, suffered or incurred while the participant was engaged in, or resulted from his having engaged in, a criminal enterprise, or resulting from future service in the armed forces and which prevents him from returning to employment with the Company and for which he receives a

military pension, shall not entitle a participant to a pension under this paragraph 2.5.

(c) Such pension shall be discontinued if such participant shall cease to be permanently incapacitated prior to age 62. The permanency of incapacity may be verified by medical examination prior to age 62 at any reasonable time.

Section 7, Appeals Procedure:

Section 7.1 Disputes as to Eligibility or Amount

If any difference shall arise between the Company and any participant who shall be an applicant for a pension, or to whom a pension shall by payable, as to such participant's right to a pension or the amount of his pension and agreement cannot be reached between the Company and a representative of the International Union, such questions shall be referred to an impartial umpire to be selected by the Company and the Union; provided, however, that the President of the International Union (or his designee) has given written approval of such referral. The impartial umpire shall have authority only to decide the question pursuant to the provisions of this Agreement applicable to the question but he shall not have authority in any way to alter, add to or subtract from any of such provisions. The decision of the impartial umpire on any such question shall be binding on the Company and the Union and the participant. If any difference shall arise between the Company and any person who shall be or claim to be a co-pensioner or a surviving spouse, as to such person's right to a benefit under this Agreement or the amount of such benefit, such difference shall be resolved by the Company and a representative of the International Union. If such difference is not so resolved, it may, by written agreement of the Company and the President of the International Union (or his designee), be referred to the impartial umpire described above, who shall have authority as described above with respect to such difference, and if it is referred, the decision of the impartial umpire shall be binding on the Company, the Union and such person. Notwithstanding the above or any provision of a Basic Agreement, a dispute with respect to a Rule-of-65 pension or any right or benefit provided under Appendix A may, at the request of either the Company or the President of the International Union (or his designee), be referred to the special arbitrator selected by the Company and the International Union for the purpose of determining such disputes. Such special arbitrator shall have the same authority

to decide the questions as the impartial umpire and such decision will have the same binding effect as a decision of the impartial umpire.

Section 7.2 Disputes as to Permanent Incapacity

If any difference shall arise between the Company and any participant as to whether such participant is or continues to be permanently incapacitated within the meaning of paragraph 2.5, such difference shall be resolved as follows:

The participant shall be examined by a physician appointed for that purpose by the Company and by a physician selected by the participant. If they shall disagree concerning whether the participant is permanently incapacitated, that question shall be submitted to a third physician.

For any location served by the ArcelorMittal USA Medical Department, the third physician shall be selected from the staff of one of the below listed medical centers, such medical center to be selected in the order listed below on a rotating basis (such selected medical center shall be the medical center next following the medical center last selected pursuant to this paragraph).:

University of Chicago Medical School
University of Illinois Medical School
Northwestern University School of Medicine
Rush University Medical College

In the event the facilities of the selected medical center are either inadequate for the subject examination or unavailable when required, then the next medical center listed shall be selected, and so on until an adequate and available medical center has been selected. The Arcelor Mittal USA Medical Department shall be responsible for contacting the head of the appropriate department (as determined by the major physical complaint of the participant) at the medical center selected, and for requesting an evaluation of the participant by the department head or other physician of the department head's choosing.

For any location not served by the ArcelorMittal USA Medical Department, the third physician shall be agreed to by the first two physicians.

The medical opinion of the third physician, after examination of the participant and consultation with the other two physicians, shall decide such question. The fees and expenses of the third physician shall be shared equally by the Company and the Union. Any addition to or deletion from the above list of medical centers shall be mutually agreed upon by the Union and the Company.

Notwithstanding anything herein to the contrary, a participant who has been granted disability benefits under Social Security with an award effective date during the period he was accruing continuous service will be deemed to be permanently incapacitated within the meaning of Paragraph 2.5. This provision shall apply to any claim for permanent incapacity pension pending as of July 31, 1999 and all subsequent claims arising during the term of this agreement.

