BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration of a Dispute Between | : | |
| LOCAL 150, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC | : | Case 5 No. 48692 A-5033 |
| and | : | |
| AMERICAN BUILDING MAINTENANCE COMPANY | : | |

Appearances:

Mr. Ted L. Mastos, Union Representative, Local 150, Service Employees International Union, AFL-CIO,CLC, appearing on behalf of the Union.

Kilpatrick & Cody, Attorneys at Law, by Ms. Diane L. Prucino, appearing on behalf of the Company.

## ARBITRATION AWARD

Pursuant to a request by Local 150, Service Employees International Union, AFL-CIO, CLC, herein the Union, and the subsequent concurrence by the American Building Maintenance Company, herein the Company, the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on March 9, 1993 pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on March 24, 1993 at Wauwatosa, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on June 29, 1993.

After considering the entire record, I issue the following decision and Award.

STIPULATED ISSUES:

1. Did the Company violate the collective bargaining agreement in November 1992 when it awarded the bid for a vacant second shift lead position to Paul Blei rather than the grievant?

2. If so, what is the appropriate remedy?

FACTUAL BACKGROUND:

The Company is primarily in the business of providing janitorial and related services to other companies. However, in this instance the Company provides security guards to the Bank One Plaza building located at 111 East Wisconsin Avenue in downtown Milwaukee.

Bank One Plaza is a 24-story building that is valued at thirty million dollars. Approximately 1,500 employes work in the building and numerous visitors pass through it each day.

Until the late 1980s, the security guards at Bank One Plaza were employed by Bank One. At that point, however, the bank decided to contract out the security function. It awarded the contract to the Company which hired the bank's former guards.

Until August 1992, the Company and the Union were parties to a collective bargaining agreement that covered only the Company's employes at Bank One Plaza. That agreement was one of a number of "site agreements" to which the Company and the Union were parties in the Milwaukee area.

During 1992, the Company and the Union decided that they wanted to negotiate a single "master" agreement to replace the numerous site agreements. Accordingly, the Company and the Union entered into negotiations which resulted in such an agreement.

During the 1992 negotiations, the language regarding job bidding was changed significantly at the Company's request. Under the previous contract, seniority was required to be "the primary factor considered in the selection process," although the Company could "require the employee have the skill and ability to perform the job." The provision that was ultimately agreed upon by the parties in 1992 gave the Company the increased discretion regarding promotions that it had sought. The Company got the right to choose the best person for the job based on skill and ability, and only thereafter, if there was a tie, seniority would be used as a tie breaker.

The grievant, William A. McNamer, has been employed as a security officer at Bank One Plaza for approximately twelve years. Although the grievant has held a number of different security positions, his regular assignment since at least 1989 is to patrol and provide security in the parking garage adjacent to the building. The grievant has not been employed as a leadman since at least 1989, which was before the control room was built or the RobertShaw computer was acquired. 1/ The grievant is the most

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1/ The RobertShaw system is a state of the art facility integrator or security system. There are only two others like it in Wisconsin. It is quite expensive and takes

senior applicant for the second shift lead position which became vacant in November 1992 due to the resignation of Ken Krueger. Paul Blei, the first shift control room operator, was the successful bidder.

The second shift leadman must be able to perform all of the duties of the other second shift security positions, including the control room operator position. The control room operator is required to operate the RobertShaw system. Anthony Piucci made the decision to award the second shift lead position to Blei rather than the grievant because he concluded that Blei possessed more skill and ability in particular regarding operation of the RobertShaw system. In reaching his decision to award the bid to Blei, Piucci considered, inter alia, the following information: (1) the recommendation of Bank One Security Head Don Niese, who recommended Blei; (2) the relative lengths of time that the three men had spent in the computer room (although the grievant had on occasion filled in as a control room operator -- a fact not known to the Company at the time of the disputed decision -- he had been assigned to the Plaza parking structure for more than three years where his duties consisted of routine patrols whereas Blei had been assigned to the security control room during the day shift for most of 1992); and (3) information provided by Mark Hammer, the Company account representative responsible for Bank One, who told Piucci that Michael Myszkowski, Supervisor of Security for the Company at Bank One Plaza, recommended that Blei should get the job.

When Piucci made the decision to award the bid in question to Blei, he had never met any of the three individuals who had bid for the job. He also did not conduct any interviews for the job. Instead, he relied on the aforesaid recommendations and information.

The grievant filed a timely Step 2 grievance which was denied. In the Step 2 denial, Company Personnel Manager, Roslynn R. Washington, states that the ". . . union contract allows that posted positions may be filled based on skill and ability, without regard for seniority. The memo from Don Niese clearly demonstrates that, while Mr. McNamer may have greater seniority, Mr. Blei clearly has more 'skill and ability' to perform the job and we stand by the decision to select him for the Lead position."

In a timely letter advancing the grievance to Step 3 of the grievance procedure, Union Representative Ted L. Mastos, stated, "it is the Union's contention that Mr. McNamer is more skilled and

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considerable training to understand how to operate it properly.

able tha(n) any of the other job bidders." The Union asked the Company to reconsider the award based on the grievant's skill and ability. The Company again denied the grievance.

PERTINENT CONTRACTUAL PROVISION:

SECTION 6.2 - SENIORITY:

. . .

C) In the event a promotional opportunity (including part-time to full-time work) occurs at the employees' job location, the Employer agrees to post a notice to all employees in that building of the opening and allow those employees to bid for the new job opening. Given that skill and ability are equal, seniority shall be the determining factor in awarding promotions. Any employee so selected shall be given a reasonable opportunity to perform the duties of the promotional job prior to placing any other employee in that job. This provision does not apply to supervisory/management positions.

PARTIES' POSITIONS:

The Union initially argues that it is improper to consider the grievant's prior disciplinary record in deciding whether the grievant was entitled to fill the disputed position.

The Union next argues that the Company relied on incomplete,

inaccurate and faulty hiring procedures in awarding the position to a less senior applicant. In particular, the Union contends that the Company did not consult with the appropriate supervisory persons to get their opinion as to who should be hired; did not properly evaluate the grievant's ability to perform the work as it related to the computerized facility integrator system; did not conduct interviews; and failed to establish clear measurement standards of skill and ability. The Union cites Arbitrator George R. Fleischli, in Ampco Metal Inc. v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and its Local Union 115 (1992) for the proposition with which it agrees that where a collective bargaining agreement reserves to management the right to make selections for promotion on the basis of ability, at least in part; and if management develops criteria which are reasonably related to the job; applies those criteria to the demonstrated qualifications of the bidders through fair and evenhanded procedures, relying upon objective evidence wherever possible; and selects the bidder having demonstrably superior qualifications an arbitrator ordinarily will not "second guess" such a determination. Where, as here according to the Union, management did not follow procedures which were fair and regular resulting in the grievant, who is undoubtedly qualified to hold the position and is senior to the bidder selected, never having received fair consideration for the position, the grievance must be sustained.

For a remedy, the Union requests that the Arbitrator find that the Company violated the collective bargaining agreement by its action and order the Company to make the grievant whole for all losses as a result of the improper selecting of the successful bidder over the grievant.

The Company, on the other hand, argues that it acted properly in awarding Blei the lead position because he had worked in the control room operator position for the previous year and was very familiar with the RobertShaw computer and all of the other duties of the control room operator. The Company concedes that the grievant had greater seniority, but argues it acted properly in not awarding the grievant the position because he (the grievant) had worked for a number of years as a roving guard patrolling the parking structure adjacent to the building and did not have the skill and ability to operate the RobertShaw computer. In reaching this conclusion, the Company emphasizes the following main points: one, the grievant's testimony that he had on occasion filled in as a control room operator on the second shift and had developed some familiarity with the aforesaid computer before November of 1992 should not be credited because it was never made until the arbitration hearing; two, the Union has the burden of proving (which it failed) that the grievant was as skilled and able to operate the RobertShaw system as Blei; three, the Company properly

awarded the lead position to Blei, the most senior employe with the skills and ability level needed to perform the job; four, the Company's action was in conformance with Section 6.2(C) of Article VI of the collective bargaining agreement and bargaining history; and five, the grievant's testimony regarding his disciplinary record further diminishes his credibility regarding his prior experience on the aforesaid computer system, as well as his reputed skills and ability to do the disputed job.

For a remedy, the Company requests that the grievance be denied, and the matter dismissed.

DISCUSSION:

The Union basically argues that the Company followed a seriously flawed hiring procedure when it found Blei more qualified than the grievant and awarded him the disputed position. The record, however, does not support a finding regarding same. The Company treated all the applicants for the job in the same manner. It asked appropriate people for their recommendations. There is no evidence, contrary to the Union's assertion, that the Company improperly relied upon the grievant's prior disciplinary record in reaching its conclusion. Also, contrary to the Union's assertion, the record supports a finding that the Company primarily relied upon objective relevant criteria such as prior work experience in awarding the position to Blei. Finally, there is nothing in the collective bargaining agreement or past practice which requires the Company to interview applicants for a vacancy or to follow a set hiring procedure as argued by the Union. 2/

Section 6.2(C) provides for job postings that if "skill and ability are equal, seniority shall be the determining factor in awarding promotions." In the instant case, the Company found Blei more qualified that the grievant for the second shift lead position based on not only his experience performing the duties in question, but also on the recommendations of two supervisors. In addition, the Company determined that Blei was "very knowledgeable in the RobertShaw life safety system," 3/ which is an important criteria in the performance of said lead duties. These factors, in the opinion of the Arbitrator, form a reasonable basis for the Company's decision finding Blei more qualified than the grievant.

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2/ Based on the grievant's seniority and his generally good work record for the Company, it might have been good labor relations for the Company to grant the grievant and other applicants an interview for the position but there is nothing in the record which requires this.

3/ Joint Exhibit 3, page 2.

Since the two applicants' qualifications were not equal, the Company was justified in disregarding seniority, and choosing the best qualified applicant -- Blei -- for the disputed position.

The Union cites Ampco Metal Inc., supra in support of its position. The Arbitrator is in agreement with the aforesaid standard articulated by Arbitrator George R. Fleischli therein. However, the Union has not met its burden of proof that the Company failed to adhere to said standard in selecting Blei over the grievant. 4/ Therefore, the Arbitrator rejects this claim of the Union.

Based on all of the above, the Arbitrator finds that the answer to the stipulated issue is NO, the Company did not violate the collective bargaining agreement by awarding the bid for the vacant second shift lead position to Paul Blei rather than the grievant, and it is my

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4/ For example, the Union did not show that "someone" in management predetermined that Blei should be appointed to the vacant position or that the grievant should not get fair consideration. In addition, as noted previously, the Union did not prove that there were serious, material flaws in the selection process.

## AWARD

That William A. McNamer's grievance dated November 30, 1992 is hereby denied and the matter is dismissed.

Dated at Madison, Wisconsin this 7th day of September, 1993.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator