BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AFL-CIO, LOCAL 565	Case 59 No. 46137 A-4824
and	
CARNES COMPANY	

Appearances:
Mr. Paul Lund, Business Manager and Financial Secretary/Treasurer, Sheet Metal
Michael, Best & Friedrich, Attorneys at Law, by Mr. Marshall R. Berkoff, on beh

ARBITRATION AWARD

Sheet Metal Workers International Association, AFL-CIO, Local 565, 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 Carnes Company, 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 designated to arbitrate in the dispute. A hearing was held before the undersigned on October 30, 1991 in Madison, Wisconsin. There was a stenographic transcript made of the hearing and the post-hearing briefing schedule in the matter was completed by January 15, 1992. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

The parties stipulated to the following statement of the issue:

> "Did the Company violate the collective bargaining agreement by terminating the light duty assignment of grievant and returning her to industrial injury status February 18, 1991? If so, what remedy, if any, is appropriate?"

CONTRACT PROVISIONS

The following provision of the parties' 1989-1992 Agreement is cited:

ARTICLE 13

SENIORITY

. . .

Section 3 - The principle of seniority shall govern the control in all cases of promotion or demotion, within the bargaining unit, transfer, shift assignment, increase or decrease in the work force, qualifications and ability being given due consideration. In the event of layoffs, the last employee hired shall be the first laid off and recalls shall be made in reverse order. Deviations from the seniority provision may be made in cases of exceptionally skilled employees by agreement from the Union.

Section 4 - When it becomes necessary to reduce the work force by laying off employees, the Company will follow these procedures:

1. The least senior employees within a classification in any department involved in a reduction will be the first to leave the department.

2. The Company will, by seniority, place such displaced employee in other departments when he can maintain his present classification.

3. If it is not possible for the displaced employee to maintain his classification, he will be offered one of the following options:

   3.1 He will be offered a job in a classification having a comparable pay rate.

   3.2 He may take a lower rated job provided his seniority allows or;

   3.3 He may take a voluntary layoff.

   In the event the employee elects 3.2 or 3.3 above, he will not be upgraded or recalled until there is an opening in his classification.

4. If the employee cannot be placed through 2 or 3 above, he may bump any less senior employee on any job provided he is able to satisfactorily perform the work.

The Company shall advise the Union of such layoffs together with a list of the employees so

affected three (3) working days in advance. An employee who feels his seniority was not given proper consideration may have access to the grievance procedure, provided that he lodges his complaint prior to the date of layoff or transfer.

Employees who have accepted lower rated jobs or who are currently on voluntary layoff may return to the higher rated job when it becomes available.

Employees will be recalled from layoff in seniority order.

The Company will make every effort to place the recalled employee in the highest rated classification he held prior to layoff. If such classification is not available, the Company will then place him in a classification with a comparable wage rate. If this is not possible, a lesser job will be offered until such time as openings occur in the employee's previous classification or a comparable pay classification.

Employees declining a job offer under the provisions of this Section shall, after twelve (12) months, nevertheless be eligible to bid for posted openings in said classification.

BACKGROUND

The Company is a manufacturer of ventilation and air movement products in the commercial building industry such as grills, registers, air diffusers, exhaust fans, etc., and its plant is located in Verona, Wisconsin. Since at least 1965 the Union has been the collective bargaining representative of the Company's production and maintenance employes.

The Grievant, Rhonda Moore, has been employed by the Company for approximately eight years and has been an Assembler/Machine Operator C or B during that time. Assembler "B" is higher paid than the "C" level. In March of 1989 the Grievant was an Assembler/Machine Operator B in the Packaging Department and was injured on the job.

On May 3, 1989, the Grievant returned to work on a light duty assignment with work restrictions regarding lifting and repetitive hand and wrist movements. On May 5th, she was off work because it was aggravating her injury. On May 8, 1989, her doctor indicated she could return to light duty work with the restrictions that she could not lift over 20 pounds and pivot her hand more than 60 times per hour.

In July of 1989 the Company sent the Grievant's doctor, Dr. Rogerson, a videotape of jobs in Departments 102, 101, 105 for Assembler/Machine Operator C. He reviewed the tape and indicated she could do 4 out of the 7 listed jobs in D102 and 1 out of 4 listed jobs in D101:

D102

Fair	1.	Picking parts-automatics-32 ton
OK	2.	Picking parts-automatics-60 ton
NO	3.	Press Brakes making retainer screws
Fair	4.	Press Brakes making brace
NO	5.	35 ton punch press (not automatic)

Fair 6. 60 ton punch press (not automatic)
NO 7. Press brakes (same as 3 and 4)

D101

OK 8. Roll form-picking parts (grille blades)
9. Roll form-picking and stacking parts (deflector)
(took video of parts with no operator) (support bar)
10. Roll form-picking parts-stacking (damper blade)
11. 180 ton press

Dr. Rogerson noted:

> Feel patient could return to light duty jobs 2, 8, 4, 6 an (sic) 1 as of 8-21-89.
>
> J.S. Rogerson /s/
> J.S. Rogerson

The Grievant returned to work per Dr. Rogerson's instructions and was assigned to pick parts on the automatics (Jobs 1 and 2). She was shown a copy of the sheet on which Rogerson had indicated which jobs she could and could not do. She was on and off work through the fall of 1990, at times off due to aggravation of the injury and at times for unrelated medical leaves.

On October 26, 1990, the Grievant saw Dr. Rogerson for a check-up on her injury and took with her a request from the Company that her doctor indicate whether restrictions were to continue, and if so, what they were. Dr. Rogerson indicated on the request/form with regard to restrictions:

> "Continue present restrictions for 6 months."

On that same date the doctor sent the Company's Personnel Assistant, Tammi Stevens, the following letter regarding the Grievant's status:

> Dear Ms. Stevens:
>
> Rhonda Moore returned to my office for follow up on 10/26/90. She is continuing to have difficulties with the flexor carpel radialis tendon insertion at the palm, some intermittent symptoms of irritation of the median nerve and dorsal tenosynovitis in spite of the fact that she has been on light duty situation. At this point I don't feel that further surgical intervention would be of benefit and we have tried just about everything possible from a conservative standpoint. My feeling is that she is generally interested in continuing to work at Carnes and is a well motivated employee. I would like to have her continue with her light duty restrictions that she has at the present time. I think it could be a rather long term situation where she will need these restrictions, if not indefinitely, and we will just have to check her probably on about six month intervals. If her situation worsens or improves, she will get back in touch with me and I will see her sooner for follow up.

> At least at this point in time, I feel that Rhonda will likely need to stay at a C-level work at Carnes indefinitely. Right now I do not foresee her going back to more vigorous B-level work in the near future. I do feel that she has some continued disability in the right hand, which does not appear to be resolving quickly. Hopefully over time it may improve but I am not sure to what extent.
>
> Please let me know if you have any further questions.
>
> Sincerely,
>
> John S. Rogerson, M.D. /s/
> John S. Rogerson, M.D.

The Grievant worked in Department 102 for the most part from October of 1990 until February 18, 1991 when the Company notified her not to come in to work. There is a factual dispute as to whether the Grievant was performing all of the jobs of the "C" classification in Department 102 during that time, as the Union claims, or whether she was only performing approximately 30 percent of those jobs, as the Company alleges.

The Grievant's rehabilitation nurse, Sheryl Becker, sent the following letter of November 28, 1990 to the Company's Worker's Compensation insurance carrier, with a copy to the Company, which read in relevant part:

Dear Christa:

Since my September 5 correspondence to Dr. Rogerson, contact has been maintained with Rhonda as well as her employer. Most recently, I met with Tammi Stevens at Carnes on November 15.

For review, Rhonda remains on light duty for a projected six months. I know she has had a lengthy medical history complicated with tendonitis and some questionable ganglion-type cysts also. She apparently continues to be symptomatic and is in need of restrictions and limitations in order to keep working, to my understanding.

Per your request, this file will be placed on hold from about mid-November to mid-December. My plans are to contact you during the week of December 17 if I have not heard anything prior to this date. Until then, I remain

Very truly yours,

Sheryl E. Becker, R.N., C.I.R.S. /s/
Sheryl E. Becker, R.N., C.I.R.S.

On January 8, 1991, Becker sent the following letter to the Grievant's doctor with a copy to the Company reporting on her interview with the Grievant. That letter stated, in relevant part, as follows:

Dear Dr. Rogerson:

This patient was visited at her home on Wednesday, January 2, per request of Christa Strong at Sentry Insurance. The request was to meet with Rhonda to see how she was doing, medically as well as vocationally.

. . .

Symptom wise, Rhonda indicated she had not improved nor gotten worse since October 1990. She identifies her main problem as tendonitis in her right, lower arm. She says the pain starts in her thumb and comes up over her wrist. She states she has just been "handling it." She says "I just take it one day at a time."

When I asked Rhonda about her left wrist, she says it occasionally flairs (sic) up. She says some days are worse than others.

When I asked Rhonda if there were particular activities at work or at home that tended to aggravate either of these extremities, she indicated it didn't seem to make any difference what she did. When I asked her more specifically about work, she indicated there may be some jobs once in a while that tend to bother and when this happens, she talks to her supervisor and

adjustments are made on the job site.

. . .

In asking Rhonda specifically about how she was doing at work with regard to her job at stacking parts in the press room or feeding a machine, her response was that the employer has done everything they can do to provide suitable work tasks for her. She communicated having taken a loss in salary in that her present placement is in a different department as compared to pre-injury. She communicates she does not think she would be able to return to the heavier type work she was doing pre-injury and seems resolved to a lesser salary.

. . .

At this point in time I do not know how to be of assistance in working with this patient. I need to ask the following questions in regard to her medical status:

1. Has she reached an end of healing?
2. Are there permanent restrictions and limitations?
3. If she has reached an end of healing, what degree of permanency would you award her?

Rhonda tells me her next appointment with you is scheduled for February 22, 1991 at 1:30 p.m.

If there is any way I can be of assistance to you in follow up with this patient, please advise. Thank you for your time and attention to this matter. Remaining,

Very truly yours,

Sheryl E. Becker, R.N., C.I.R.S. /s/
Sheryl E. Becker, R.N., C.I.R.S.

On February 12, 1990, the Grievant's doctor sent the Company's Worker's Compensation insurance carrier the following letter regarding the Grievant's status:

Dear Ms. Strong:

This is in response to your letter of January 4, 1991 regarding Rhonda Moore. The rating that I gave Rhonda was for her right upper extremity. The rating relates to her whole upper extremity and compares her disability to amputation at the elbow. Much of her problem occurs at the wrist but she also has a tenosynovitis that involves her forearm. The restrictions currently imposed on Rhonda I do feel at this point are going to need to be permanent in nature. I do not feel that at this point I would proceed with

any more aggressive medical care. I am not sure whether she will over time see a gradual improvement in her tenosynovitis but I suspect that if she were in a situation that required less repetitive motion of her forearms and wrists, that this might slowly occur.

Please let me know if you have further questions regarding Rhonda.

Sincerely,

John S. Rogerson /s/
John S. Rogerson, M.D.

On February 18, 1991, the Grievant was notified not to come to work. The Grievant subsequently called the Company to ask why she was being laid off and eventually talked to the Personnel Manager, Bill Bacon. Bacon advised her that she was not being laid off, but had been placed back on "Industrial Injury" status because she could not perform all of the duties of the "C" classification due to her work restrictions. Besides the Grievant, the Company returned six other employes to Industrial Injury status, three of which were Assembler "C"'s. The preceding week, the Company laid off eight employes, all of whom were Assembler "C"'s and placed two other employes on Industrial Injury status. In addition, two Assembler "C"'s took voluntary lay off. Department 102 went from five Assembler "C"'s to two, both of which were more senior than the Grievant. Four other Assembler "C"'s were also used temporarily in D102 during that period for short periods and were less senior than the Grievant.

On February 20, 1991, the Grievant's doctor, at her request, sent the Company the following letter:

February 20, 1991

Re: Rhonda Moore

To Whom It May Concern:

This letter is to clarify Rhonda's permanent work restrictions. It is my understanding that she can be permanently at a C level work at the Carnes Company. I do not feel that she will be able to perform the B level activities. The C level work is a restriction that should be permanent.

If you have further questions, please let me know.

Sincerely,

John S. Rogerson, M.D. /s/
John S. Rogerson, M.D.

JSR/jr

ADDENDUM: Rhonda does not need to be placed on any restrictions for C-level work. As long as she does not work in B-level areas, she should be able to tolerate C-level work.

John S. Rogerson, M.D. /s/
John S. Rogerson, M.D.

The Company checked with Becker, the Grievant's rehabilitation nurse, who indicated she felt the doctor had cleared the Grievant to work as an Assembler "C" without restrictions at that level. The Grievant was returned to work on March 4, 1991 as an Assembler "C" without restrictions. She worked in that manner until June 3, 1991 when problems she had in her left arm were aggravated, and since then has worked off and on, at times half days, and at the doctor's direction alternating jobs every two hours. As of October 2, 1991, the Grievant was again off work.

A grievance was filed on the Grievant's behalf regarding the two week period she was placed on Industrial Injury status from February 18, 1991 until March 4, 1991, alleging a violation of Article 13, Seniority, Section 3, of the Agreement. The parties were unable to resolve the dispute and proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union:

The Union takes the position that the Company violated Article 13 of the Agreement when it placed the Grievant on Industrial Injury status for the two week period in question, in effect laying her off out of seniority.

After an on-the-job injury the Grievant returned to work on light duty with certain restrictions per her doctor's orders. She went from the higher paid and more strenuous Assembler "B" classification to the Assembler "C" classification. The latter required less in terms of amount of weight to be lifted and less strenuous physical activity. After her doctor reviewed a videotape of types of level "C" operations, he indicated there were some jobs in that class she could perform and some she should not. That was in the summer of 1989. However, over time the Grievant reached a point where she was performing all of the operations of an Assembler "C" without a problem, including those the doctor had initially indicated she should not do. Her doctor's letter of October 26, 1990 indicated the Grievant could perform "C" level work, but advised against her returning to "B" level work and indicated that was likely a permanent situation.

Due to a decline in work in early 1991, the Company had a lay off situation and decided to select some of the employes on light duty restrictions and notified them not to report for work. Those employes, including the Grievant, were told they were being put on Industrial Injury status because of their work restrictions. The Grievant was told she must be fully capable of performing all of the duties of an Assembler "C".

The Grievant fully believed she could do all of the work as an Assembler "C" and that the only restriction on her at the time was that she could not do "B" level work, per her doctor's letter of October 26, 1990. While she was off work for the two weeks, the work she had been performing was done by a less senior employe. The Union asserts that the Company's actions in placing the Grievant back on Industrial Injury status amounted to a layoff contrary to the seniority provisions in the parties' Agreement.

As a remedy, the Union requests that the Grievant be made whole for the two weeks she was off work.

Company:

The Company takes the position that the grievance is without merit for a number of reasons.

First, there is no provision in the Agreement that requires the Company to assign employes to light duty status, or to layoff or recall such employes by seniority and qualification. Article 13, Section 3, of the Agreement, cited by the Union, does not apply to employes on light duty. Bacon testified that such employes are not in job classifications and are not laid off or recalled as such. The Company has consistently treated employes on light duty in this fashion and in fact there were other employes more senior than the Grievant who were returned to medical leave status on February 18th and no one else filed a grievance. There is no evidence of any grievances being filed in the past in like circumstances.

Second, the Company had the right to rely on the directions of the Grievant's doctor that it continue the light duty restriction on the Grievant for six months. The Company also disputes the Grievant's claim that she was

performing all of the "C" level jobs and was effectively working without restrictions in February of 1991. Her supervisors who assigned her work were limiting those assignments in both time and scope. Her supervisors, the Manufacturing Manager and Bacon, all testified that she was unable to perform approximately 70% of the "C" level jobs in Department 102. Her supervisor testified she spent 99% of her time on the automatic punch presses where the work was to stack light and small pieces in the bins and that she could only be assigned to the manual machines for some runs and only for short periods of time. Those restrictions were significant to the Company when it was reducing the number of Assembler "C"'s in the department from five to two. The two remaining employes would have to be able to handle a broader range of assignments.

The Company had a right to rely on the records and its experience with the Grievant as far as her capabilities when it made its decision. It is the employe's responsibility to advise the Company of any changes in medical status. The fact that the Grievant was able to have restrictions lifted after she was placed back on Industrial Injury status should not create a retroactive liability. The restrictions were in effect until that change was made. The Company cites the doctor's letter of October 26, 1990 as establishing that she was on work restrictions for at least six months from that point. On February 12, 1991, the doctor notified the Company's Worker's Compensation carrier the restrictions would be permanent. Becker's letter of January 8, 1991 indicates that the Grievant was experiencing pain while performing light duty assignments and that adjustments were being made in the jobs. The Company also questions whether her doctor understood that the videotape he had reviewed was not a complete inventory of all the Assembler "C" work. The Company also notes that when the Grievant returned to work and performed all of the "C" level operations her previous medical problems returned. The Company concludes the Grievant has failed to show that she was capable of performing all of the "C" level work.

Being on a light duty assignment the Grievant was not in a classification. Article 13, Seniority, Section 3, only applies to layoff of employes in a classification. The Company cites the references to "classification" in Section 4 dealing with layoff and recall. Further, even if Article 13, Section 3, applied to employes on light duty assignments, that provision provides that seniority would be applied with "qualifications and ability being given due consideration." As the Grievant did not have the ability to perform the available work, she still would not have been retained.

The Company concludes that with the lack of available work at the time it did not have sufficient light duty work to keep the Grievant on and appropriately decided to return her to Industrial Injury status.

DISCUSSION

As the Company asserts, Article 13, Section 4, of the Agreement, which specifically addresses layoffs, provides that layoff is by seniority within the affected classification in a department. The Personnel Director's unrebutted testimony was that if an employe is on a light duty assignment and not capable of performing all of the functions in the classification level at which the employe is working, the employe is not considered to be in a classification. He testified without contradiction that this has been the manner in which employes have been treated in the past without challenge. However, he also testified that in reviewing the Company's manpower needs at the time of the downturn in work, those employes who were on light duty assignments, but who could perform all of the work of a lower classification, here an Assembler "C", were treated as Assembler "C"'s for production purposes and not returned to leave status. (Tr. 124-5) Thus, the question becomes whether the Grievant was

able to perform all of the jobs of Assembler "C" at the time she was returned to Industrial Injury status. If she was, she should have been treated as being in that classification and her seniority should have been applied pursuant to the procedure the Company followed with regard to the employes it did not return to Industrial Injury status.

For the following reasons, it is concluded that the Grievant was not capable of performing, and was not performing, all of the functions of an Assembler "C" as of February 18, 1991 when she was returned to Industrial Injury status. First, the Grievant's two immediate supervisors credibly testified that they took the weight and wrist motion restrictions into account when assigning the Grievant work and that the set-up man on the automatic presses in D102 was also instructed to do so in assigning the Grievant work. Grievant's supervisor during all that time except August of 1990 to December, 1990 was Gary Schmoldt, and Dennis Stampfli filled in during the time he was gone. Schmoldt testified he tried to keep the Grievant primarily on the automatic punch presses and assigned her to other jobs only while the automatics were being set up. In the latter case, Schmoldt testified he would tell the Grievant to stop and let him know if it starts to bother her. Stampfli testified he was aware of the restrictions on Grievant through having filled in for Schmoldt previously for vacations and such, and that he primarily relied on the set-up man for the automatic presses to know whether the Grievant could handle the job. Secondly, there is Becker's letter of January 8, 1991 to the Grievant's doctor wherein she states she visited the Grievant on January 2, 1991. In response to Becker's question about whether there were any activities at work that tended to aggravate her condition, the Grievant stated that there were some jobs once in a while that tended to bother her, but that when it happens she talks to her supervisor and adjustments are made on the job site. The Grievant testified that Becker's letter was accurate as to what she had told Becker. Third, until the Grievant obtained the note from her doctor on February 20, 1991 stating there need not be any restrictions on her performing "C" level work, there was no clear indication on record that the earlier restrictions from 1989 were not to be followed. There is no evidence of any change in restrictions on the doctor's part from those he indicated in 1989 until his note of February 20, 1991. According to all of the Company's witnesses, the Company was still following those restrictions in terms of the jobs and the duration of the jobs that the Grievant was being assigned at the time she was returned to Industrial Injury status. This is further born out by the fact that after being returned to work on March 4, 1991 to do Assembler "C" work without restrictions, she was again off work as of June 3, 1991 due to aggravating a condition in her other arm and wrist and that condition has persisted. It is likely this condition would have been manifested earlier if the Grievant had in fact been performing all of the jobs in the "C" level without restrictions.

Thus, it is concluded that the Grievant was not performing all of the functions of an Assembler "C" in Department 102 without restrictions at the time she was returned to Industrial Injury status on February 18, 1991, and therefore was not in a classification. Given that the Grievant was on a light duty assignment at the time, and that such limited work was not available at the time, and that there is no contractual requirement cited that would require that the Company create such work, the Company properly returned the Grievant to Industrial Injury status until it was made clear that the restrictions were removed.

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

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 7th day of April, 1992.

By David E. Shaw /s/
David E. Shaw, Arbitrator