BACKGROUND

The Employer in this case is Cleveland-Cliffs Steel LLC – Indiana Harbor ("Company"). The Union, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union and USW Local 1010 ("Union"), is the sole and exclusive collective bargaining representative for all production and maintenance employees at the Indiana Harbor East Plant. The Company and Union are successor parties to a collective bargaining agreement effective September 1, 2018. In addition, the Company and the Union are successor parties to a series of pension agreements governing the defined benefit pension plan, the most recent of which is also effective September 1, 2018 ("Pension Agreement").

The Grievant, Carl Hart, effectively retired from the Company on September 1, 2007. At the time of his retirement, Hart had twenty-six (26) years of service with the Company. Hart's pathway to retirement was less than straightforward. The Company terminated Hart's employment on August 11, 2007. After his termination, Hart developed severe mental health issues which became debilitating. After a long period of treatment without any meaningful improvement, Hart applied for Social Security Disability ("SSD") in April of 2011. Initially, Hart's SSD application was denied, but after an appeal Hart won a fully favorable decision granting him benefits in September of 2017. The Administrative Law Judge ("ALJ") found that Hart had been disabled under Sections 216(i) and 223(d) of the Social Security Act since August 11, 2007.

The ALJ found that Hart had several severe impairments, including anxiety, depression, PTSD, history of substance abuse, borderline intellectual functioning, social phobia, and obstructive sleep apnea. The ALJ concluded that on the basis of these impairments Hart was fully disabled and eligible for SSD benefits. Inasmuch as the ALJ found Hart to be disabled based on his mental impairments, he declined to address Hart's physical impairments. The ALJ also found that Hart's past substance abuse was not material to the outcome of disability.

In March of 2018, after receiving the fully favorable determination from SSD, Hart applied for a Permanent Incapacity Pension under the Pension Agreement. Despite the SSD Determination, the Company denied Hart's application for full retroactive benefits. As a result of the Company's denial, Hart and the Company were involved in a separate legal proceeding about the pension benefits. That legal proceeding was eventually settled out of court in October of 2019. It is undisputed that Hart was granted, and began receiving, the Permanent Incapacity Pension.

Section 2.5(c) of the Pension Agreement permits the Company under certain circumstances to verify a participant's permanent incapacity. On November 26, 2019, the Company (relying upon that provision) initiated a challenge to Hart's permanent incapacity. The process to settle a dispute as to permanent incapacity, set forth in Section 7.2 of the Pension Agreement, starts with an examination by the participant's physician. Towards that end, Dr. Mario Robbins (Hart's physician), provided his opinion regarding the current status of Hart's permanent incapacity. Dr. Robbins did so by completing the Company's form entitled "Physician's Statement – Verification of a Permanent Incapacity Pension," on March 14, 2020. Dr. Robbins opined that Hart was totally disabled for any occupation for an indefinite period of time.

Pursuant to Section 7.2 of the Pension Agreement, the Company also had Hart examined by a physician selected by the Company. The Company's physician opined, on an identical form as was provided to Dr. Robbins, that: (i) Hart is not totally disabled for any occupation, but (ii) Hart is totally disabled for his regular occupation for an indefinite period of time.

The Company deemed the first two physicians' opinions to be in conflict and submitted the question of Hart's permanent incapacity status to a third physician. The third physician performed a forensic psychiatric evaluation. The third physician submitted his findings and conclusions using a different form than was utilized by the first two physicians. The third physician completed a form, which appears to have originated from Inland Steel, entitled "Physician's Statement – Application for Permanent Incapacity Pension". The third physician forensically

diagnosed Hart with malingering, while noting that Hart misused cannabis, cocaine and alcohol for many years. The third physician opined that Hart was not totally disabled psychiatrically for any occupation or for his regular occupation and that he could have gone back to work as of June 1, 2011.

Based on the third physician's evaluation, the Company concluded that Hart was no longer permanently incapacitated. Accordingly, the Company terminated Hart's Permanent Incapacity Pension on February 5, 2021. The Company's position is that Hart is no longer permanently incapacitated as that term is defined in Section 2.5 of the Pension Agreement and that Section 7.2 of the Pension Agreement gave the Company the authority to terminate Hart's benefits under those circumstances.

The Union grieved the Company's decision to terminate Hart's Permanent Incapacity Pension, citing the Company's violation of Section 7.2 of the Pension Agreement. The parties processed the Grievance to arbitration before the undersigned.

ISSUE

Whether the Company violated the Pension Agreement by terminating Carl Hart's Permanent Incapacity Pension? If so, what shall be the appropriate remedy?

POSITION OF THE UNION

Carl Hart was indisputably entitled to his Permanent Incapacity Pension under Section 2.5 of the Pension Agreement, and the Company did not have a right to verify his permanent incapacity under Section 7.2 of the Pension Agreement. The Company improperly terminated Hart's Permanent Incapacity Pension. Hart's Pension must be reinstated, he must be made whole in all ways, and the Company must cease and desist from this practice.

Section 7.2 of the Pension Agreement expressly prohibits the Company from invoking the verification procedure for resolving disputes in Hart's case. The Company ignored a very important and integral part of Section 7.2 – the very last paragraph – which keeps participants who have been awarded SSD with an eligible effective date from any type of challenge to their permanent incapacity. In Hart's case, the SSD Award and benefits are controlling: the Company cannot intervene and create a dispute.

Even if the Arbitrator finds that the Company had the right to verify Hart's permanent incapacity under Section 7.2, Section 2.5 is absolutely controlling in this case. Section 2.5(a)(2) guides the parties to put everything else aside once a participant attains an SSD Award. In the alternative, if the Arbitrator finds that the Company was able to apply the Section 7.2 procedure to Hart, the Company did not properly adhere to the Section 7.2 procedure. Specifically, the third doctor should never have been invoked as the first two doctors agreed with the SSD Award and found that Hart is indefinitely permanently incapacitated.

The Company failed to present any evidence to challenge the Union's assertion that the Section 7.2 process has never been utilized by the Company. It's unclear what separates Hart from the hundreds of other retirees – his settlement or his SSD Award, possibly – but we do not know because the Company failed to present.

The Union respectfully submits that the Arbitrator order Hart's pension to be reinstated and he be made whole in all ways. In addition, the Arbitrator should order a cease and desist to the Company of this practice.

POSITION OF THE COMPANY

As an initial matter, Section 7.2 of the Pension Agreement does not provide for arbitration at the end of the dispute process. Instead, the issue before the Arbitrator is whether the Company had the right under 2.5(c) of the Pension Agreement to send Hart for verification of his permanent incapacity. The answer to that question is yes.

The Union carries the burden of proof in this contract interpretation case. The Company submits that the Union failed to carry that burden, and the Grievance must be denied.

The testimony and evidence presented by the Company makes clear that the parties anticipated that participants who initially qualify for a Permanent Incapacity Pension may later cease to be permanently incapacitated. Two separate paragraphs in the Pension Agreement outline that concept.

First, Section 2.5(c) of the Pension agreement allows the Company to verify whether a participant continues to be permanently incapacitated by way of a medical examination prior to 62 years of age. The Company elected to verify Hart's permanent incapacity under this language. While the Union disputes the Company's right to verify Hart's permanent incapacity, there is no limiting language in Section 2.5(c) except the age of the participant.

Second, Section 7.2 of the Pension agreement is entitled "Disputes as to Permanent Incapacity" and governs the next steps of the process once the Company decides to verify a participant's permanent incapacity. Section 7.2 addresses whether the participant "is or continues to be permanently incapacitated within the meaning of 2.5." The process outlined in Section 7.2 involves the participant being examined by two doctors – one selected by the Company and one selected by the participant. If those two doctors disagree, as they did in Hart's case, a third doctor is selected from a list of specifically named medical centers. All of the steps were properly followed in Hart's case. Despite any contention to the contrary, there is no language which requires that the Union agree to the doctor chosen by the Company in Section 7.2. Instead, the language specifically provides that the Company is the party responsible for contacting the third doctor. The opinion of that third doctor resolves the dispute under the language of 7.2.

