

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE and
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA (UAW), LOCAL
UNION NO. 391,

Complainant,

vs.

WEBSTER ELECTRIC COMPANY, INC.,

Respondent.

Case 14
No. 36624 Ce-2041
Decision No. 23510-A

Appearances:

Mr. Ronald Reading, President of Local 391, 4328 Goley's Lane, Racine, Wisconsin 53404 and Mr. Jack R. Cole, International Representative, Region 10, UAW, 7435 South Howell Avenue, Oak Creek, Wisconsin 53154, appearing on behalf of the Complainant.
Matkov, Griffin, Parsons, Salzman & Madoff, Attorneys at Law, by Mr. Larry G. Hall and Mr. Jeffrey W. Byrd, Suite 1500, 100 West Monroe Street, Chicago, Illinois 60603-1906, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 391, having, on March 3, 1986, filed a complaint with the Wisconsin Employment Relations Commission, hereinafter the Commission, alleging that Webster Electric Company, Inc., had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act, herein WEPA; and the Commission having, on April 7, 1986, appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5) Stats.; and hearing on said complaint having been held in Racine, Wisconsin on May 12, 1986; and the parties having filed briefs with the Examiner which were exchanged on August 13, 1986; and the Examiner having considered the evidence and arguments of Counsel, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 391, hereinafter referred to as the Union, is a labor organization which functions as the exclusive collective bargaining representative for all production and maintenance employees of Webster Electric Company, Inc.; and that its offices are located at 7435 South Howell Avenue, Oak Creek, Wisconsin 53154.

2. That Webster Electric Company, Inc., hereinafter referred to as the Employer, is a corporation engaged in the manufacture, design and sale of hydraulic pumps, motors and valves; and that its headquarters are located at 1900 Clark Street, Racine, Wisconsin 53403.

3. That the Union and Employer are parties to a collective bargaining agreement covering the wages, hours and conditions of certain employees including employee Michael F. Flynn, which agreement by its terms became effective on November 17, 1983 and expires on April 1, 1987; that said agreement includes a grievance procedure for the resolution of disputes arising thereunder, but does not provide arbitration or any other means of final and binding resolution of such disputes; and that said agreement provides, in relevant part, as follows:

No. 23510-A

4.08. Transfer to Avoid Layoff Procedure. 1. Layoffs within a department will be done on the basis of seniority, providing that the employees remaining can perform the job without additional training.

2. The laid-off employee will be referred to the Personnel Department.

A. Probationary employees will be laid off.

B. Employees with seniority will be interviewed by the Personnel Department and in the presence of a bargaining committee member. (Time spent by the bargaining committee member shall be equally divided between Account No. 512-141.) The following procedure will take place at the interview:

- (a) Where there are one (1) or more jobs which in the opinion of the Company an employee is qualified to perform, he will be offered such job. He shall have thirty (30) days to fulfill the job satisfactorily. Failing to fulfill the job satisfactorily in thirty (30) days, he will be reassigned to another job by the Company. He will have thirty (30) days to perform to established standards or be laid off.

Where there is no job, which in the opinion of the Company an Employee is qualified to perform, the employee will not be offered a job. However, such an employee shall have the right to exercise his seniority, providing he qualified under the bumping provisions as set forth in subparagraph (b) below.

- (b) If an employee prefers some other job than the one offered to him, he shall be required to exercise his seniority on the job he prefers. However, he must be qualified to perform the job into which he bumps and be able to convincingly show such qualifications within five (5) working days from the date he starts to work on a job in labor grades 7 through 10 or within ten (10) working days from the date he starts to work on a job in labor grades 1 through 6 during which time he will be acquainted with the job content by the foreman or other instructor. Failing to fulfill the requirements of the job in the time periods specified above, he shall be referred back to the Personnel Department for placement on any job the Company chooses. He will have ten (10) days or such shorter period as may be mutually agreed between the Union committeeman responsible for transfers and the employee's foreman to perform to the established standards or be laid off. In order to exercise his seniority as mentioned above on jobs in labor grade 1 through 6, he must have had previous experience on this or related work. Claims of previous experience gained at plants other than Webster will be verified by the Personnel Department.

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4.09. Job Posting.

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7. The provisions of this paragraph 4.09 shall not apply to assistant foremen positions. Employees designated as assistant foremen shall be selected and assigned by the Company. Prior to the designation of an employee as assistant foreman, the superintendent will discuss the proposed designation with the Union committeeman assigned to job posting.

4. That Michael F. Flynn, hereinafter referred to as the Grievant, whose date of hire was April 23, 1974, was removed from a Labor Grade 3 position of setup man on December 12, 1984, and given a temporary transfer to a Labor Grade 5 position; that on or about April 29, 1985, the Grievant indicated that he wanted to exercise his rights to bump into the Assistant Foreman position in the Inspection Department, which has been held by John Rowley since 1981; that the Employer denied the Grievant the right to bump on the basis that he had no experience in the position; that the Grievant was then permanently transferred to avoid layoff (TAL) to the Labor Grade 5 position to which he had been temporarily transferred; that on April 29, 1985, the Union filed a grievance on behalf of the Grievant alleging a violation of Sec. 4.08 of the agreement by the Employer for its refusal to allow the Grievant to bump Rowley from the Assistant Foreman position; and that the grievance was processed through the grievance procedure and denied at Step 4, the final step of the grievance procedure.

5. That from January 5, 1976 until August 16, 1976, the Grievant held the position of Layout Inspector, a Labor Grade 6 position; that the position of Layout Inspector was eliminated in 1981 when the person holding that position retired and was not replaced; that the duties of the Layout Inspector were then assigned to the Assistant Foreman; that the equipment used by the Assistant Foreman to perform layout inspection changed in 1983 when the Cordax measuring device was retrofitted with a P-3 computer; that the new system requires knowledge of the computer in order to operate the device; that the Assistant Foreman in the Inspection Department is also responsible for the Federal Gauging system, gear checking equipment, involute machine, roundness checking machine and the magniflux; that the Assistant Foreman runs the Department in the absence of the Chief Inspector including attendance at management meetings; and that the Assistant Foreman deals with vendors and directs and assists floor and bench inspectors.

6. That the Grievant has not previously held the position of Assistant Foreman; that while the Grievant previously held the Layout Inspection job, the duties of that job make up only a part of the Assistant Foreman's present duties; that due to the changes in equipment, it would take some weeks of training for the Grievant to be able to perform the layout inspection duties now performed by the Assistant Foreman; that the Grievant's attendance and disciplinary record established that he lacked the necessary characteristics to perform the administrative and supervisory functions of the Assistant Foreman position; and that the Grievant on April 29, 1985, was not qualified to perform the job of Assistant Foreman.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the Grievant exhausted the grievance procedure set forth in the parties' collective bargaining agreement, and thus, the jurisdiction of the Wisconsin Employment Relations Commission may be invoked to determine the merits of the grievance.

2. That inasmuch as the Grievant was not qualified to perform the job of Assistant Foreman, the Employer's refusal to permit him to bump into the Assistant Foreman job did not violate the parties' collective bargaining agreement, and therefore, was not violative of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER/1

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 1st day of October, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Lionel L. Crowley, Examiner

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- 1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

WEBSTER ELECTRIC COMPANY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

In its complaint, the Union alleged that the Employer committed prohibited practices by denying the Grievant the right to bump a less senior employee in the Assistant Foreman classification in the Inspection Department, a violation of Sec. 4.08B of the parties' collective bargaining agreement. The Employer denied that it violated the agreement by its refusal to allow the Grievant to bump into the Assistant Foreman position.

UNION'S POSITION

The Union contends that Sec. 4.09, Job Posting, is not applicable to bumping rights. It argues that the Grievant had the right to bump into the Assistant Foreman position pursuant to Sec. 4.08 of the agreement. It submits that the Grievant was qualified for the job as he had previously performed the Layout Inspector's job and the Employer had filled the Assistant Foreman's job from the Layout Inspector's classification. It concludes that the Grievant should have been allowed to bump into the Assistant Foreman's job and should be made whole for all wages lost since April 29, 1985.

EMPLOYER'S POSITION

The Employer contends that the Union failed to meet its burden of proving that the Employer acted arbitrarily, capriciously or discriminatorily when it determined that the Grievant was not qualified to bump into the Assistant Foreman position. It asserts that the Grievant was not entitled to a ten day trial period because he was not qualified for the job as he had no previous experience in it or related work. It submits that although he had been a Layout Inspector in 1976, this is only one small part of the overall job of Assistant Foreman and the evidence failed to demonstrate that the Grievant had the qualifications or experience to perform the other duties of the position. It claims that the layout duties have changed dramatically since 1983 and the Grievant would require extensive training beyond the ten day trial period. It maintains that the intent and purpose of Sec. 4.08(b) in a bumping context is that the Grievant must have the training and experience to perform all duties of the job and the Grievant fails to meet this requirement. The Employer takes the position that because the Assistant Foreman position requires an individual who can command the respect of employees whom he supervises, the Grievant's disciplinary and attendance record establishes that he would not engender such respect. Thus, it insists that the Grievant did not satisfy the contractual requirements to bump into the Assistant Foreman position under Sec. 4.08(b).

The Employer also claims that under Sec. 4.09 of the agreement, it has the unilateral right to select and remove Assistant Foremen, so, if Sec. 4.08 permitted bumping into the position, the Employer could remove the employee. It submits that this is nonsensical, thus it must be concluded that bumping rights under Sec. 4.08(b) do not apply to the Assistant Foreman position.

The Employer alleges that the record affirmatively establishes that it did not act arbitrarily, capriciously or discriminatorily when it refused to permit the Grievant to bump. It points to the records of attendance and discipline of the other working foreman to demonstrate that the Grievant was not held to higher standards. It notes that no other employee without experience as an Assistant Foreman has been allowed to bump into the Assistant Foreman classification. The Employer asks that, based on the entire record, the complaint be dismissed.

DISCUSSION

Section 4.08, 2.B.(b) of the parties' collective bargaining agreement provides that a senior employee may bump into a job held by a junior employee provided he is "qualified to perform the job into which he bumps", and in "order to exercise his seniority . . . , he must have previous experience on this or related work." Arbitrators have generally held that an employee must be currently qualified before

he can exercise the right to bump. 2/ Section 4.08 provides for a ten day period to allow an employee to show he is qualified and be acquainted with the job content by the foreman. However, this trial period is not a training period. 3/ The ten day period is to familiarize one with the job rather than to learn the skills necessary to perform the job and the trial period is not automatic unless the employee already possesses the necessary skills or is qualified for the job. 4/ This requirement is made clear by the language of Sec. 4.08 that an employee must have had previous experience on this or related work. Additionally, in order to bump into the job, the senior employee must be able to perform all the duties assigned to that job. 5/ The determination of whether or not an employee is initially qualified so that he will be given ten days to convincingly show he is able to do the job is vested in the Employer and this determination is entitled to great weight absent a showing that the Employer acted arbitrarily, discriminatorily or in bad faith. 6/

Application of the above principles to the Grievant's case based on the evidence presented supports the Employer's decision that the Grievant was not qualified and would not be able to perform the job satisfactorily after the ten day familiarization period.

The Grievant did not testify and the only evidence of his qualifications were that he held the Layout Inspector classification in 1976. 7/ The Layout Inspector classification was eliminated in 1981 and the functions that had been assigned to that classification were taken over by the classification of Assistant Foreman. 8/ It must be noted that prior to 1981 the Assistant Foreman classification already existed 9/ and the assignment of layout inspection duties to that classification was only part of and in addition to the duties already assigned to it. 10/ The equipment required to perform layout inspection duties has changed significantly since 1983 and the evidence established that one week of formal training would be required to learn to operate just the Cordax machine. 11/ Additionally, the Assistant Foreman was responsible for other equipment such as the Federal Gauge System, 12/ gear checking, involute machine, roundness checking and the magniflux. 13/ The evidence failed to demonstrate that the Grievant presently possessed any qualifications to perform these duties. The Chief Inspector who supervises the Assistant Foreman testified without contradiction that it would

2/ Murphy Oil U.S.A., Inc., 86 LA 54 (Allen, 1985).

3/ Westvaco Corp., 80 LA 118 (Ipavec, 1982); Columbus Bolt & Forging Co., 35 LA 397 (Stouffer, 1960); Federal Paper Board Co., 51 LA 49 (Krimsley, 1968); Reynolds Metal Co., 66 LA 1276 (Volz, 1976); Elkouri and Elkouri, How Arbitration Works, (BNA 3d Ed 1973) at p. 585.

4/ Dentsply International, Inc., 85 LA 24 (Murphy, 1985); Airwork Corp., 83 LA 977 (Handsaker, 1984).

5/ Airwork Corp., 83 LA 977 (Handsaker, 1984); Sheldahl, Inc., 78 LA 706 (Rotenburg, 1982).

6/ Airwork Corp., 83 LA 977 (Handsaker, 1984); Social Security Administration, 69 LA 1239 (Kaye, 1977), Federal Paper Board Co., 51 LA 49 (Krimsley, 1968); Semling-Menke Co., 62 LA 1184 (Bilder, 1974); Reynolds Metals Co., 66 LA 1276 (Volz, 1976).

7/ Jt. Ex.- 3

8/ TR-87

9/ Jt. Ex.- 5, TR-16, 17

10/ TR-87

11/ TR-89-91

12/ TR-95

13/ TR-96

take substantial training in order to be able to perform the Assistant Foreman duties and the Grievant lacked this training. 14/

Additionally, the evidence established that the Assistant Foreman had certain administrative duties such as acting on behalf of the Chief Inspector during any absence by him. 15/ The Chief Inspector testified, again without contradiction, that the Grievant would require substantial training and did not have the ability to perform these duties at the present time. 16/ Additionally, the Assistant Foreman's duties are to assist the Foreman, to assign work, review work assignments and train employees. 17/ It is undisputed that the Grievant has not previously been an Assistant Foreman. The Grievant's disciplinary and absenteeism record established that he lacked the necessary characteristics as testified to by Mr. Shuman, the Director of Human Resources, to perform the Assistant Foreman's duties. 18/

Clearly, the evidence establishes that the Grievant lacked the qualifications to perform all the duties of the Assistant Foreman at the time of bumping. The Grievant may have been qualified at one time to perform a part of the Assistant Foreman's duties, but he has not demonstrated that at the time of bumping, he was qualified to perform these or the other duties of the position without substantial training. It must be concluded that the Employer's determination that the Grievant was not qualified for the job has not been shown to be arbitrary, discriminatory or in bad faith. Therefore, the Employer did not violate Sec. 4.08 of the agreement, and consequently, has not violated the Wisconsin Employment Peace Act.

One further issue needs to be addressed and that is the Employer's assertion that Sec. 4.09 precludes the Grievant from the right to bump under Sec. 4.08. The Employer's contention is not persuasive. Section 4.09 provides for a job posting system and Subsection 7. provides that it does not apply to Assistant Foreman positions. The Assistant Foreman position is in the bargaining unit and is not specifically excluded from the layoff or bumping procedure. 19/ Layoff by seniority is quite different from selection of an Assistant Foreman in the first instance and merely because he may be selected without regard to seniority has nothing to do with his relative standing among all other bargaining unit employees should a layoff occur. 20/ The Employer does not have the absolute right to retain the Assistant Foreman and he can be bumped by a qualified senior employee. 21/ Therefore, the Employer's reliance on Sec. 4.09 is erroneous. However, as noted above, the Grievant did not have the qualifications to perform the Assistant Foreman's job at the time of bumping, and thus, the Employer was not obligated to permit him to bump under Sec. 4.08 rather than denying the bumping pursuant to Sec. 4.09. For the above reasons, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 1st day of October, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

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- 14/ TR-99
15/ TR-97-98
16/ TR-99
17/ TR-32
18/ TR-46, Co. Ex. 4 & 5.
19/ Jt. Ex. 2 (4th Step Reply of T. M. Shuman admitting that the position is not exempt from bumping); Co. Ex. 6; TR-56.
20/ Monroeville Dodge, Inc., 75 LA 521 (Kreimer, 1980).
21/ Bechtel Power Corp., 73 LA 128 (Oldham, 1979).