

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 APPLETON MILLS : Case 33
 : No. 48581
 : A-5021
 and :
 :
 UNITED TEXTILE WORKERS OF AMERICA, :
 AFL-CIO, LOCAL 78 :
 :

Appearances:

Mr. Robert R. Stroud, Esq., Stroud, Stroud, Willink, Thompson & Howard,
Mr. John S. Williamson, Jr., Esq., on behalf of Local Union 78.

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ARBITRATION AWARD

According to the terms of the 1991-1994 collective bargaining agreement between Appleton Mills (hereafter Employer) and United Textile Workers of America, AFL-CIO, Local 78 (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to serve as impartial arbitrator of a dispute between them regarding the Company's temporary assignment of the Grievant to the second shift. The undersigned was designated arbitrator. Hearing was held on March 19, 1993 at Appleton, Wisconsin. A stenographic transcript of the proceedings was made and received March 24, 1993. At the hearing, the parties agreed to waive the Board of Arbitration procedures detailed in Article XIII of the labor agreement and they stipulated that the undersigned shall be the sole arbitrator in this case. The parties filed their written briefs by April 15, 1993 which the undersigned exchanged for them. The parties waived their right to file reply briefs herein at the hearing.

ISSUES:

The parties stipulated that the following issues are to be decided:

- 1) Did the Company violate the collective bargaining agreement when it temporarily assigned the Grievant, Mr. Bessette, to the second shift?
- 2) If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

ARTICLE XI - SENIORITY

Section 25. As to layoff or recall, seniority shall prevail. Seniority is defined as an employee's length of service in a department during any period of continuous employment with the Company.

. . .

If an individual is about to be laid off due to a lack of work in his occupation and no vacancies exist in the department which he would be capable of filling, he may exercise his right to bump by bumping the least senior person in a job which he can perform.

. . .

When an individual is about to be laid off due to lack of work in his job category, he has the right to bump if he is capable of performing the job held by an employee with less seniority. However, this right must be exercised at the time the individual is informed of the impending layoff. That is, an individual cannot go on layoff for a period of time and then choose to exercise his right to bump.

An individual who has been bumped from his job by a more senior employee, in turn has the right to bump an individual with less seniority whose job he can perform. The same rule as above would apply; that is, he must bump the least senior person in a job which he can perform.

. . .

ARTICLE XII - JOB POSTING

Section 33. Whenever a vacancy occurs or is about to occur in any job, the Company will post a notice of the vacancy, with the time of posting, on the main bulletin board at least 72 hours before permanently filling the vacancy. Any employee desiring to have the vacant job shall make written application therefore to the foreman of the department or to the Personnel Department office within 72 hours of the time of posting. All applications filed within the 72 hours will be given consideration.

. . .

Employees making application to fill a posted vacancy shall be given preference in the filing of such vacancy, based on length of continuous employment with the Company, provided there is not a significant difference in past job performance, such determination to be made solely by the Company.

Posting shall not be required when employees are temporarily shifted to another job.

The Company shall have the right to appoint the Leadperson in each department, such departments being Weave Department, Yarn Department, Burling Department, Needling Department, Finishing Department, and Maintenance Department. There shall be paid to a Leadperson appointed by the Company a premium of fifty (50) cents per hour which shall be added to the base rate of a Leadperson in the Maintenance Department and shall be added to the evaluated rate of employees appointed as Leadpersons in each of the other departments. Where a Leadperson is appointed in the Maintenance Department for a specific project, such appointment is to be for a period of not to exceed six (6) months, at which time the status as Leadperson shall terminate, unless such employee is reappointed, but employment as a maintenance worker shall continue after termination as a Leadperson. Appointment as a Leadperson shall not change the seniority rights of an employee within a department. In the event that the Company determines that there is no qualified employee willing to assume the position of Leadperson within a department, the Company may employ a person to assume such position. Seniority shall not affect the right of the Company to appoint a Leadperson.

FACTS:

The Company appoints and employs fifteen leadpersons throughout its Appleton plant, pursuant to Section 33 of the labor agreement. When one of these leadpersons is on vacation, out sick or otherwise leaves the lead position, the Company has appointed replacements, if needed. The Company appointed Jeff Hermanson from his position as an electrician in the Maintenance Department to serve as Maintenance Department Leadperson on first shift and during all times relevant here, Hermanson has served as Maintenance Leadperson on first shift. Hermanson's seniority date is April 17, 1989. The Company does not employ a Maintenance Leadperson on second shift.

Jeff Bessette, the Grievant, is employed by the Company as an electrician in the Maintenance Department on first shift at the Company's Appleton plant. The Company employs four other electricians in the Maintenance Department who have more seniority than the Grievant. Bessette's seniority date is February 6, 1989.

There is a separate position description for Maintenance Leadperson which reads as follows:

SUMMARY

Works under the direction of the Maintenance Department Foreman.

DUTIES

1. Supervises all maintenance department personnel; may assign individual tasks, schedule projects, hours to be worked. Insures that employees follow safe work practices, that all tools and equipment meet safety standards. Aids the maintenance department foreman in achieving a high degree of productivity and quality of performance.

2. Insures that all equipment, machinery, buildings and grounds are maintained in a proper manner to provide for safe and efficient operation.
3. Responsible for knowing all clerical and reporting systems used in department. Records and reports all information required. Requires other maintenance department employees to follow established reporting and information systems.
4. May train maintenance department employees. May train employees in manufacturing departments on proper use and maintenance of machinery and equipment.
5. Responsible for maintaining or exceeding acceptable levels of quality and efficiency of the operation of the department.
6. Responsible for general good housekeeping.
7. May be required to work temporarily on other than regularly assigned shift.
8. Estimates labor and materials costs. Requisitions material for various projects following standard procedures.
9. Performs other miscellaneous duties as instructed.

Although the parties disagree regarding the amount of time the Maintenance Leadperson performs the same work as electricians in the Department, it is clear that when plant equipment and machinery has broken down and needs servicing, Hermanson spends more of his time performing electrician duties than he does when operations at the plant are running smoothly. Maintenance Supervisor, Tim Wyrobeck testified that Hermanson's primary duties as Leadperson on first shift are to assist him in scheduling the seven to eight full-time Maintenance Department employees, coordinate jobs, assign employees to jobs/crews, order and inventory parts and supervise employees at work. Wyrobeck stated that the Company has no need for and would not employ a Maintenance Leadperson on second shift, where it employs only two employees, because all major maintenance jobs are performed by the first shift and Wyrobeck needs the Leadperson to assist him in his work on first shift.

Wyrobeck stated that the amount of time Hermanson performs electrician duties varies widely from day to day and is hard to estimate. Wyrobeck did not believe Hermanson performed electrician duties 60 to 70% of the time as Union witness Graper initially stated. Graper stated that his estimate of Hermanson's electrician work (60-70%) was based upon Graper's having observed Hermanson's work for about 80% of the time both are at work.

The position description for a Maintenance Department Electrician reads in relevant part as follows: 1/

1/ The position description describes specific work to be performed by "Plumber Pipefitter," "Millwright (Machine Erector)," "Maintenance Mechanic", "Instrument Fitter", "Maintenance Machinist". These portions

SUMMARY:

Works under the supervision of the Maintenance Foreman to install and maintain all types of electrical, mechanical, pneumatic, and hydraulic equipment and systems. Assembles experimental circuitry and makes a complete prototype model of new equipment. May estimate labor and material costs and requisition material for various projects.

