BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 565, AFL-CIO and CARNES COMPANY of Verona, Wisconsin	Grievance No. 90-06 filed by Terry D. Babler Case 57 No. 44453 A-4681

Appearances:

Mr. Paul Lund, Business Manager, 1602 South Park Street, Madison, WI 53715, appearing on behalf of the Union.

Mr. Marshall R. Berkoff, Michael, Best & Friedrich, 100 East Wisconsin Avenue, Milwaukee, WI 53202-4108, appearing on behalf of the Company.

ARBITRATION AWARD

The parties requested the Wisconsin Employment Relations Commission to designate the undersigned as Arbitrator to hear and decide a dispute concerning the above-noted grievance under the grievance arbitration procedures contained in the parties' 1989-1992 collective bargaining agreement (herein Agreement). The undersigned Arbitrator was so designated by the Commission.

The parties presented their evidence and preliminary arguments to the Arbitrator at a hearing at the offices of the Wisconsin Employment Relations Commission on October 1, 1991. A transcript was made of the proceedings and distributed. After the parties' initial post-hearing briefs were exchanged, the Arbitrator received a letter from Company Counsel on December 18, 1992, advising that "Each of the parties has agreed to waive their rights to file reply briefs," thereby marking the close of the record.

ISSUES

At the hearing, the parties stipulated to the first and third issues noted below, and authorized the Arbitrator to determine whether the Union's or the Company's statement of the second issue was the most appropriate:

1. Is Grievance 9-06 arbitrable?

2. As Proposed By The Union: Did the Company properly follow the procedures set forth in Article 13, Section 4 of the working agreement with regard to the transfer of the aggrieved employes due to the layoff which occurred January 29, 1990?

As Proposed By The Company: Did the Company properly follow the procedures set forth in Subsection 3.1 of Article 13, Section 4 of the working agreement with regard to the transfer of the aggrieved employes due to the layoff which occurred January 29, 1990?

3. If 1 and 2 are so, what shall the appropriate remedy be, if any?

BACKGROUND

Union Steward Terry Babler filed the grievance on January 29, 1990, which addressed a layoff effective the same day. The grievance asserts the Company was not following the "procedures of Section 4 in the contract," and requests that the Company "offer employees losing their job, the next lower rated available job closest to the comparable pay rate of their current classification and not lose their classification status." The "employes losing their job" referred to in the grievance were five employes classified as Assembler B (Kathy Morgan, Herb Federman, Mark Jones, Jeff Zweifel and Laurie Jacoby), two employes classified as Welder B (Frances Powell and Jim Ingwell), and one employe classified as Welder C (Mike Mellor).

The Company offered each of these eight employes the option of moving into open positions in the Assembler C classification. The two employes classified as Welder B were also offered the option of moving into openings in the Welder C classification, but were informed that such a move would result in their loss of the right to transfer to the Welder B classification when a position became available. Powell was the only employe who chose not to move into the Assembler C classification. Moving to the Assembler C classification would have reduced Powell's wage by $1.14 per hour, while moving to the Welder C classification resulted in a loss of $0.15 per hour.

The Company's answer to the grievance at Step 2 stated the procedures followed by the Company thus:

> When it has been necessary to reduce the workforce, the Company has followed Article 13, Section 4, Paragraphs 1, 2, 3.1 and 3.2 in placing displaced personnel in available open jobs. If the available jobs were not acceptable to the employee, they had the option of a voluntary layoff as stated in Paragraph 3.3. In these cases, the

> employees maintained their displaced status. In the event that none of the above changes were acceptable, the employees had the right to create an opening by bumping a less senior employee out of their job as stated in Paragraph 4. When an employee creates their own opening in this fashion, they lose their displaced status. This practice has been consistent and in accordance with the contract.

Babler testified that the Company neither informed the eight employes that there were positions which were closer to their then-effective pay rates and occupied by less senior employes, nor offered them such positions without denying them the status of displaced employes. Babler noted that when the Company closed its Madison plant it placed Madison employes into the Verona plant on the basis of seniority even if that placement bumped a Verona employe from their position. Babler acknowledged that Company Foreman Carl Schaper informed him the Company felt obligated only to inform employes subject to a layoff of the existence of open positions, leaving the employes to determine on their own if they wished to exercise bumping rights to any position occupied by an incumbent employe. Babler acknowledged that an employe who chose to exercise bumping rights into a filled position lost status as a displaced employe, thus forfeiting the right to transfer without going through the posting procedure, back into the classification from which they were displaced. He noted this loss of displaced employe status was known throughout the plant, and was the reason that only Powell chose not to accept a Assembler C position.

Powell testified that she chose to bump Mellor, a less senior employe, from his position as Welder C to avoid a significant pay cut. This was, she stated, the first time she had ever exercised such bumping rights in her eleven years of experience with the Company. Schaper specifically informed her that if she chose to bump Mellor, she would lose her classification as Welder B. She noted that as a result of her decision, employes with less seniority than she has presently work in the Welder B classification. She noted that when the Company closed the Madison plant in 1988, she was bumped from a Welder B position by a more senior Madison employe, and in turn moved Mellor from his position in the Welder C classification on the day shift to a position in the Welder C classification on the night shift. She noted she understood, and retained, her rights as a displaced employe from the Welder B classification, ultimately transferring back into that classification in January of 1989.

Mellor testified that approximately one week before the January 29 layoff, Schaper informed him of the coming layoff and of Powell's decision to bump him from the Welder C classification. Schaper also informed Mellor that the only open positions available were in the Assembler C classification. Mellor, thinking this large drop in pay was unnecessary, asked Schaper if other positions were available for which he could qualify. He stated that Schaper told him that the Company's sole obligation was to identify open positions for him, and that if Mellor chose to bump a less senior employe from that employe's job, it was up to Mellor to do so. Mellor acknowledged Schaper informed him that Mellor could retain his rights as a displaced Welder C only if he accepted the position of Assembler C or took a voluntary layoff. Mellor

stated he felt this deviated from prior layoffs, when the Company would afford an employe a complete view of the options available, including filled positions into which the employe might wish to bump. Mellor noted that he understood the rights of a displaced employe, and that in any layoff situation, before selecting any job movement, he would ask Company representatives if he would retain displaced status after such movement.

Mellor testified that in perhaps January of 1986, when employed as an Assembler B, he bumped an employe in the Shipper classification from the Verona plant into a position in the Madison plant. Mellor did not believe he lost his status as a displaced Assembler B by bumping the less senior Shipper to the Madison plant. He did not, however, specifically know whether or not the employe who moved to the Madison plant was forced to do so. He also testified that in December of 1986, due to a reduction in force, he bumped a less senior employe in the Madison plant from an Assembler B position. He felt the Company had a practice of continuing the displaced status of employes who bumped less senior incumbent employes from their job.

Bill Bacon is the Company's Personnel Manager. He testified that the procedure outlined in the Company's Step 2 answer has been followed for many years. He noted that the procedures were in place at the time he was first employed by the Company, roughly six and one-half years ago. He noted that a displaced employe is one who has been moved out of a classification due to a layoff and placed in an open position. Because the Company allows employes in the same classification to transfer between departments before implementing a reduction, the Company assures that the least senior employes in a classification are selected for a reduction. Once the least senior employe has been so selected, the Company looks for job openings in classifications having a comparable pay rate. Bacon noted the Company defines "comparable" as "identical". If such openings exist, the Company offers the openings to the employes selected for reduction based on their seniority. If such openings do not exist, Bacon testified that the employes selected for reduction must either select openings in lower rated classifications; accept a voluntary layoff; or bump a less senior employe from that employe's job, if the more senior employe is qualified to do the work. The final option, Bacon stated, costs the bumping employe his or her displaced status.

Bacon testified that prior to 1985, the Company treated the classifications of Shipper, Material Handler, Assembler B, and Maintenance Helper as one classification for layoff purposes. He stated that in 1985, the Company ceased this policy, concluding that the policy was producing "domino-type" bumping and was putting employes into jobs they were not qualified to handle.

Bacon testified that the Company undergoes layoffs every year and that employes in the Assembler C classification have been laid off annually since at least the mid-1980's. He noted that laying off Assembler C positions to create openings into which higher-rated, displaced employes can move without losing their displaced status has been the layoff procedure consistently followed by the Company. Bacon testified that this, and the procedures described above, have not been altered in any way throughout his tenure with the Company, with one exception. He also noted the Company had not, until grievance 90-06, ever been made aware that the procedure outlined

above was objectionable.

The sole exception to the procedure outlined above came with the closing of the Madison plant. Under that procedure, the Company permitted Madison employes, without losing their displaced status, to bump less senior incumbent Verona employes from their positions. This exception was mutually understood by Company and Union representatives, according to Bacon.

Bacon serves on the Company's bargaining team. He testified that his bargaining notes from the Spring of 1989 indicate the Union made a proposal Bacon summarized as follows:

> [The Union] would like Company to agree by letter of understanding that any employee who exercises a seniority bump pursuant to Article 13, Section 4, Sub. 4; will be considered a displaced employee for purposes of being returned to their former classification in line with their seniority when an opening occurs in that classification.

The Company did not agree to this proposal. Bacon acknowledged that the contract does not specify how displaced status is lost, but he stated that the Company's policy has been openly followed for longer than he has been employed by the Company.

Other testimony and documentary evidence concerning the consistency and the publicity of the Company's past practices regarding layoffs was adduced at hearing. In addition, the Company submitted two prior arbitration awards in support of its assertion that Grievance 90-06 is not arbitrable. That evidence is referred to in the summaries of the parties' positions and in the discussion, below.

PORTIONS OF THE AGREEMENT

ARTICLE 13

SENIORITY

. . .

> 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 recalled or upgraded 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.

. . .

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.

. . .

Section 8 - . . . The Company shall provide the Union with a copy of all job postings. The job posting shall indicate the shift and classification. The Company shall not be required to post new openings for existing jobs so long as there are qualified displaced or laid off employees.

POSITION OF THE COMPANY

Grievance 90-06 is not arbitrable. The Union essentially contends that the Company is

obligated under Article 13, Section 4, Subsection 3.1, to "bump" an incumbent from his or her job so that an employe subject to a reduction in force does not have to exercise the right stated at Article 13, Section 4. The Company has, however, with one exception not relevant here, only offered open jobs under Subsection 3.1.

The Union's claims are barred by the 1989 and 1991 arbitrations. Though it did not do so, the Union could have claimed in the 1989 arbitration, that displaced employes should have been offered occupied jobs or that displaced employes should have the right under Article 13, Section 4, Subsection 4, to bump a less senior employe without losing displaced status. Because the 1989 arbitration involved the same parties and the same contract language as the current case, the current grievance is barred under res judicata or collateral estoppel. Under either doctrine, the Union is barred from claiming any right under Subsection 3.1 to an occupied job since that claim could have been, but was not advanced in the 1989 arbitration. The only difference between that arbitration and the current one is that the employe claim arises in the current case during, not after, the reduction process. This difference is insufficient to override the compelling policies underlying the doctrines of res judicata and collateral estoppel. Those policies have been articulated by judges and arbitrators, and are implicit in the Agreement provision that an arbitrator's decision "will be binding on the parties."

Even if the grievance is found arbitrable, the Company did not violate Article 13. Article 13, Section 4, Subsection 3.1 clearly does not require the Company to bump an incumbent out of a job and offer the job to a more senior displaced employe. The Company has uniformly applied that subsection only to open jobs, and no grievance has been filed about the Company's having done so.

The only exception to the uniform practice of the Company came when the Company moved senior qualified employes into occupied jobs when the Madison plant was consolidated with the Verona plant. The Union was aware of this action and was aware that it was an exception to the rule.

With the exception of Powell, none of the employes affected by Grievance 90-06 exercised a Subsection 4 bump. The Company briefly treated, but no longer treats, the classifications of Assembler B, Material Handler, Maintenance Helper and Shipper as one for displacement purposes under Subsection 2 of Article 13, Section 4.

The Union has not offered any credible evidence that the Company has deviated in other instances from its uniform policy of only offering open jobs under Subsection 3.1. Even apart from the absence of reliable evidence rebutting the consistent practice, the Union's interpretation of Subsection 3 renders Subsection 4 meaningless, as Babler himself admitted.

Beyond this, the Union has not substantiated its claim that an employe exercising bumping rights should not lose displaced status. The Company has, with the limited exception of the

Madison plant closing, uniformly applied the contract to deny displaced status to employes who bump another employe. The Union was well aware that the closing of the Madison plant was a limited exception to the rule. The Union tried, and failed, to secure the interpretation it advances in this grievance during collective bargaining in 1989. Thus, the record shows the Union's assertion that bumping employes retain their displaced status is unsubstantiated.

The grievance should be denied as not arbitrable. If arbitrable, the grievance should be denied because it has no merit.

POSITION OF THE UNION

The Company's assertion that the two prior arbitrations bar the current grievance cannot be accepted. Both arbitrations concern Article 13, Section 4, but neither involves the issues posed by the current grievance. The first arbitration addressed the rights of three employes who lacked the skill and ability to satisfactorily perform the jobs they sought to bump into. The second arbitration concerned the seniority rights of displaced employes to perform temporary work in the job from which they had been displaced. Neither arbitration addresses the issues presented here. Grievance 90-06 involves the transfer options under Article 13 of employes who are facing a layoff, and it must be addressed on its merits.

The parties' dispute centers on Subsection 3.1 of Article 13, Section 4. The Company asserts, without any support in the contract language, that Subsection 3.1 can only be applied to jobs which are open. Bacon acknowledged that the contract does not contain any support for the Company's assertion that Subsection 3.1 can only apply to positions in which there is no incumbent employe. The testifying employes established that the Company has in the past displaced incumbent employes from their positions.

The Company's assertion that the Union's view of Subsection 3.1 would render Subsection 4 meaningless is unpersuasive. The Union's view of Subsection 3.1 would require the Company to do some "bumping" for displaced employes. However, this is a problem only because the Company has chosen, without any support in the contract, to deny displaced status to employes who exercise their Subsection 4 bumping rights.

The appropriate result here is to find the grievance to have merit, and to make the grievants whole for any loss of earnings incurred as a result of the restriction the Company placed on their rights to exercise seniority bumps.

DISCUSSION

Arbitrability

The first stipulated issue questions whether Grievance 90-06 is arbitrable. The Company

urges that it is not, citing two prior arbitration awards to bar the grievance under principles of either res judicata or collateral estoppel.

The legal authorities cited by the Company establish that policies of judicial economy underlying those doctrines are also applicable in arbitration and have been applied in appropriate cases by arbitrators. However, the Company's legal authorities also reflect that under both doctrines there must be issues of fact or law that were, or could have been, addressed in prior proceedings. Thus, in Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411 (1980) the same constitutional claim was asserted in different forums. In Local 616, IUE v. Byrd Plastics, Inc., 428 F.2d 23, 74 LRRM 2550 (CA 3, 1970), the same issue on the merits was litigated twice. In Trailways Lines v. Joint Council, 624 F.Supp. 880, 121 LRRM 3163 (E.D.Mo., 1985), the two arbitrations involved facts that were found identical in all material respects. And in Bofors-Lakeway, Inc., 72 LA 159,161 (Kelman, 1979), the case involved two grievances that were "indistinguishable" except for the identity of the grievant and the precipitating event.

In the instant case, an identity of issues that were, or could have been, addressed in prior proceedings is not present. The 1989 award followed the closing of the Company's Madison plant. It addressed grievants from the Madison plant who were permitted to displace less senior Verona employes from their positions without the loss of displaced status. The grievants subject to the 1989 award sought to exercise their "free bump" on higher rated positions than those permitted by the Company. The parties' dispute in that case focused not on the nature of the grievants' contractual bumping rights, but on their individual qualifications. The dissimilarity of the two cases is highlighted by the Company's contention in Grievance 90-06 that the "free bump" permitted after the Madison plant closing was an exception to established procedure. The Union, in Grievance 90-06, seeks, in part, the "free bump" the Company granted during the layoffs at issue in the 1989 award, but denied during the layoffs at issue here. This highlights that the Union and the Company did not offer and could have offered the arguments presented herein regarding Grievance 90-06 in the proceeding which led to the 1989 award.

As the Union asserts, the 1991 award focused on different language than that at issue here, and it presented a different issue. Grievance 90-06 concerns employe rights to proper job assignment options at the outset of displacement from their regular job. The 1991 award concerned the rights of laid off employes to temporary higher paying work opportunities. It is impossible to know if the laid off employes subject to the 1991 award could have displaced less senior employes from occupied positions at the time of their layoff, as the Union seeks in Grievance 90-06. That point was not raised in the 1991 proceeding, and it arguably could not have been timely raised in that proceeding given the fact that the layoff process had been completed. Thus, that award is dissimilar to Grievance 90-06 both factually and legally.

In sum, Grievance 90-06 cannot be considered to pose issues that were, or could have been litigated in the proceedings which produced the 1989 and the 1991 awards. Therefore, the legal doctrines asserted by the Company cannot bar consideration of the merits of Grievance 90-06.

Merits

Turning to ISSUE 2, the Arbitrator is persuaded that the Union has accurately stated the issue to be decided. As the Union asserts, the grievance raises issues that can be resolved only by reading Article 13, Section 4 as a whole.

In addressing the competing interpretations of the language of Article 13, Section 4, the Arbitrator is persuaded that that language cannot be considered clear and unambiguous. Accordingly, recourse to past practice and bargaining history is warranted. Because the Company has undergone layoffs annually for many years, the parties have mutually confronted layoff-related issues for an extended period of time, and have built up a significant history of dealing with such issues. There is also meaningful bargaining history on the subject.

The language in Article 13, Section 4, Subsections 3.1, 3.2 and 3.3 does not expressly mention "bumping" an incumbent employe. Subsection 4, does, however, expressly mention "bumping" another employe as a part of the procedure involved. If the provisions of Subsections 3.1, 3.2 or 3.3 required the Company to unilaterally bump an incumbent employe from their position, that would render Subsection 4 meaningless. Since the parties ought not to be deemed to have created language which has no meaning or effect, the Union's proposed interpretation, which produces such a result, is inherently unpersuasive.

The Company's interpretation of Section 4 is also somewhat problematic. While it gives effect to a difference between the provisions of Subsections 3 and 4 so as to permit Section 4 to be read as a whole without rendering any portion meaningless, it does so on the basis that Subsection 3.1 involves only "open" positions, whereas Subsection 4 involves positions occupied by an incumbent. However, the Company's interpretation is somewhat strained because the entry level positions which the Company allowed the displaced employes to take in this case had been held by less senior employes until the Company laid them off as a part of the reduction in force. Those position were only "open" because the Company chose to lay off the employes that had been holding them.

While the Company's interpretation is somewhat strained in that regard, it must also be noted that Grievance 90-06 does not challenge the propriety of the Company's making those entry level positions available to the eight employes involved herein; rather the Union only argues that the Company's actions seem inconsistent with its claim that Subsection 3.1 involves only "open" positions. More importantly the evidence shows that the Company has a longstanding, uniform past practice of "making room" for displaced individuals at the entry level rather than laying them off to the street while less senior employes continued working at the entry level. The Arbitrator does not interpret the Company's position to be that it can arbitrarily choose which jobs to reduce and render open. Rather, the Company asserts that (with only one special case exception) it has always treated entry-level type jobs as the ones to which employes wishing to retain displaced

status must go. This is not, on this record, an arbitrary or capricious exercise of the right to reduce positions or classifications. On this record, the Company's position is consistent with longstanding past practice and, as noted, an action which is not specifically objected to in Grievance 90-06.

The Arbitrator concludes that it would be more inconsistent with the Agreement and with the parties' past practice and bargaining history to conclude that Subsection 3.1 applies to both open and occupied positions such that the employe need not give up displaced status in order to bump from an above entry-level position than it would be to allow the Company to offer free bumps only into entry-level positions as it effectively has done for many years without any objection from the Union.

The Union is understandably concerned that the Company does not unconditionally offer jobs closer in rate to those from which employes are displaced, thus leaving less senior employes in better paying jobs than the displaced employes. This reflects the difficult situation a displaced employe is put into at the time the employe is displaced. The Company conditions its offer of positions to displaced employes by offering, under Subsection 3.1, only open positions. The only other way for a displaced employe to move into another position is to bump a less senior employe under Subsection 4. A Subsection 4 bump means the employe loses his or her displaced status, thus forfeiting their right to transfer back into the classification the employe was displaced from without going through the posting procedure. Loss of displaced status is significant, as evidenced by the fact that each of the employes covered by Grievance 90-06 could have returned to the classification they were displaced from had they retained displaced status.

The reason the Union's understandable concern is not persuasive here is that the concern lacks a solid basis in the language of Article 13, Section 4, or related past practice and bargaining history. That the Union's view renders Subsection 4 meaningless has already been noted. Beyond this, the free bump the Union seeks has been afforded only with regard to the closing of the Madison plant, and that was mutually recognized as an exceptional case. The fact that the Company once treated four classifications as one is simply not relevant here, given the time which has passed since the cessation of the policy, and the consistency of the Company's application of Article 13, Section 4. More significantly, it is apparent from the testimony of each of the witnesses that employes are generally aware of the Company's position that only employes who fill open positions retain their displaced status. Finally, the fact that during the parties' 1989 contract negotations the Union unsuccessfully sought agreement to the interpretation it relies on herein, underscores the conclusion that Grievance 90-06 lacks a solid contractual basis. In sum, the Union's concerns, although understandable, cannot undermine the longstanding and consistent practice demonstrated by the Company.

Accordingly, in light of the parties' past practice and bargaining history, the Arbitrator concludes that the Company has satisfactorily shown that it did not violate Article 13, Section 4 with regard to the transfer of the aggrieved employes due to the layoff which occurred January 29,

1990.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the ISSUES noted above that:

1. Grievance 90-06 is arbitrable.

2. The Company did properly follow the procedures set forth in Article 13, Section 4 of the working agreement with regard to the transfer of the aggrieved employes due to the layoff which occurred January 29, 1990.

3. Grievance 90-06 is denied, such that no consideration as to an appropriate remedy is necessary or appropriate.

Dated at Shorewood, Wisconsin
this 24th day of May, 1992 by Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator