

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 UNITED STEELWORKERS OF :  
 AMERICA, DISTRICT 32 : Case 12  
 : No. 42633  
 and : A-4483  
 :  
 ALTO-SHAAM, INC. :  
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Appearances:

Mr. John Cleveland, Staff Representative, on behalf of United  
 Steelworkers of America, District 32.  
Mr. James C. Schalow, Labor Representative, on behalf of Alto-Shaam, Inc.

ARBITRATION AWARD

United Steelworkers of America, District 32, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the Alto-Shaam, Inc., hereinafter the Company, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The Company subsequently concurred in the request and the undersigned was appointed to arbitrate in the dispute. A hearing was held before the undersigned on October 19, 1989, in Menomonee Falls, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by November 2, 1989. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

The parties stipulated there is no procedural issue.

The Union would state the issue as to the merits as being:

Did the Company violate the Agreement when it denied the grievant, Troy DeStefano, the posted vacancy in the Glass Assembly Department? And if so, what is the remedy?

The Company would state the issue as being:

Did the Company violate the labor agreement between the parties when it did not award the position posted on February 4, 1989 to Troy DeStefano?

The undersigned concludes that the Union's statement adequately frames the issue to be decided.

CONTRACT PROVISIONS

The parties cite the following provisions of their Agreement:

SECTION 7 - SENIORITY

. . . .

7.2 Seniority shall govern in all cases of promotion, demotion, lay-off, recall or transfer provided the employee has the ability to perform the work. The initial determination is to be made by the Company, subject to the Grievance Procedure.

. . . .

SECTION 8 - JOB VACANCIES

8.1 Job vacancies shall be posted on the bulletin board for four (4) business days. Employees interested may obtain applications from the Personnel Department. Vacancies will be filled by seniority provided the employee is qualified and has the ability to perform the work. In order to make a successful application for a posted job vacancy, an employee must not have been the successful applicant for a posted job

vacancy within the previous six (6) month period, unless he has been involuntarily removed from such job. These requirements may be waived by mutual agreement executed in writing between the Company and the Union.

#### BACKGROUND

The Grievant, Troy DeStefano, had been employed by the Company since May of 1984 and at the time of this grievance held the position of Assembler in Department 05.

On February 21, 1989 the Company posted the job, "Glass (Experience)" in Department 01, Fabrication. The Grievant had at times been temporarily assigned to work in the Glass Department when he was on "light duty" or when the employe in that department had needed help, for a total of approximately six months in aggregate, most of it occurring before the posting, but some occurring after the job was awarded. The Grievant was the most senior employe to sign the posting for the job, but it was awarded to a less senior employe, Bink.

The instant grievance was filed on the basis of the Company's awarding the Glass Department job to a less senior employe. The parties proceeded to arbitrate this dispute before the undersigned.

#### POSITIONS OF THE PARTIES

##### Union:

The Union takes the position that the Company violated the parties' Agreement by not awarding the Glass Department job to the Grievant. In support of its position, the Union asserts that Section 7.2 requires that seniority shall "govern in all cases of promotion . . . provided the employee has the ability to perform the work", and that Section 8.1 provides that vacancies be filled "by seniority provided the employee is qualified and has the ability to perform the work".

The Union notes that the Plant Superintendent, Lamondo, stated in his response to the grievance that Bink was awarded the job based on his having more experience. The Agreement requires that the job be awarded based on seniority to the qualified employe who is able to do the job. According to the Union, the evidence establishes that the Grievant can perform the work required of the job and that he was the senior employe that applied for the job. The Union cites the testimony of those employes who worked on units or "finalized" units that had parts from the Glass Department produced by the Grievant, as establishing his ability to produce parts that were used in the manufacture of an acceptable quality end product. The Union also asserts that the employe who had been in the Glass Department, Smith, testified that the Grievant was qualified to perform the required work. Also noted in that regard is the Company's assignment of the Grievant to the Glass Department and the fact that some of the assignments occurred after he was denied the job.

Since the Grievant was the most senior qualified employe to apply for the Glass Department job, he should have received the position. As relief, the Union requests that the Grievant receive the difference between his rate of pay and the rate paid to Bink from the time Bink was assigned to the Glass Department to the last day the Grievant worked. 1/

Company:

The Company first notes that Section 7.2 of the Agreement provides that the Company makes the initial determination as to whether an employe has the ability to perform the work subject to the grievance procedure. The Company asserts that to prevail the Union must show that management's action was capricious, arbitrary, discriminatory or unreasonable. According to the Company, the evidence presented clearly proved the Grievant did not have the ability to perform the work and was not qualified. Given the amount of time the Grievant was assigned to the Glass Department, he had equal access to the opportunity to prove his qualifications. His performance was given fair consideration by the incumbent in the job, Smith, and by Lamondo, who made the initial determination, and both testified the Grievant was not qualified to perform the work. Those witnesses knowledgeable about the operation testified that the most important job in the Glass Department is cutting glass, and the Grievant never performed that job. As to the letter from his outside employer that the Grievant offered at the hearing, the Company asserts that it states he learned to cut glass on that job, but does not say when he learned. Given his failure to cut glass during his employ with the Company, his failure to produce such evidence of experience when he applied for the job, and the lack of any mention of experience on his employment application, it is reasonable to infer he acquired the ability sometime after the job in question was filled.

The Company contends that while the Agreement is silent as to the factors to be considered in determining ability, management is entitled to use any method to determine ability as long as it is fair and not discriminatory. Such factors as a trial period on the job and the opinion of supervision, already addressed, should be considered, as should employe production records. A review of the latter shows the Grievant's production record was "subpar". Given such proof as to the Grievant's efficiency, it cannot be said that the Company's decision not to place him in a one man department was arbitrary, capricious, etc. The Company further asserts that this is further born out by a comparison of the Grievant's production record with that of Bink's, the employe who got the job, i.e., 54% vs. 100+%.

The Company concludes that its decision that the Grievant was not qualified and not able to perform the work required in the Glass Department was based on objective evidence and should be upheld.

DISCUSSION

The parties have cited two provisions of the Agreement as controlling in the filling of vacancies. Section 7.2 provides that seniority shall govern provided the employe "has the ability to perform the work", and also provides that the Company will make the initial determination in that regard, "subject to the Grievance Procedure". Section 8.1 provides, in relevant part, that "Vacancies will be filled by seniority provided the employee is qualified and has the ability to perform the work".

It is noted that the contract does not provide that seniority only governs where ability is "relatively equal". Therefore, it is not a question of whether Bink was more experienced or better qualified than the Grievant, rather, it is a question of the Grievant's qualifications and ability to perform the work. In this case the Company decided that the Grievant was not qualified for the position of Glass Department (Experienced) and did not have the ability to perform the work required in the position.

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1/ The Grievant left the Company's employ in October of 1989.

The Company cites the opinions of Smith and Lamondo that the Grievant was not qualified, the Grievant's lack of experience cutting glass, and what it characterized as a "subpar" production performance, as the bases for its determination. Smith testified that he based his opinion of the Grievant's ability on his having worked with the Grievant at the times the latter was temporarily assigned to help Smith in the Glass Department. Smith's un rebutted testimony was that cutting glass was the most important step in the job. The evidence indicates that at the time the determination was made that the Grievant was not qualified for the job, management had no information available as to the Grievant's glass cutting skills other than Smith's observations and the Grievant's initial employment application. Smith testified that while the Grievant at times ran the saw or sander, he never cut glass while working in the Glass Department. The Grievant testified to the same and also that he was only left to work by himself for short periods when Smith would have to leave.

The letter from Trier's Concession Services offered by the Grievant at hearing does not establish that he had the ability to cut glass in February of 1989 when the Glass Department job was posted. The letter is dated July 25, 1989 and stated, in part, that:

Troy worked for us for 3 months regularly and has done work for us when needed since then. He gained the majority of his glass/plastic experience when he was with us regularly.

The letter does not indicate during what time period the Grievant worked regularly for Trier's and gained the glass cutting skill. More importantly, there is no evidence to indicate that the Grievant ever made the Company aware of the work he was doing at Trier's, even assuming he was working there at the time he signed for the Glass Department job. The Company can only be expected to consider information it had available or to which it had reasonable access. If the Grievant possessed a critical skill for the job in question and had learned that skill after joining the Company, but outside of its employ, he was obligated to inform the Company of that fact at the time he applied for the job, if he wanted it to be considered in determining his qualifications and ability.

In asserting the Grievant was qualified, the Union relied primarily on the testimony of fellow employes that the units the Grievant worked on while working in the Glass Department contained as good a level of workmanship as units worked on by other employes. There is, however, no indication as to the type of work done by the Grievant on those units, other than it did not include cutting the glass for those units.

Given the unrefuted testimony of the former incumbent in the job that cutting glass is the most important step in the job, and the Grievant's seeming lack of experience in that skill at the time, the Company reasonably concluded he was not qualified for the Glass Department (Experienced) position. Having reached that conclusion, it is not necessary to address the question of whether the Company correctly concluded that the Grievant's production record made him unfit to work alone.

Based upon the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 3rd day of January, 1990.

By \_\_\_\_\_  
David E. Shaw, Arbitrator