BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CUSTOM COMPONENTS COMPANY

and

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, LOCAL 2190

Case 1
No. 52616
A-5369

Appearances:

Mr. Darrell J. Graf, 1800 21st Street, Racine, Wisconsin 53403, appearing on behalf of Custom Components Company.

United Brotherhood of Carpenters and Joiners of America, AFL-CIO, 1614 Washington Street, Two Rivers, Wisconsin 54241, by Mr. Conrad Vogel, Business Agent, appearing on behalf of Local Union 2190.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, the United Brotherhood of Carpenters and Joiners of America, Local Union No. 2190 (hereinafter referred to as the Union) and Custom Components Company, (hereinafter referred to as the Company) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute concerning the status of employee Hugo Gonzalez. The undersigned was so designated. A hearing was held on July 14, 1995 at the Company's offices in Racine, Wisconsin, at which time the parties were afforded full opportunity to present such stipulations, testimony, exhibits, other evidence and arguments as were relevant. No record was made of the hearing, and the parties waived the submission of post hearing arguments.

Now, having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the undersigned makes and issues the following Award.

I. Issue

The parties stipulated that the following issue was to be decided herein:

> Was notice given to the grievant that he would not be eligible for inclusion in the bargaining unit within his first 60 days of employment. If not, what is the appropriate remedy?

The parties also stipulated to the effect of the answer to the stipulated issue:

> If notice was given, he is not included in the bargaining unit.
>
> If notice was not given, he is eligible for fringe benefits, wages and other coverage of the contract.

II. Relevant Contract Language

. . .

ARTICLE III

. . .

Section 3. WAGE RATES

Helpers that are hired on a temporary basis shall be paid a wage rate as determined by the Company for the first two hundred (200) working days of employment. After two hundred (200) working days of employment, these helpers will as a condition of employment join the Union. Their seniority shall date from the date of hire. After the two hundred (200) working day period they will advance to seventy (70%) of the semi-skilled full rate of pay.

Two helpers wages are to be determined by the Company. These two helpers will not be eligible for any fringe benefits and also will not be eligible to join the Union. The Company will notify employees that fall into this class of workers sixty days after their date of hire.

. . .

III. Background

The collective bargaining agreement allows the Company to designate two helpers who will be ineligible for coverage by the agreement. In order for a helper to be so designated, the Company must notify him by his 60th day of employment. If the Company does not give this notice, the helper is eligible for membership in the Union and coverage of the contract after his 200th work day.

The grievant, Hugo Gonzalez, was hired as a helper on March 12, 1994. In January of 1995, he asked about joining the Union. Steward Mike DeHahn asked if he had worked 200 days, and after checking Gonzalez told him that he had. The next day DeHahn gave him an application to complete, and told him how much the initiation fee would be. On January 15th, Gonzalez gave DeHahn the completed paperwork and paid the initiation fee. Supervisor Tom Graf subsequently told DeHahn that the grievant was not eligible to join the Union. DeHahn turned the matter over to Union Business Agent Conrad Vogel. Vogel determined that the Company was claiming it had given the notice to the grievant within 60 days of his hire, and that the grievant denied any notice was given. This grievance was then filed.

At the hearing, in addition to the facts set forth above, the following testimony was given:

Mike DeHahn testified that Gonzalez came to him in January and told him he'd spoken with Tom Graf about joining the Union and Graf had referred him to DeHahn. Once Gonzalez returned the completed paperwork, DeHahn went to Tom Graf and gave him the information necessary to have the Company deduct dues and extend contract coverage to the grievant. According to DeHahn, Graf asked who the paperwork was for, and he told him it was Hugo Gonzalez. Graf said okay and accepted the paperwork. A few hours later, Graf gave it back to him and said the grievant would not be allowed to join the Union.

Hugo Gonzalez testified that he approached Tom Graf in January and asked about joining the Union. Graf told him to talk to DeHahn, which he did. A month after completing the application and paying the initiation fee, he was informed that he was not eligible to join. Gonzalez testified that Graf had never told him before this that he could not join the Union.

Tom Graf testified that he had notified Gonzalez that he was ineligible to join the Union, although he was not sure when he had said this. The number of days worked are tracked in the front office so that the Company does not miss a deadline on notices to employees. Graf said that he had told both DeHahn and Gonzalez in January that Gonzalez was not eligible to join the Union. He could not remember whether he told DeHahn this before or after DeHahn put in the paperwork, but he did recall telling DeHahn at the time that he should check with him about eligibility before signing employees up with the Union.

IV. Discussion

The sole issue in this case is whether or not Tom Graf told Hugo Gonzalez that he was not eligible to join the bargaining unit in the sixty days following Gonzalez's hiring in March of 1994. If he did give the notice, the grievance must be denied. If he did not give the notice, the grievance must be sustained. Graf testified that he did give him notice and Gonzalez denies getting notice.

A. The Testimony

The testimony of Gonzalez and DeHahn suggests that Tom Graf did not give the grievant notice, since Gonzalez said that it was Graf who sent him to DeHahn for information about joining the Union, and DeHahn confirmed that Gonzalez told him this when they spoke in January. Had Graf already told Gonzalez he was not eligible for membership, it would not have made sense for him to waste Gonzalez's time sending him to DeHahn. In addition, DeHahn testified that he gave the paperwork to Graf, and told him it was for Hugo Gonzalez. According to DeHahn, Graf initially accepted the papers and several hours passed before he returned them. Again, had Graf already told Gonzalez he could not be in the bargaining unit, there would have been no reason for him to accept the paperwork from DeHahn.

Graf's recollection was that he told Gonzalez he could not be in the unit in a timely fashion, although he was not sure when he did this. He also recalled that he rejected the paperwork for Gonzalez as soon as he saw it, although he was not sure whether this was before or after it had been turned into the office.

None of the witnesses was absolutely clear on the sequence of events. Graf could provide little in the way of detail about when or where the notice was given. The grievant was clearly confused about several points, including his date of hire. DeHahn seemed sure that Gonzalez had gone to Graf before coming to him, but this was based on the hearsay statements of Gonzalez, rather than DeHahn's personal observation of any meeting between the two men. The weight of the testimony favors the Union's position, although it is not conclusive. It is not possible, on the state of this record, to draw a positive conclusion that notice was or was not given to the grievant within sixty days of his date of hire.

B. The Burden of Proof

Given the relatively balanced nature of the testimony, the outcome here turns on which party bears the burden of proof. I conclude that it is the Company that bears the burden. There are two reasons for this conclusion. First, the Company seeks to claim an exception to a general rule, and the party claiming an exception bears the burden of showing that it is entitled to make such a claim. The second reason for this conclusion is that assigning the burden of proof to the Union would make it virtually impossible for them to police this provision and would as a practical matter write the notice requirement out of the contract.

The contract provides that helpers must join the Union after two hundred working days and will then advance to 70% of the semi-skilled rate. The exception to this is that the contract allows the Company to exempt up to two helpers by giving them notice within sixty days of their date of

hire that they may not be in the Union. If this notice is given, the Company is free to set the wages for these two employees and to deny them fringe benefits and other contract coverage. This is an enormously important consequence for the Company and the employee, and it is entirely within the Company's power to bring it about. If the Company takes no action, the helpers become eligible for the negotiated rights and benefits of the contract. As the party claiming a very significant and unusual benefit, the Company is responsible for showing that the conditions precedent to receiving the benefit exist. The employer has the discretion to give the required notice in any fashion that it chooses, but to the extent that it decides to give notice verbally, without witnesses or documentation, it assumes the risk that the notice will be misunderstood by the employee, or disputed at a later date.

The second factor leading to my conclusion that the Company bears the burden of proof is that the parties cannot be presumed to have negotiated so significant a provision without intending that the single safeguard -- notice to the employee -- would be given full force and effect. The practical consequence of saying that the Union bears the burden of proof in this type of case would be that the Company could ignore the notice provision with impunity. If the Union is required to establish that notice was not given, it is placed in the impossible position of proving a negative. Neither the employee nor the Union plays any role in triggering the exception, and if the Company does fail to give notice there is nothing to cause the Union or the employee to document or even note the passage of sixty days without the giving of notice. 1/ While the Company could easily bear the burden of proving notice by either providing it to the employee in writing with a copy to the Steward or by having witnesses present when notice is given verbally, there is absolutely no way for the employee or the Union to prove that during a sixty period a brief conversation did not take place. Given the importance of this provision to all parties, I cannot interpret it in such a way as to make it impossible for the Union to police Company compliance with the notice requirement.

The record evidence provides greater support for the Union's version of events than for the Company's, but it is not conclusive of the notice question. The Company, as the party claiming an exception to the general rule, bears the burden of proof. It has not met its burden, and I therefore conclude that the grievant is eligible for inclusion in the bargaining unit.

C. The Remedy

1/ The difficulty of proving the negative is compounded by the fact that notice must be given within sixty calendar days of hire, but membership in the Union for helpers does not occur until after 200 days of work. Thus, even with an employee working a full five day work week, the Union would not be aware of any dispute until eight months after the notice period expired.

The grievant became eligible for inclusion in the bargaining unit after 200 working days. He applied on January 15, 1995 and his application was rejected. As discussed above, this was a violation of the contract. Had his application been approved and processed, he would have been credited with seniority to his date of hire, advanced to 70% of the semi-skilled full rate of pay, and become eligible for other benefits under the contract. The appropriate remedy is to immediately credit the grievant with seniority to his date of hire, advance him to the appropriate rate of pay, provide him with the fringe benefits available to other employees in his classification with like seniority, and to make him whole for any losses he may have suffered as a result of being excluded from the bargaining unit since January 15, 1995. The arbitrator will retain jurisdiction over this case for a period of thirty days following the issuance of this Award, for the sole purpose of clarifying the remedy if requested to do so by one or both of the parties.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The record does not prove that the grievant was given notice within his first sixty days of employment that he would not be eligible for inclusion in the bargaining unit. The stipulated result of this is that the grievant is included in the bargaining unit.

The appropriate remedy is for the Company to:

> (1) Treat the grievant as having been included in the bargaining unit as of his application on January 15, 1995, by immediately crediting the grievant with seniority to his date of hire, advancing him to the appropriate rate of pay, and providing him with the fringe benefits available to other employees with like seniority in his classification; and
>
> (2) Make the grievant whole for any losses caused by his exclusion from the bargaining unit from January 15, 1995 through the date of compliance with this Award.

The arbitrator will retain jurisdiction for a period of thirty days following the date of this Award for the sole purpose of clarifying the remedy if requested to do so by one or both of the parties.

Dated at Racine, Wisconsin this 21st day of July, 1995.

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator