BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL 565

and

CARNES COMPANY

Case 61
No. 54363
A-5504

Appearances:

Mr. Richard Lewis, Business Manager and Financial Secretary/Treasurer, appearing on behalf of the Union.

Michael, Best & Friedrich, Attorneys at Law, by Mr. Marshall R. Berkoff, appearing on behalf of the Company.

ARBITRATION AWARD

Sheet Metal Workers International Association Local 565, hereinafter referred to as the Union, and Carnes Company, hereinafter referred to as the Company, are parties to a collective bargaining agreement which provides for the binding arbitration of disputes arising thereunder. The parties mutually selected the undersigned to act as the sole arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. Hearing was held in Madison, Wisconsin, on December 4, 1996. The hearing was transcribed and the parties filed post-hearing briefs which were exchanged on January 9, 1997.

BACKGROUND:

The basic facts underlying the grievance are not in dispute. On June 7, 1996, the Company posted an opening for an Assembler B classification. A number of employes signed the posting including employes already in the Assembler B classification. The Company did not consider any employes already in the Assembler B classification and it filled four vacancies with employes in other classifications. On June 16, 1996, the Union filed a grievance over the failure of the Company to consider "B's" when awarding the "B" jobs. The grievance was denied and appealed to the instant arbitration.

ISSUE:

The parties stipulated to the following:

Did the Company violate Article 9 of the labor agreement when it did not consider an Assembler B for another Assembler B job in a posting on June 7, 1996?

If so, what remedy, if any, is appropriate?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 9
JOB TRANSFER

. . .

Section 2 - Job Postings

All new jobs and all new openings for existing jobs shall be posted by the Company on its bulletin boards for a period of three (3) working days for the purpose of enabling employees in the bargaining unit to apply for such job or jobs if they so desire. The most senior employee in the bargaining unit applying for any job under this provision shall be awarded such job providing the employee is capable of satisfactorily performing such job. The employee shall not be eligible to apply for a new job for six months thereafter unless the employee has been transferred to a lower paying job in the intervening period. An employee awarded a posted job which is at the same or lower pay level of his or her prior job will be ineligible to apply for a new job for twelve months thereafter unless transferred to a lower paying job in the intervening period.

Employee (sic) who do not pass qualification exam(s) for a job posting, cannot re-post for the same position for six (6) months from the date of the previous exam.

The Company shall provide the Union with a copy of all job postings. The job posting shall indicate the shift and classification.

UNION'S POSITION:

The Union contends that the grievance is meritorious. It argues that the Company's assertion that in the 1989 negotiations, the omission of the word "department" in the job posting language, implied that no one in the same classification could sign a job in that classification, is not

supported by clear testimony, notes or notification to the Union. The Union points out that there was no attempt to include any of these items in the contract language.

The Union disputes the Company's claim that it was aware of the posting ban in classification by Mr. Bennett's "wish list" conversation in the 1992 negotiations because his comments were taken out of context. It claims that hypothetical questions on bumping were asked of Mr. Bennett. It points out that Mr. Berkoff seems to support contract language over past practice by quoting him from the 1992 negotiations. The Union states that in July, 1996, it asked for the Company's bargaining notes but the Company did not supply a full copy and provided only a partial copy of the notes the day before the hearing. It suggests that if the notes supported the Company, they would have been supplied in their entirety earlier.

The Union argues that it was neither negotiated nor implied that employes would be restricted in the jobs they could post into. It maintains that the job posting language is clear and unambiguous and submits that the Company is twisting the language to render it near meaningless and to diminish the seniority rights of all involved. The Union takes issue with the Company's argument that "job" means "classification" in Article 9, Section 2 as there is no evidence that this was even talked about and the clear and unambiguous meaning and use does not uphold this interpretation. In conclusion, the Union seeks the interpretation that employes can move laterally in their classification.

