

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :  
of a Dispute Between :  
TEAMSTERS LOCAL UNION NO. 43 :  
and : Case 16  
: No. 44102  
: A-4644  
MODERN BUILDING MATERIALS, INC. :  
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Appearances:

Mr. Charles G. Schwanke, President, Teamsters Local Union No. 43,  
appearing on behalf of the Union.  
Mr. Bill Fassbender, Representative, appearing on behalf of the Employer.

ARBITRATION AWARD

Teamsters Local Union No. 43, hereinafter referred to as the Union, and Modern Building Materials, Inc., hereinafter referred to as the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The parties jointly requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Kenosha, Wisconsin on August 7, 1990. The hearing was not transcribed and the parties orally stated their respective positions at the conclusion of the presentation of the evidence.

BACKGROUND

On May 2, 1990, the Employer's plant was shut down except for a few employees. The Employer was making benches in the wet cast area of the plant. Normally, the Employer makes two benches at one time in the wet cast area, however, on May 2, 1990, its mixer was not working and it had to call in Redi-Mix for a load of concrete. This required it to make eight benches at one time and it needed two qualified people who could each do four benches at one time. The Employer assigned this work to its most qualified employees, Tom Faulkner and Don Hoff. The grievant has greater seniority than Hoff and had the Employer's mixer been working so that only two benches at a time would be made, the grievant would have been called in, however, the Employer determined that the grievant could not do four benches at a time because he had not poured a bench in years. Additionally, the Redi-Mix concrete delivery was not on time being one to one and one-half hours late in delivering the concrete, so the Employer had to utilize supervisors to assist in making the eight benches. The grievant filed the instant grievance alleging the Employer violated the seniority provision by calling in Hoff who was junior to him and by using supervisors to do the work.

ISSUE

The parties stipulated to the following:

Did the Company violate the Seniority clause, Article 12, on page 4 of the agreement/or Article 15 of the agreement?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 12. SENIORITY

For the purpose of this Article, "Seniority" of an employee shall be defined as his continuous service with the Company from the first day worked until termination.

The Company and the Union agree that where qualifications and ability to perform work are equal overall, seniority shall prevail. In case of lay-offs or reduction in force. (sic) The last man hired within the bargaining unit shall be the first laid off unless he possesses qualifications and abilities to perform work not possessed by a senior employee. In such cases then the junior employee shall be retained and the next man in seniority shall be laid off. In recalls the same procedure in reverse order shall prevail except that the Company shall not be required to recall a laid off employee when the work for which he would be recalled is not expected to last for one (1) week or more. Whenever possible, seniority shall prevail for Saturday, Sunday and holiday work.

. . .

ARTICLE 15. WORK BY SUPERVISORS

Individuals outside the bargaining unit, such as managerial or supervisory employees may perform bargaining unit work in cases of operational necessity (defined as absenteeism or unavailability of qualified personnel to perform the work when it is needed), training, instruction or experimental work. Non-bargaining unit personnel may also perform unit work customarily performed by employees, providing such work does not preclude regular full-time bargaining unit employees from working the normal scheduled work week.

UNION'S POSITION

The Union contends that the grievant is qualified to do the work and has greater seniority than Hoff, and therefore, the grievant should have been called in to perform the work and the Employer's calling in the less senior employe violated Article 12, the seniority clause of the contract.

The Union also argues that the Employer violated Article 15 of the agreement because it utilized supervisors to perform bargaining unit work and thereby deprived members from doing the work. It asks that the grievant be made whole.

EMPLOYER'S POSITION

The Employer contends that it did not violate the agreement, either Article 12, the seniority provision or Article 15, the prohibition of work by supervisors. It contends that the grievant is normally a machine operator who has not poured a bench in many years and Hoff normally does this work and thus was better qualified and able to perform the work especially where eight benches had to be done at one time as opposed to the normal two at a time. It submits that the qualifications and ability were not equal under the circumstances of this situation, so it picked the less senior employe without violating Article 12.

With respect to the use of supervisors, the Employer claims that operational necessity required it to use supervisors because the Redi-Mix truck did not show up on time and it needed all hands immediately to do the work and so supervisors helped out. It asks that the grievance be denied.

DISCUSSION

Article 12 of the parties' agreement provides that where qualifications and ability to perform work are equal overall, seniority shall prevail. Here, the undersigned finds that the qualifications and ability to perform the work are not equal. The basis for this conclusion is that the grievant does not normally perform this work and Don Hoff does. The Employer's mixer was not in operation so Redi-Mix delivered the concrete which required eight benches be made at one time rather than the normal two which meant the Employer needed someone who could do four benches at one time by himself. Although the grievant would have been able to do the normal two benches under supervision, it was not established that he could do four alone given the long time since he had performed this work. Therefore, Hoff had greater qualifications and ability to do this particular job on this date and the Employer did not violate the Seniority provision, Article 12, by calling in Hoff who is less senior to the grievant.

Article 15 prohibits supervisory employes from performing bargaining unit work except in cases of operational necessity, training, instructions or experimental work. The only exception applicable in this case is operational necessity which is defined as the unavailability of qualified personnel to perform the work when it is needed. The evidence established that the Redi-Mix delivery was one hour to one and one-half hours late and its late arrival required all hands including supervisors to assist so the work could be completed. The Redi-Mix delivery being late was not within the Employer's control and the evidence failed to show that qualified personnel were available to assist when the delivery was made. Therefore, it is concluded that the work done by supervisory personnel fell within the operational necessity exception to the prohibition of supervisors performing bargaining unit work and the Employer therefore did not violate Article 15 of the agreement.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The Employer did not violate the parties' agreement by its failure to call in the grievant and instead used a junior employe to pour benches in the wet cast area, nor did it violate the agreement when supervisory personnel

assisted in pouring the benches, and therefore, the grievance is denied.

Dated at Madison, Wisconsin this 22nd day of August, 1990.

By \_\_\_\_\_  
Lionel L. Crowley, Arbitrator