The Union contends that any SSD Award, regardless of duration, entitles a participant to a Permanent Incapacity Pension for life. The Company disagrees. The only limitation on the Company's ability to verify permanent incapacity is once the participant reaches 62 years of age, but that is the only limitation prescribed in Section 2.5. The Company agrees that the SSD Award does initially meet the Permanent Incapacity standard set forth in the Pension Agreement under Section 2.5(a)(2)(b). This fact does not limit the Company's rights under latter parts of the Pension Agreement.

The Pension Agreement does not contain any language which exempts those who were awarded SSD from the verification process outlined in Sections 2.5(c) and 7.2. There is no distinction made in the Pension Agreement as to the length of time associated with an Award of SSD. Under the Union's theory, a participant could receive an SSD Award for a total of 13 months and become entitled to a Permanent Incapacity Pension for life. This result is unsupported by the language and would be a windfall for the individual as well.

The Company properly exercised its rights under Section 2.5(c) and properly followed the procedure outlined in Section 7.2 for disputes as to Permanent Incapacity. While the Company still maintains the end result of the process in 7.2 is not an arbitrable issue, it is clear from the first two doctors that they did not agree that he was permanently disabled.

The Union failed to meet its burden of proof therefore the Company submits that the Grievance should be denied in its entirety.

FINDINGS AND DISCUSSION

The essential underlying facts in the within grievance are not in dispute and the issue is a straight-forward matter of contract interpretation. The rule primarily to be observed in the construction of written agreements is that the interpreter must, if possible, ascertain and give effect to the mutual intent of the parties. The collective bargaining agreement should be construed, not narrowly and technically, but broadly so as to accomplish its evident aims. In determining the intent of the parties, inquiry is made as to what the language meant to the parties when the agreement was written. It is this meaning that governs, not the meaning that can possibly be read into the language.

The rule primarily to be observed in the construction of written agreements is that the interpreter must, if possible, ascertain and give effect to the mutual intent of the parties. The Pension Agreement should be construed, not narrowly and technically, but broadly so as to accomplish its evident aims. In determining the intent of the parties, inquiry is made as to what the language meant to the parties when the agreement was written. It is this meaning that governs, not the meaning that can possibly be read into the language.

As a threshold matter, I would ordinarily have to address the Company's arbitrability issue before proceeding to the merits. However, in this case, the arbitrability issue ends up being one and the same with the substantive issue on the merits. As I understand the Company's position on this question of arbitrability, it appears that the Company contends the following. Once the three-physician process under Section 7.2 is invoked, and then when the Company is provided with an outcome by the finding of the third physician, the Company's action based on that outcome is not reviewable in arbitration. I disagree. Although the Company may be able to argue that the third physician's opinion may not be reviewed in arbitration, that is quite different from saying that the Company's subsequent conduct is not reviewable in arbitration.

First, my determination on this record as to Hart's permanent incapacity is not based on the three-physician verification process but instead on a different ground expressly permitted under Section 7.2. Second, there is nothing in Section 7.1 that supports the notion that the Company's actions as to a participant's benefits fall outside the arbitration process spelled out in that section, and in fact the language favors arbitrability of all disputes arising under the Pension Agreement. The Company's argument that its action in this case is not subject to arbitral review ignores the plain language of Section 7.1. Due to the fact that the arbitrability argument is inextricably

interwoven with the substantive issue, my rationale for dismissing the Company's procedural arbitrability argument is set forth below as part of my decision on the merits.

Section 7.1 provides the broad authority for an impartial umpire/arbitrator to resolve disputes arising thereunder. The first step is that the parties are directed to attempt to reach an agreement. Absent an agreement by the Company and the International Union, Section 7.1 of the Pension Agreement vests the authority in an impartial umpire/arbitrator to settle disputes under the Pension Agreement. Although Section 7.2 allows for a three-physician process should there be disputes as to a participant's permanent incapacity, Section 7.2 does not limit the authority of an impartial umpire/arbitrator to settle any disputes which may arise thereunder. The most that could be said is that in the case of utilizing a third physician the opinion of that third physician shall be determinative.

If I were to accept the Company's argument on this point, the participant and the Union would be left without recourse if something went awry in the three-physician verification process. By way of example, if there was a disagreement about the interpretation of any physician's report (such as appears to be the case here), the Company's reading of Section 7.2 of the Pension Agreement would leave the participant and the Union without recourse. It is well-established that such a waiver should be clear and express, and that is not the case herein. To the contrary, Section 7.1 is broadly worded and evinces a clear intent by the parties for disputes to be resolved through arbitration.

Focusing on the merits, the issue is whether the Company can disregard the SSD Award and attempt to verify this participant's permanent incapacity solely by the three-doctor process. In order to answer that question, it is important to take account of the process from Hart's initial eligibility through the Company's conclusion that Hart was no longer permanently incapacitated.

The analysis begins at Section 2.5 of the Pension Agreement, which requires that a participant prove that he is permanently incapacitated. To establish permanent incapacity, Section 2.5 requires that:

> Any participant who shall have had at least 15 years of continuous service and who shall have become permanently incapacitated shall be eligible to retire and shall upon his retirement (hereinafter "permanent incapacity retirement") be eligible for a pension. A participant shall be considered to be permanently incapacitated (as "permanently incapacitated" is used herein) only if

> (1) He has been totally disabled by bodily injury or disease so as to be prevented thereby from engaging in any employment of the type covered by the Basic Agreement and
>
> (2) After such total disability shall have continued for a period of five consecutive months and (a) in the opinion of a qualified physician, it will be permanent and continuous during the remainder of his life or (b) notwithstanding anything herein to the contrary, a participant has been granted disability benefits under social security with an award effective date during the period he was accruing continuous service.

The record reveals that Hart met the initial requirement to have at least fifteen years of continuous service at the time he first applied for the Permanent Incapacity Pension (he had twenty-six years). The record further reveals, based on the SSD Award, that Hart was "totally disabled by bodily injury or disease so as to be prevented thereby from engaging in any employment of the type covered by the Basic Agreement," which satisfies the first prong of the analysis.

The second prong has two alternative paths to establish eligibility for a Permanent Incapacity Pension benefit. The participant must be determined to have had the "total disability…have continued for a period of five consecutive months" and either "(a) in the opinion of a qualified physician, it will be permanent and continuous during the remainder of his life or (b) notwithstanding anything herein to the contrary, a participant has been granted disability benefits under social security with an award effective date during the period he was accruing continuous service." The parties ultimately agreed that Hart satisfied the second prong of the analysis by meeting the standard under subparagraph (b). In this regard, Hart was initially determined to be permanently incapacitated on the basis of the SSD Award, with an effective date "during the period he was accruing continuous service". The SSD Award had a disability effective date of August 11, 2007. Thus, as of October 2019, Hart met the definition for permanent incapacity.

The instant dispute commenced soon after Hart qualified for his Permanent Incapacity Pension. In November of 2019, the Company sought to have Hart's incapacity status verified pursuant to Section 2.5(c). As noted above, that Section provides that the "permanency of incapacity may be verified by medical examination prior to age 62 at any reasonable time."

The Company relied upon the process under Section 7.2 of the Pension Agreement that provides for disputes regarding a participant's permanent incapacity status to be submitted to two physicians – one selected by the participant and one selected by the Company. If the two physicians disagree, Section 7.2 provides that the dispute would be submitted to a third physician for final resolution. In this case, the Company concluded that the two physicians disagreed about whether Hart was permanently incapacitated, so the Company submitted the issue to a third physician.

The third physician opined that Hart was a malingerer and was fully capable of working any occupation, including his own, from June 1, 2011 to the present. That finding is plainly in conflict with the SSD Award that Hart received in 2017. This is the critical juncture in the present case. According to the Company, the analysis of continued permanent incapacity ends with the third physician's finding, irrespective of the prior SSD Award. According to the Union, the SSD Award establishes permanent incapacity and prohibits the Company from even attempting to utilize the three-physician process to arrive at a different outcome.

The heart of the dispute in this case is grounded in the final paragraph of Section 7.2, which reads as follows:

> Notwithstanding anything herein to the contrary, a participant who has been granted disability benefits under Social Security with an award effective date during the period he was accruing continuous service will be deemed to be permanently incapacitated within the meaning of Paragraph 2.5. This provision shall apply to any claim for permanent incapacity pension pending as of July 31, 1999 and all subsequent claims arising during the term of this agreement.

The Union contends that the above-quoted language means that once Hart was awarded SSD benefits, his permanent incapacity was established and could not be overridden by resort to the three-physician process. The Union argues that the language in Section 7.2 makes clear that an SSD Award is determinative, so that there should not even have been a resort to the three-physician process in this case.

The Company's position is based exclusively on the language of Section 2.5(c). The Company does not expressly address the above-quoted language from Section 7.2. The Company contends that the *only limitation* on the Company's ability to verify permanent incapacity is the age of the participant. The Company points to the language of Section 2.5(c), which provides that "the permanency of incapacity may be verified by medical examination prior to age 62 at any reasonable time." The Company's view is that this provision permits the Company to utilize the

three-physician process in Section 7.2 to verify continued permanent incapacity, without any limitation, so long as Hart had not reached the age of 62. In essence, the Company maintains that the SSD Award is completely irrelevant to the Company's right to pursue a three-physician verification of continued permanent incapacity, so long as Hart was not yet 62 years old. Implicit in the Company's position is the assertion that the first sentence of the above-quoted paragraph ("Notwithstanding anything herein to the contrary…") does not limit the Company in the present case, even though Hart had an SSD Award to the contrary.

The difficulty with accepting the Company's argument is that it would render the above-quoted language ("Notwithstanding anything herein to the contrary…") meaningless or superfluous. First, that argument disregards the placement of the quoted language. Second, that argument disregards the plain meaning of that language.

First, as to the placement of the quoted provision, a version of that declaration appears in two separate Sections of the Pension Agreement. The first is in Section 2.5(c), where the parties referenced the process to establish eligibility for the disability benefit. The second place this sentence appears is in the final paragraph of Section 7.2, where it follows directly after the detailed description of the three-physician verification process. Inasmuch as a version of the sentence already appeared earlier in the Pension Agreement, it is implausible that the parties repeated the sentence in a different section without intending that sentence to carry a separate meaning in that section. It cannot be an accident that the parties used essentially the same sentence in two distinctly separate provisions; the parties obviously intended to deliberately include this sentence at the end of Section 7.2 to specifically modify that section. For this reason, there can be no mistaking that the intent of the parties in stating, "[n]otwithstanding anything herein to the contrary…" was to state that *notwithstanding the three-doctor process*, an SSD Award would have a preclusive effect.

Indeed, that outcome seems most logical especially because the threshold to become entitled to SSD benefits is demonstrably more difficult to meet than the verification under the three-physician process. This language allows for two alternate means to verify permanent incapacity, but gives deference to the Social Security Administration and the heightened burden an individual must meet in order to be awarded benefits. Had there not been an SSD Award, it is entirely plausible that the determination of whether Hart's permanent incapacity continued could be addressed through the three-physician verification process. It cannot be overlooked, however, that Hart underwent an arduous and lengthy administrative process, including appeals, which took

many years before he was found by an ALJ to be eligible for SSD benefits. Having gone through that arduous and lengthy legal process, it makes little sense that the parties would expect that he would immediately be subjected to a new and different method of verification of his permanent incapacity. This conclusion is buttressed by the placement of this notwithstanding clause immediately following the three-physician verification process, suggesting that the sentence as it appeared in Section 7.2 was intended to modify the three-physician verification process in that same Section.

Second, it is well-established that any interpretation of contract language that would render language meaningless or superfluous should be disfavored, especially when there is an alternate interpretation that gives that language full force and effect. In this case, the Company's interpretation would not allow for any room for that "notwithstanding" sentence to have a separate effect in Section 7.2. The Company's position would require me to find that the parties' use of a version of the sentence for a second time added nothing beyond what the first usage obtained. Indeed, if the Company's interpretation were to be accepted, the three-doctor process would prevail notwithstanding the existence of the SSD Award, instead of the other way around. I cannot square the parties' deliberate decision to use a version of the "notwithstanding" sentence in two separate provisions with the Company's interpretation that would require me to find that the second usage adds nothing beyond what the first usage provided.

The Company really never offers any explanation for the decision of the drafters of this Pension Agreement to use the "Notwithstanding anything herein to the contrary..." sentence in both Section 2.5 and in Section 7.2. Both times the notwithstanding clause is used to give effect to the SSD Award. The fact that the drafters of this Pension Agreement used a version of that sentence in two different places strongly suggests that the drafters intended to reinforce the preclusive effect of the SSD Award in each separate part of the Pension Agreement. The drafters gave that sentence meaning in Section 2.5, but they also gave the sentence separate meaning in Section 7.2. The only way to honor that intent is to recognize that when the parties inserted that sentence in Section 7.2, they meant that sentence to apply to the three-physician verification process set forth in that Section. They weren't simply referencing back to the initial version of that sentence in Section 2.5(c).

Taking the Company's argument to its conclusion, I would be compelled to modify the express language of the Pension Agreement to provide for a contrary outcome, in violation of the

limit on my authority set forth in Section 7.1. By contrast, accepting the interpretation offered by the Union allows for all of the language in Section 7.2 to have meaning and effect. On this basis, I am compelled to sustain the Grievance.

The Union advanced a separate basis to sustain the Grievance. The Union contended that the first two physicians' findings were not in conflict, so that the Company should never have been privileged to proceed to the third physician's findings under Section 7.2. In view of my ruling above, it is not necessary to reach this issue. However, in the interest of providing clarity for future proceedings between the parties, it is appropriate to comment on this issue.

The parties presented the forms that were utilized by each of the physicians to provide their reports. What stands out from even a cursory review of the forms that were used is that they seem to be manifestly inadequate to provide guidance with respect to the basic terms of the Pension Agreement.

The primary deficiency that seems to stand out is that the form asks the wrong question about permanent incapacity. The Pension Agreement provides that someone must be "totally disabled by bodily injury or disease so as to be prevented thereby from engaging in any employment of the type covered by the Basic Agreement." By contrast, the form asks two questions: (1) whether the participant is totally disabled for any occupation, and (2) whether the participant is totally disabled for his regular occupation. The phrasing of the questions in the form does not necessarily produce an answer to the standard set forth in the Pension Agreement.

In this case, Hart's physician opined that Hart was totally disabled from any occupation, while the Company's physician opined that Hart was totally disabled from his regular occupation. The difference in these responses did not automatically establish that their opinions were in conflict regarding whether Hart was disabled from "employment of the type covered by the Basic Agreement," and in the absence of a conflict between those opinions, there would have never been an occasion for the Company to proceed to the third physician. However, neither physician was asked the question that needs to be asked, which is whether the participant is totally disabled for "any employment of the type covered by the Basic Agreement." Had I been forced to resolve that issue on this record, I would have been unable to do so on the basis of the response provided by the second doctor.

What the Company characterized as a conflict between the first and second physicians was a gap in information. It is unclear whether the second physician would have characterized Hart as

totally disabled from any employment covered by the Basic Agreement. On this record, it would have been impossible to determine with any certainty whether the second physician actually disagreed with the finding of the first physician. That in turn would have made difficult a determination of whether the Company was entitled to proceed to the third physician. Given that the documents were drafted by the Company, doubts about those documents would most likely have been resolved against the Company as the drafter, with the conclusion that the first two physicians were not actually in conflict. Although that issue ultimately does not become determinative in this case, it would seem appropriate for the parties to undertake a review of the form being used to make that form more consistent with the express terms of the Pension Agreement.

AWARD

The Grievance is sustained. The Company shall restore Carl Hart's Permanent Incapacity Pension and shall make him whole for all pension benefits owed to him during the period of time that his Permanent Incapacity Pension was rescinded.

Jurisdiction shall be retained in order to ensure compliance with this Award.

Date: Aug. 31, 2021

Ronald F. Talarico, Esq.
Arbitrator