

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
SUB-ZERO FREEZER COMPANY, INC. :
and : Case 53
: No. 41968
LOCAL UNION 565, SHEET METAL WORKERS' : A-4420
INTERNATIONAL ASSOCIATION, AFL-CIO :
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Appearances:

Mr. Paul Lund, Business Manager and Financial Secretary Treasurer, for the Union.
Mr. Donald D. Emerich, Personnel Director, for the Company.

ARBITRATION AWARD

Pursuant to the terms of the parties' 1988-1990 bargaining agreement, the undersigned was designated by the Wisconsin Employment Relations Commission as arbitrator to resolve a grievance. Hearing was held in Madison, Wisconsin on May 16, 1989. No transcript of the hearing was taken and the parties submitted written argument, the last of which was received on June 20, 1989.

STIPULATED ISSUE:

The parties agreed during the hearing that the undersigned was to resolve the following issue:

Did the Company violate the contract when it found the grievant, Jim Collins, ineligible for a job posting for a first-shift Sheet Metal Department job opening? If so, what remedy is appropriate?

POSITIONS OF THE PARTIES:

The Union

The Union argues that the Company improperly denied the grievant the Sheet Metal job by applying a nine-month waiting period policy which is in conflict with the parties' agreement. The Union contends that only after the grievance was filed did the Company assert that the grievant's medical condition made him incapable of satisfactorily performing the job. The Union asserts that the Company ought not be allowed to try to salvage its position with a new theory and further contends that the grievant's medical condition would not prevent him from satisfactorily performing the work in question.

As the most senior qualified bidder for the job in question, the Union requests that the grievant be awarded the job in question.

The Company

The Company asserts that the grievant was properly denied the posted job primarily because his medical condition made him incapable of performing same and also because he had not completed the necessary waiting period. The Company contends that the Sheet Metal job involved work of the same type which had caused and aggravated the grievant's medical condition, a condition which the Company reasonably believed continued to exist when the job was posted. The Company further argues that application of a nine-month waiting period to the grievant's bid is proper under the parties' past practice and the contract's management's rights clause.

Given the foregoing, the Company asks that the grievance be denied.

DISCUSSION

Under Article XIV, Section 6 of the parties' agreement, the right of the most senior bidder to receive a posted job is limited by the following language:

" . . . provided he/she is capable of satisfactorily performing such job in the opinion of both the Union and the Company."

Here, the Company's initial written response 1/ to the grievance identified the grievant's tendonitis as a basis for denying him the job in question.

The record establishes that at the time he signed the posting, the grievant was still bothered by tendonitis. The record further establishes that repetitive arm motion and lifting aggravate the tendonitis and that the duties of the job the grievant wanted required such actions. It is conceivable that the grievant is correct in his belief that the new job would put less strain on his tendonitis because it does not involve use of a grinder. However, as the record establishes that the Company had a reasonable basis in fact for concluding that the grievant's medical condition would prevent him from satisfactorily performing the new job and as there is no contractual provision which obligates the Company to give the grievant a trial period in the new job under the instant circumstances, I conclude that the Company did not violate the contract by denying the grievant the job and hereby dismiss the grievance.

Given this conclusion, I need not and do not express any opinion on the validity of the Company's waiting period theory.

Dated at Madison, Wisconsin, this 13th day of September, 1989.

By _____
Peter G. Davis, Arbitrator

1/ The Union has correctly noted that during the grievant's initial oral discussion of his grievance with his foreman, no mention was made of the tendonitis. However, as the medical condition was raised in the Company's first response after the grievance was reduced to writing and as the evidence presented is not sufficient to establish that the Company's decision was based exclusively on the "waiting period" theory, I find it appropriate to consider the grievant's medical condition in this Award.