SKILLS/DUTIES:

1. Repairs and maintains electrical systems and equipment, such as motors, elevators, and control equipment. Locates and determines electrical malfunction using test instruments such as ammeter, VOM, and recording instruments. Repairs malfunctions by such methods as replacing burned out components or fuses, by-passing or replacing contact points, and cleaning or replacing components using hand tools.
2. Makes repairs on computerized machinery. Diagnoses malfunctions and replaces components of computerized equipment.
3. Repairs and adjusts mechanical, pneumatic, hydraulic, or electronic components of electrical equipment using standard tools, gages, and procedures.
4. Installs and wires, from blueprints or schematic diagrams, electrical equipment such as motors and motor control, electrical distribution systems, air conditioning, communications, and other electronic equipment. Connects wiring to lighting fixtures and low voltage power equipment using hand tools. Installs control and distribution apparatus such as switches, relays, and circuit breaker panels.
5. Measures, cuts, bends, threads, assembles, and installs electrical conduit using such tools as hacksaw, pipe threader, and conduit bender. Pulls wires through conduit. Splices wires by stripping insulation from terminal leads with knife or pliers, twisting or soldering wires together, and applying tape and terminal caps.
6. Tests continuity of circuits to insure electrical compatibility and safety of all components. Checks circuits for specified shielding and grounding to conform with electrical codes and safety regulations.
7. Assembles experimental circuitry or complete prototype model according to engineering instructions, technical manuals, and knowledge of electronic systems

did not appear relevant or material to this case and therefore they are not quoted above.

and components and their functions. Recommends changes in circuitry or installation specifications to simplify assembly and maintenance.

8. Does welding, grinding, and flame cutting.

. . .

14. May drive company trucks. In emergency or absence of Groundskeeper, may drive tractor to remove snow or mow lawns. May use tractor in performance of various maintenance activities, operate lawn mower, tiller, and/or snow blower.

15. Performs other miscellaneous duties as instructed.

Prior to August 26, 1992, the Company transferred Grievant Bessette to second shift on a temporary transfer because, it needed an electrician on second shift and Bessette was the least senior employe in the electrician classification. The Company did not need a Leadperson on second shift and it did not consider transferring Hermanson because he was then appointed to and occupying the Leadperson job on first shift, pursuant to Section 33. It is undisputed that if Hermanson had been an electrician instead of the Maintenance Leadperson in or about August, 1992, Hermanson, not Bessette, would have been transferred to second shift. Bessette was transferred to second shift in August, 1992, because (according to the Company) he was the least senior electrician on first shift. Thereafter, Bessette worked on second shift for six months and he was then transferred back to his first shift position.

On August 26, 1992 Bessette filed the instant grievance, contending that he should not have been transferred to second shift but that Hermanson should have been transferred based on seniority. The Union thereafter processed this case to arbitration. Due to the fact Bessette was transferred back to first shift prior to the hearing in this case and the fact that Bessette suffered no loss of pay or benefits during the period of his transfer, the Union merely seeks a declaratory award and a cease and desist order, should it prevail in this case.

POSITIONS OF THE PARTIES

Union

The Union contended (both at the hearing and in its brief) that the labor agreement defines seniority as departmental seniority and although Section 25 only refers to layoff and recall, the principles of departmental seniority should apply to temporary transfers like the one at issue here. The Union asserted that because Section 33 allows the Company to appoint Leadpersons without regard to seniority, the additional proviso of Section 33, which states that such an appointment "shall not change the seniority rights" of employes in the department, must be read in harmony with Section 25. Therefore, the Union urged, the Company's temporary transfer of Bessette to second shift effectively gave Hermanson super-seniority over all maintenance department electricians. 2/

2/ At the hearing, the Union asserted that because Hermanson has less seniority than Bessette, the Company's need for a maintenance electrician on second shift should have resulted in Hermanson (the least senior electrician) being transferred to second shift and Hermanson's Leadperson job on first shift should have been treated as a Section 33 vacancy which Bessette could have posted for, tried out, and if he could not perform

In its brief, the Union asserted that the Company's actions in this case robbed Bessette of his seniority rights, essentially making him (rather than Hermanson), the most junior Maintenance electrician. In addition, the Union argued, the Company's actions here changed the seniority of all maintenance department employes and granted Hermanson seniority over them for layoff, recall and temporary transfers. Such an interpretation, the Union contended, would nullify and render meaningless the provisional language of Section 33 which protects seniority, contrary to sound arbitral principles.

In sum, the Union asserted that its interpretation of the labor agreement allows all provisions to be effective, while the Company's exercise of its Section 33 right to appoint Hermanson to the Leadperson job does violence to departmental seniority rights, nullifies the proviso in Section 33 and has resulted in the unfair treatment of more senior employes. In this regard, the Union also argued that the Company could have transferred Hermanson to second shift and still employed him there as Leadperson and the Company's right to appoint whomever it chose to be Leadperson would not have been affected. Therefore, the Union sought an award sustaining the grievance.

Company

The Company asserted that the Leadperson job is a separate job from maintenance electrician, relying in part upon a comparison of the position descriptions for these jobs placed in evidence here. The Company also noted Maintenance Supervisor Wyrobeck's supporting and elaborative testimony regarding the Leadperson's duties on first shift support such a conclusion. The Company also observed that the Union had conceded that the Company had the right to select whomever it wished to be Leadperson and that the Company's practice has been to layoff, not by department but by job. In this regard, the Company argued that because Bessette was the least senior employe working as an electrician and because the Company needed an electrician on second shift, it transferred Bessette consistent with its past practice of applying job seniority. The Company urged that even if Hermanson had not been Leadperson, if he had been working in a different maintenance job (not electrician), Bessette would nonetheless have been transferred to second shift because he would have been the least senior electrician. The Company therefore disagreed strongly with the Union's assertions that Hermanson remained an electrician and should be treated as such, despite his appointment to the (separate) Leadperson job.

In regard to layoff (and recall), the Company contended that Section 25 allows the least senior employe in an electrician's job who has greater seniority than some other maintenance department employe occupying a different job to bump the latter employe if the electrician can properly perform/fill the other less senior employe's job. The Company also asserted, its Section 33 right to choose and appoint Leadpersons must supercede employes' Section 25 rights. In the Company's view, whether Hermanson performed a significant amount of electrician work as Leadperson and whether Bessette could have filled the Leadperson job are not relevant to this case because Hermanson and Bessette occupied different jobs at the time of the transfer and neither the labor agreement nor past practice required the Company to consider departmental seniority in temporarily transferring electrician Bessette. The Company urged that the express seniority rights of maintenance department employes remained unchanged by the Company's actions in this case and that if it cannot appoint whomever it wishes to Leadperson, that portion of Section 33 of the labor

the lead job, he should have returned to his first shift electrician job.

agreement would be rendered meaningless.

Therefore, based upon the evidence and argument herein, the Company urged that the grievance be denied and dismissed.

DISCUSSION:

The labor agreement at Article XI, Section 25, defines seniority, for purposes of "layoff or recall", as "an employe's length of service in a department. . . ." Seniority is not otherwise defined in the labor agreement for any of the other specific purposes for which seniority is generally used. It is undisputed that the Company has apparently had a past practice of using job classification seniority in transferring and laying off employes. In regard to the former action, there is no separate section in the labor agreement relating to transfers. In regard to the latter action, I note that Section 25 allows employes about to be laid off to bump the least senior employe "in a job" the employe to be laid off can perform. In addition, one portion of Section 33 guarantees the Company the right to appoint Leadpersons in certain departments. Section 33 also guarantees that the Company's appointment of a Leadperson "shall not change the seniority rights of an employe within the department."

The undisputed facts indicated that in August, 1992, the Company needed one less electrician on first shift. In this case, the Company has relied upon Section 33 to transfer Bessette, asserting its practice of transferring the least senior employe in a job classification. Several problems arise if one accepts the Company's approach in this case. First, as a general rule, a lead job is not considered a separate job classification, as the Company has argued.

Rather, it is generally accepted in labor relations that lead jobs take their form and character from the underlying line job classification leading others.

In addition, lead jobs normally involve a substantial amount of line work as well as additional administrative responsibilities as well as duties involving the coordination and direction of line employes' work. Frequently, the leadperson is paid a premium rate over and above his/her (normal) contract rate in a non-lead position.

The documentary and testimonial evidence in this case clearly showed that the Maintenance Department Leadperson position on first shift requires that the Leadperson do a significant amount of electrician work; that he/she is paid a premium (50 cents over his/her normal contract rate) while acting as Leadperson; and that the Leadperson, a bargaining unit member, also does administrative work as well as work coordinating and directing non-lead workers. 3/ Therefore, the record demonstrates that the Maintenance Department Leadperson job is readily recognizable as a normal lead position in labor parlance and it clearly does not constitute a separate job classification. Thus, the Company's argument that the Leadperson job is separate and distinct from the electrician job simply does not comport with generally accepted principles of labor relations, the Company's own position descriptions or the way the Company has utilized, listed and paid its Leadpersons.

Second, and more troubling than the Company's perception of the Maintenance Leadperson job is the effect of the Company's application of its

3/ Whether the Leadperson does 60 to 70 percent or 48 to 56 percent electrician work, (gleaned from Graper's testimony, wherein he stated he only observed Hermanson 80% of the time) is not significant, because under either set of figures Hermanson's line electrician work as Leadperson time is substantial.

Section 33 right to select a person of its choice as Leadperson. In this regard, I note that although Section 33 gives the Company the right to appoint Leadpersons without regard to seniority, that right is not an unfettered one. Rather, pursuant to Section 33, the Company has the right to appoint an employe of its choosing to Leadperson from among the pool of employes then working in the Department. Absent express language to the contrary, the Company is thus limited to this existing pool of employes. 4/ Section 33 also states that the appointment of Leadpersons "shall not change the seniority rights" of employes within the Department. This language specifically guarantees that employe seniority rights regarding such things as layoffs, recalls, bumping and job posting shall not be affected by the Company's appointment of a Leadperson.

It is in this context that the Company's actions must be judged. In this case, because the Company appointed Hermanson to the Leadperson job, it argued that this took him off the "seniority list" in the electrician job where he had apparently been the least senior electrician. This approach resulted in Hermanson being given superseniority in the Leadperson position, and in Bessette becoming the least senior employe in the electrician classification. The Company's act in transferring Bessette to second shift rather than Hermanson, adversely affected Bessette and effectively "changed" his seniority rights, contrary to the proviso of Section 33. This action was taken by the Company solely because Hermanson had been appointed by the Company to be Leadperson. 5/

The Company has argued that unless it can select and retain whomever it chooses as Leadperson, even in the face of layoff, its Section 33 right to select Leadpersons is without meaning. I disagree. As stated above, Section 33 merely allows the Company the right to select a Leadperson from among those in the then-existing departmental pool of employes and the

4/ Assuming Hermanson had been transferred to second shift to work as an electrician, I note that no evidence was offered herein to show that there were no other Maintenance Department employes who were qualified and willing to act as Leadperson.

5/ Based upon the contract language, Hermanson should have been transferred to second shift as the least senior electrician who could perform the work on second shift. The Company could then have selected from among the remaining pool of qualified and willing Maintenance department employes which one, if any, it wished to appoint to be Leadperson. To do otherwise would render meaningless the proviso of Section 33 guaranteeing no changes in seniority rights and it would essentially grant Hermanson superseniority rights over other more senior Maintenance department employes.

Company's right to do this is clearly limited by the proviso of Section 33.

Although the Company's assertion that in the past, it has laid off and transferred employes based upon job, not departmental, seniority appears to fly in the face of the clear language of Section 25, referring to departmental seniority, this alleged practice may merely be what has practically occurred when the layoff and bumping language of Section 25 have been read together and applied by the Company. In any event, having found that the Leadperson position is not a separate job classification from electrician and that the Company has violated Section 33 when it transferred Bessette changing his seniority rights, I need not and do not decide the proper function of Section 25. I therefore issue the following

AWARD

The Company violated the collective bargaining agreement when it temporarily assigned Grievant Bessette to the second shift.

The Company shall therefore cease and desist from applying Section 33 in such a way as to effectively grant Leadpersons superseniority over other more senior employes in the department.

Dated at Madison, Wisconsin this 25th day of May, 1993.

By _____
Sharon A. Gallagher, Arbitrator