COMPANY'S POSITION:

The Company contends that the grievance is without merit and should be dismissed. It points out that the contract provides that the job posting shall indicate the shift and classification. It notes that prior to 1989, the posting would also have included "department." The Company states that in the 1989 negotiations it indicated it needed the flexibility to transfer employes in their classification to other jobs anywhere in the plant and allowing employes to post to a different department could affect this flexibility. It observes that in the 1989 negotiations the Union agreed to remove "department" but in the 1992 bargaining, the Union sought to reintroduce "department" in the job posting to permit employes to switch jobs within their classification. The Company claims that the evidence establishes that Company said no to the Union's proposal to add "department" back in making it clear that employes could not post to different jobs within the same classification. The Company argues that the Union's suggestion that it had no knowledge that employes were not considered in postings to different jobs within the same classification from 1989-1996 cannot be credited because the postings and decisions were posted throughout the plant and were an open book. It also maintains that the issue had come up in the 1989 and 1992 negotiations, so was well known to the bargaining committee members and other employes. The Company insists that the Union had both constructive and actual knowledge that employes who sought to bid for other jobs in the same classification were denied consideration. The Company observes that no grievances were filed from 1989 until the present case even though employes

tried to switch job assignments within the same classification and were denied.

The Company claims that the Union's argument that the language of Section 2 "all new jobs . . . shall be posted" means employes have the right to pick a different job in their own classification is simply not supported by contract language. It asserts that the contract requires the shift and classification be posted which in fact is exactly what was posted. It notes that employes may post for jobs in different classifications at the same or lower pay but this does not support the Union's claim. The Company relies on bargaining history and past practice to prove that the intent of the contract language is that employes cannot use the posting procedure to move to another job in the same classification. It submits that the grievance is without merit and should be dismissed.

DISCUSSION:

Article 9, Section 2 of the parties' collective bargaining agreement provides that all new jobs and new openings for existing jobs be posted. In addition, Section 2 also provides that the posting shall indicate the shift and classification. An issue presented in this case is whether "job" in Section 2 means a particular position or does it mean job classification? It can mean either and where a term can have more than one meaning, it is ambiguous. Past practice and negotiating history may be considered to determine the meaning of ambiguous language. Article 9, Section 1 refers to job classification and job and apparently uses these terms interchangeably. Additionally, the bargaining history and past practice establish that in 1989 the word "department" was removed from the job posting requirements. The Company sought its removal to have the flexibility to move an employe from one department to another and if a person left a particular job in a particular department, that vacancy would not necessarily be the position filled by posting. 1/ This was agreed to by the Union and "department" was dropped from the posting requirements. 2/ In 1992, the Union sought to include "department" back in the job posting requirements. 3/ The Company would not agree to this and the language was not changed. In addition, the practice since 1989 has been not to consider employes in the same classification who post for positions between departments. The evidence clearly established that an employe in the same classification cannot post to a department.

1/ Ex. 13, page 5.

2/ Ex. 16. page 1.

3/ Ex. 19, page 4.

Therefore, if the Company posts for an Assembler B on the first shift, an employe who is already an Assembler B on the first shift could sign the posting but need not be considered because he/she is already on the shift and in the job classification posted. The Company sought in negotiations the flexibility to move employes around within classification from one department to another and the Union agreed to this proposal. The Union cannot now try to obtain in arbitration what it relinquished in negotiations. Any change must be negotiated.

The Union asserts that it understood that the Company wanted flexibility in transferring employes within classification but the Company never told them that this would limit rights to employes to post by department. It is difficult to believe that the Union did not understand this particularly when the word "department" was being removed from the posting requirement. Merely because the full implications of the removal of "department" were not realized by the Union or did not square with its unilateral expectations does not mean that the terms should not be enforced. 4/ Thus, where a vacancy is posted by shift and classification, an employe on that shift and in that classification need not be considered as he/she is already in that shift and classification. The Company has the right to move employes within classification so if they were given the posting the Company could move them back to his/her former position. This is not only disruptive but unwarranted. Employes on a different shift and/or classification must be considered with the senior qualified employe being awarded the position. However, the evidence in the instant case failed to show that any Assembler B who signed the June 7, 1996 posting for an Assembler B was on a different shift from the position posted. The Union's reliance on Borden Co., 34 LA 658 (Morvant, 1960) is misplaced because the express language there provided for transfers within a department. The Union's reference to Southwest Airlines Co., 106 LA 655 (Allen, 1996) is also not applicable to the instant case because it provides that past practice cannot overrule clear contract language. As noted above, the contract language is ambiguous, so past practice may be considered.

On the basis of the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The Company did not violate Article 9 of the labor agreement when it did not consider any Assembler B for another Assembler B job in a posting on June 7, 1996, and therefore, the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 11th day of February, 1997.

4/ Elkouri & Elkouri, How Arbitration Works, (4th Ed., 1985) at 397.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator