BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1558, AFSCME, AFL-CIO

and

AMERICAN RED CROSS
(BADGER-HAWKEYE REGION)

Case 28
No. 55181
A-5584

(Grievance of Virgil Miller)

Appearances:

Mr. Laurence S. Rodenstein, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Local 1558, AFSCME, AFL-CIO.

Clark Hill P.L.C., by **Mr. Fred W. Batten**, Attorney at Law, on behalf of the American Red Cross.

ARBITRATION AWARD

On May 20, 1997, Local 1558, AFSCME, AFL-CIO, hereinafter the Union, and American Red Cross (Badger-Hawkeye Region), hereinafter the Employer, jointly requested that the Wisconsin Employment Relations Commission designate the undersigned staff arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The undersigned was designated to arbitrate in the dispute, and a hearing was held before the undersigned on July 29, 1997 in Madison, Wisconsin. There was no transcript made of the hearing and the parties submitted post-hearing briefs by September 2, 1997 and on September 18, 1997 advised the undersigned that they would not be filing reply briefs.

Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to agree upon a statement of the issues, agreeing that the undersigned will frame the issues to be decided.

The Union asserts there are two issues in dispute:

(1) Did the Employer violate the Agreement when it refused to allow the Grievant to exercise his severance rights? If so, what is the appropriate remedy?

(2) Did the Employer violate the Agreement when it involuntarily transferred the Grievant? If so, what is the appropriate remedy?

The Employer states the issue as being:

Has Virgil Miller been "laid off" within the meaning of Article 29 - Severance Pay?

The undersigned concludes that the issues to be decided may be stated as follows:

Did the Employer violate the parties' Agreement when it refused to permit the Grievant, Virgil Miller, to take severance pay as an option? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1994-1997 Agreement have been cited:

ARTICLE 3 - MANAGEMENT

3.0 Except as may be expressly limited by this Agreement, the Employer has the sole right to plan, direct and control the working force, to schedule and assign work to employees, to determine the means, methods and schedules of operation for the continuance of its operations, to establish reasonable standards, to determine qualifications, and to maintain the efficiency of its employees. The Employer also has the sole right to require employees to observe its reasonable rules and reasonable regulations, to hire, lay off or relieve employees from duties and to maintain order and to suspend, demote, discipline and discharge employees for just cause. The Employer has the right to assign

temporarily personnel to any other duties at such times as natural and man-made disasters threaten to endanger or actually endanger the public health, safety and welfare or the continuation beyond the duration of such disasters. The Employer shall determine what constitutes a natural and man-made disaster as expressed in this Article.

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ARTICLE 6 - DISCRIMINATION FORBIDDEN

6.0 The Employer and the Union agree that there shall be no discrimination against any employee because of age, race, color, handicap, sex, creed, religion, sexual orientation, ancestry, national origin, Union membership or lack thereof.

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ARTICLE 10 - SENIORITY

10.1 The Employer agrees to recognize the principle of seniority with due regard to ability and qualifications in promotions, layoffs and vacation selection, as set forth in this Agreement.

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10.5 When it becomes necessary to reduce the number of employees in a classification, the junior employee(s) will be displaced. Employees affected shall displace the least senior employee in the same pay classification within their department, provided they have the ability and qualifications either to perform the available work immediately or within twenty (20) working days on a satisfactory basis. Should the affected employee be unable to displace a junior employee in the same pay classification, he will displace the least senior employee in his department, provided he has the ability and qualifications either to perform the available work immediately or within ten (10) working days on a satisfactory basis.

When an employee is reduced from his department, he shall displace the least senior employee in the bargaining unit provided he has the ability and qualifications either to perform the available work immediately or within ten (10) working days on a satisfactory basis.

Employees who may be affected by a reduction will be given written notice five (5) days prior to the date of the reduction. Employees may, during this period, serve written notice on the Employer of their intent to elect a layoff rather than displace a junior employee.

. . .

ARTICLE 11 - JOB POSTING AND TRANSFERS

11.0 Whenever there is a vacancy caused by the transfer, promotion or termination of an employee or the creation of a new position, a notice of such vacancy shall be posted simultaneously in Green Bay and Madison on all bulletin boards giving all information concerning the position and the requirements of applicants. Employees who wish to fill such vacancies shall have five (5) working days in which to make written application to the Employer. All such applicants will be considered provided that:

(a) the employee is not on probation or in a training period, or

(b) the employee has not been promoted within the last four (4) months, or

(c) the employee has not failed to complete a probationary period for the same or similarly classified position within the last four (4) months.

11.1 Employees desiring to apply for a vacancy shall sign on the posted notice. The qualified applicant with the most seniority in the department shall be given the first opportunity at the job. Said employee shall demonstrate the ability and qualifications to perform the job during a training period and, if said employee is deemed qualified by the Employer after said training and trial, said employee shall be assigned to fill the vacancy.

11.2 The Employer may make an immediate temporary assignment to fill any vacancy until the vacancy has been filled pursuant to the procedure herein outlined.

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ARTICLE 19 - HOURS OF WORK

19.6 There shall be established schedules for Bloodmobile runs, Blood return runs and Hospital Delivery runs. Schedules of work shall be established which rotate employees with the exception of those employees assigned permanently to Hospital Delivery runs, through the aforementioned run schedules.

. . .

ARTICLE 29 - SEVERANCE PAY

29.0 An employee who has at least two years of continuous service with the Employer and is laid off by the Employer in lieu of retaining any rights under this Agreement, may elect severance pay in accordance with the following schedule, provided such election is made in writing within thirty (30) days of the employee's layoff. An employee who elects severance pay shall lose all rights under this Agreement and in the event of reemployment shall be treated as a new hire for all purposes with the Employer.

Years Worked	Severance Pay
Two to four years continuous service	One week's pay for each continuous year worked
Four to eight years continuous service	One week's pay for each six months worked beyond four such years.
Over eight years continuous service	One week's pay for each four months worked beyond eight such years.

Severance pay shall be cumulative. For example, an employee who has worked seven continuous years shall be entitled to four weeks' pay for his first four such years and six weeks' pay for the ensuing three years.

29.1 Severance pay is not available and shall not be paid to an employee who resigns, retires, or is terminated for cause.

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BACKGROUND

The Employer operates facilities in Madison and Green Bay, Wisconsin. The Union is the recognized exclusive bargaining representative for all full-time and regular part-time non-professional employes at those locations. The Grievant, Virgil Miller, has been employed at the Employer's Madison, Wisconsin facilities since 1956, the last 15 years as a Product Manager Courier (PMC). The Grievant is in the C-3 pay classification. Since the Union's organizing in 1977, the Grievant had been its President until 1996.

For a number of years the Grievant had been permanently assigned to the "Marshfield Run", delivering blood to clinics and hospitals along the way, with St. Joseph's Hospital in Marshfield being the largest customer and the last stop on the run. The Grievant was the only PMC of the four PMC's that was permanently assigned to a run, with the rest rotating through the other runs.

In February or early March of 1997, the Employer was notified it was losing St. Joseph's Hospital as a customer. Around that same time, the Employer was attempting to contract with a number of hospitals in the Chicago area to supply them with blood, including Rush Memorial and affiliated hospitals. Due to the loss of St. Joseph's as a customer as of March 31, 1997, there would no longer be a "Marshfield Run" as of that date.

On March 6, 1997, the Employer's Assistant Director of Hospital Services, Mike Fountain, and Director of Marketing, Tim Ryan, met with the Union's officers to inform them of the loss of the major customer and the possibility of having a "Rush Run" to the Chicago area. At that meeting, the Union was told that the Marshfield Run would be eliminated and the remaining runs would be rearranged somewhat and of the possibility of having a Rush Run. The Union was also told that the Grievant's "position" would be eliminated and that if the Rush Run came to be, a new "position" would be created and posted as a C-2 and that the person in the position would rotate through the runs like the other PMC's. Neither the Grievant nor the Union's representative, Laurence Rodenstein, were able to attend the March 6th meeting, however, the Employer taped the meeting and provided the Union with a copy of the tape.

Another meeting was held on March 13, 1997, with John Ridgely, the Employer's Human Resources Manager, another manager, the Union's President, Vice-President and Steward, the Grievant (Miller) and Rodenstein present. At that meeting, Ridgely discussed the impact of the loss of the Marshfield Run and what would happen if Rush did or did not sign a contract with the Employer. Ridgely indicated in that meeting that Miller would have three options: (1) bump a less senior employe; (2) sign the posting for the Rush Run, if Rush signed; or (3) take severance pay. Ridgely and Rodenstein computed how many weeks of pay Miller would have coming if he took the severance pay option (109 weeks). It was agreed at the

meeting that Ridgely would obtain retirement information Miller had requested and that Miller would then have three days from the time he received that information to select one of the three options.

Subsequent to the March 13th meeting, Ridgely had a conversation with the Employer's Administrator, Ralph Roberts, regarding the options he had given Miller. Roberts advised Ridgely that he would have to discuss the matter with the Employer's Director, Dr. Becker, as he did not think severance pay had been discussed by management as one of the ways to handle the loss of the Marshfield Run. Roberts brought the matter to Dr. Becker's attention, who then discussed it with Ridgely. Dr. Becker advised Ridgely that he did not think severance pay was appropriate as the Employer would still need four PMC's if it obtained the contract with Rush, so that there would be no layoff of a PMC in his view.

On March 28, 1997, following his discussions of the situation with Dr. Becker, Ridgely called Rodenstein, the Union's President and Miller (who was not home) to advise them that the options given Miller at the March 13th meeting were being revoked. At that time, Ridgely had not provided Miller with any retirement information and Miller had not selected any of the options. In the interim between the March 13th meeting and March 28th, the "Rush Run" had been posted as a PMC with a C-2 pay classification, rotating run. The posting was signed by another employe, Dennis Lokken. Miller did not sign the posting. On March 31st, a meeting was held at which Ridgely apologized and again advised Miller that severance pay was no longer an option for him. Miller asked Ridgely whether he was supposed to work that day and was told he was not. Miller then asked if he would be paid and was told he would not. On April 1, 1997, Miller was called at home and told they had found work for him that day, which work he performed. On April 2, 1997, Miller was told he had been assigned the Rush Run and Miller has been in that position since that time. Miller remains classified as a PMC and paid as a C-3. Miller rotates through the runs the same as the other three PMC's.

Ridgely sent Rodenstein the following letter of April 2, 1997, regarding Miller's "Job Status":

> Dear Mr. Rodenstein:
>
> We have had several discussions on the subject of Virgil Miller's employment status, and there continues to be a great deal of confusion.
>
> With the loss of St. Joseph's Hospital (Marshfield) as a customer, we discontinued our delivery to them March 31, 1997, and assigned Virgil Miller to other Product Management Courier duties. He will retain his C-3 classification but will be scheduled as part of the regular courier rotation. In the event

Mr. Miller leaves our employ, the position will be filled (if necessary) at the C-2 rate.

We also scheduled Virgil to work in the Center April 1, 1997, to help with general department maintenance, local deliveries, etc.

Sincerely,

John Ridgely /s/
John Ridgely
Human Resources Manager

Also on April 2nd, the instant grievance was filed on Miller's behalf alleging that his job had been eliminated and that he was entitled to severance pay under Article 29 of the parties' Agreement and as was offered as one of his three options at the March 13th meeting. A grievance was also filed on behalf of Lokken, the employe who had signed the posting for the Marshfield Run.

Rodenstein sent Ridgely the following letter of April 4, 1997:

Dear Mr. Ridgely:

Pursuant to Article 29, Mr. Virgil Miller is exercising his option to elect contractual severance pay. Mr. Miller was notified on March 28, 1997 that his position as Marshfield Driver was being eliminated as a result of business operation changes. Mr. Miller was informed that he could be able to take one of three (3) options:

1) Bump a more junior employee pursuant to Section 10.5;

2) Accept a lesser position working on a rotating shift basis;

3) Exercise his rights to severance under Article 29.

Mr. Miller has been employed continuously with Red Cross since October 16, 1956, or approximately 40.5 years. Mr. Miller has earned severance pursuant to the Article 29.0 formula with approximately 109 weeks of pay.

As you know, Mr. Miller's circumstances parallel Ms. Carol Rodgers' circumstances when she received her severance pay. Aside from Mr. Miller's greater length of service with Red Cross, the only substantive difference between Ms. Rodgers and Mr. Miller is that Mr. Miller happened to organize this union in 1975 and has been the President of AFSCME Local 1558 for 19 years.

Please honor Mr. Miller's request expeditiously. It would be unfortunate if Red Cross forced this outstanding long-term employee to have to fight for his benefits.

Very truly yours,

Laurence S. Rodenstein /s/
LAURENCE S. RODENSTEIN
Staff Representative

Miller's grievance was processed through the parties' contractual grievance procedure. The parties attempted to resolve their dispute, but were unsuccessful, and proceeded to arbitrate the matter before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union first asserts that Miller was laid off on March 31, 1997 when his Marshfield Run position was eliminated and that he was subsequently involuntarily transferred to the rotating Rush Run position. In the past, when a position was eliminated, that employe was offered the option of either bumping a junior employe, taking a layoff, or electing severance pay. That is what happened when Weeth's position was eliminated in LaCrosse and when Rodgers' position was eliminated in Madison. Those instances constitute mutually acknowledged application of the contract under the same circumstances as in this case. Similar to the situation with Weeth, Miller was invited to post for the Rush Run, but demurred, as was his right. Miller was then involuntarily transferred to the Rush Run at the direction of the Director. At both the March 6 and March 13th meetings, the Employer's managers acknowledged that Miller had greater options than being involuntarily reassigned. The Union asserts that the discrepancy between the way Miller has been treated and the way Weeth and Rodgers were treated is based on Miller's having been the Union's president for its first 19 years. The language of Article 29, Section 29.1 is clear and unambiguous that an employe who is laid off may elect severance pay. Miller would have been laid off, but for the involuntary transfer, had he not exercised his bumping rights or his severance rights.

The Union next asserts that arbitrators have relied upon the doctrine of an "implied covenant of good faith" as governing an employer's conduct, citing a number of arbitration awards as holding that labor agreements contain an implied covenant of good faith and fair dealing which requires that employers not be permitted to exercise their rights in an arbitrary, capricious or bad faith manner so as to defeat an employe's rights under another provision of the agreement. The Union posits that in this case management was apparently disturbed by the size of the prospective severance payout, although it had authorized Rodgers to receive 63 weeks of severance pay the prior year. The Union asserts that the Employer offered no affirmative defense of its decision and that, by its agent, the Employer and the Union reached a meeting of the minds at the March 13, 1997 meeting and they are bound by that agreement.

The Union also contends that under the principle of "agency", an organization can be held responsible for the acts of its authorized agents even if it has not specifically empowered the agent to represent it in the general area within the agent's scope of authority. The Union cites a number of arbitration awards as holding that the principle is so powerful that when an organization's authorized agent enters into an agreement, even where it is contrary to the clear terms of the contract or the contract is silent on the point, the agreement entered into is sustained. Other awards are cited as holding that the agency principle applies as well to grievance settlements. Even though the question in issue here was settled on March 13, 1997, prior to the filing of any grievance, the critical element of a party's reliance on the other's good faith representations is present. Ridgely's commitment to offer Miller three options, including severance pay, obliges the Employer the same way as the employers were obligated to comply with grievance settlements in the arbitration awards cited. Ridgely is the Employer's Human Resources Manager and represents the Employer in collective bargaining matters and has routinely settled grievances, as well as rejected them. Ridgely is clearly an authorized agent of the Employer and because of that Miller relied on the severance option, and his failure to sign the Rush posting was, in part, due to his reliance on Ridgely's statements at the March 13 meeting. As a result of that reliance, Miller suffered the loss of one day's pay and was involuntarily transferred. Even if the labor agreement permitted involuntary transfers, which it does not, the Employer is estopped from doing so. Thus, the Employer is bound by Ridgely's actions and even if he was wrong, which he was not, the agency principle holds the Employer accountable.

The Union asserts that there is also a collateral issue in this grievance regarding the involuntary transfer of Miller to the Rush Run position. Miller was permanently assigned to the Marshfield Run, the only permanently assigned employe, and was not required to rotate runs. Miller's refusal to sign for the Rush Run when it was posted is consistent with Ridgely's statements. Article 11 only provides for voluntary transfers and promotions and nothing obligates an employe, even if his position is to be eliminated, to sign a posting. The forced reassignment ignores Miller's seniority rights. If the Employer's action is sustained, any employe with any length of seniority could be shuffled around and reassigned by whim. While

the Employer has the right under Section 11.2 to make temporary involuntary transfers to fill a vacancy until plans to fill it permanently are completed, there is no contractual authority for permanent involuntary reassignment, citing the maxim, "To express one thing is to exclude all others". The Union concludes that the permanent involuntary transfer of Miller was clearly impermissible and that the Employer was obligated to post the Rush position and fill it consistent with Section 11.0 of the Agreement. The Union notes that when Ridgely was questioned as to why he posted the Rush position on cross-examination, he responded that he did not know why. The involuntary transfer of Miller not only violated his rights, but also the rights of the successful applicant for the Rush Run, Lokken. Thus, in addition to ordering the Employer to pay Miller severance pay, the Union also requests that the Employer be ordered to place Lokken in Miller's position.

Employer

The Employer first asserts that the Union's challenging of Miller's assignment to the Rush Run as being an improper "transfer" is not before the Arbitrator, as that issue has not been grieved. Further, the Union confuses the Employer's right to assign work within the employe's own job classification with assignments to work in a different job classification.

With regard to this grievance, the Employer asserts that it was not required to layoff Miller. Article 3, Management, provides that the employer "Except as may be expressly limited" by the Agreement has the "sole right" to plan, direct, schedule and assign work to employes, etc. It also has the "sole right" to "layoff or relieve employees from duties. . ." There is nothing in the Agreement that "expressly limits" the employer's right to rearrange hospital delivery routes, delete hospitals from a particular route, or change routes in a manner which would result in a C-3 PMC making a delivery rather than a C-2 PMC, nor is there any provision requiring that the Employer layoff one or more employes. Nothing in Article 19 - Hours of Work, expressly limits the aforementioned management right to assign or change hospital delivery runs. The language of the second sentence of Section 19.6 was contained in the parties' first Agreement, and means that Bloodmobile run assignments will be rotated with Blood Return runs, but that hospital delivery runs will not be part of that rotation; it does not mean that hospital delivery runs will not be rotated among PMC's. It has been the consistent policy of the Employer to so rotate hospital delivery runs. The exception has been the Marshfield Run because management exercised its right to so assign the work. Section 19.6 was placed in the Agreement in 1977, years before Miller became a PMC and was not written to protect his claim that his job was the Marshfield Run and only that run and that his job was eliminated with the loss of St. Joseph Hospital as a customer. Miller's job was to make PMC hospital deliveries. While it so happened that he made deliveries along the same route for a good many years, that does not entitle Miller to severance pay.

Section 10.5 of the Agreement speaks to reductions in force, i.e. "when it becomes necessary to reduce the number of employees in a classification. . ." The Employer has specifically determined that it was not necessary to reduce the number of employes in any classification. While there is arguably an ambiguity in the first paragraph of Section 10.5 as to the meaning of the term "classification", in that PMC is a single job classification, and employes in that classification can be paid at a C-2 or C-3 rate and Section 10.5 also references employes in the same "pay classification". While using the term "classification" in those different contexts has a potential to complicate issues, it is not necessary to resolve any such confusion in this case as neither a PMC job classification, nor a C-2 or C-3 "pay classification", was eliminated.

Article 29, Severance Pay, is also irrelevant. That provision states that "if an employe is laid off", the employe has an option to elect severance pay. The predicate to any employer obligation under Article 29 is the implementation of the management decision to "reduce the number of employes in a classification" under Section 10.5, and that did not take place.

Next, the Employer asserts that a discussion with an employe regarding an impending layoff or eligibility for severance pay does not require that the employe in fact be laid off or the employe receive severance pay. That an Employer intends to layoff an employe or even if the Employer notifies an employe of an impending layoff, is different than actually laying off the employe. Further, Section 10.5 of the Agreement requires a minimum of five days advance written notice of reductions in force, and no such notice was given in this case. If an employe does not actually suffer the loss of employment or compensation from a layoff, then no layoff has occurred. Citing, In re: Interfaith Medical Center and New York State Federation of Physicians and Dentists, 106 LA 544, (Arbitrator Gregory).

The Employer disputes that Miller was treated differently than other unit members similarly situated or that he was denied severance pay because of anti-union animus. The Union's comparison of Miller's circumstances to that of Carol Rodgers, who was laid off in September of 1996, is misplaced. In Rodgers' case, there was a reorganization resulting in the elimination of accounting functions which were transferred to a different employer. The very type of work being performed by Rodgers was eliminated resulting in a reduction in force, i.e. there was one less accounting position in the unit after the layoff. In Miller's case, there has been no reduction in force within the C-2 or C-3 PMC classification, i.e. there were four PMC's before the loss of St. Joseph's Hospital, and there still are four PMC's. As to the Union's mention of Robert Weeth, there was no testimony offered that would in any way suggest that the severance payments to Weeth, who was laid off, is inconsistent with how Miller, who was not laid off, had been treated.

Regarding the allegation that Miller was denied severance pay because of anti-union animus, the Employer asserts it would be fiscally irresponsible to pay out more than $55,000 in severance pay to one employe, knowing that it would have to hire another employe to perform the same work at the same location, and that is what Dr. Becker told the Union when its officers

came to discuss this matter with him after the grievance was filed. There is no testimony as to any expression of animus or any evidence of ill motive involved in the Employer's decision. Illegal motives cannot be attributed to either Becker or Roberts simply because they reviewed the decision of a subordinate which they believed to be in error, as it is part of their responsibility to be budget conscious and to manage subordinates. The Employer concludes that the grievance is without merit and asks that it be denied.

DISCUSSION

One of the prerequisites to being entitled to severance pay under Article 29, Severance Pay, Section 29.0, is that the employe be "laid off by the Employer. . ." Article 10 - Seniority, Section 10.5, the contractual language that applies to layoffs, provides, in relevant part, "When it becomes necessary to reduce the number of employees in a classification, the junior employee(s) will be displaced." The Grievant's job classification is PMC, and at the time he was, and still is, the most senior of the four employes in that classification.

The number of employes in the PMC classification was not reduced when the Marshfield Run was lost due to the addition of the Rush Run. The Union argues that Miller's "position" was eliminated and a new "position", Rush Run PMC, created, which new position had to be, and was, posted by the Employer pursuant to Article 11 - Job Posting and Transfer. According to the Union, since Miller did not sign the posting for that position, he would have been subject to layoff had the Employer followed the Agreement. That argument, however, ignores the wording in the parties' layoff provision. By its terms, Section 10.5 applies when it is necessary to "reduce the number of employes in a classification". Section 10.5 only applies when a position is eliminated if it results in the reduction in the number of employes in a classification. While the two usually go hand-in-hand, that did not occur in this case. That is due at least in part to the Marshfield Run having been an "assignment" rather than a "position". While it is at times difficult to distinguish between an "assignment", especially a permanent assignment, and a position, it is possible and necessary to do so in this case. There is one position description for the PMC classification and it states that the position's "Primary Function" is to transport blood, components, etc. to the Employer's customers. Under "Major Duties and Responsibilities", it lists "Deliver orders to customers within specified time frame of assigned route." Miller was permanently assigned to the Marshfield Run, unlike the three other PMC's who rotated through the other runs, and that is likely the source of much of the confusion. In this case, however, it was the route that was eliminated, i.e. the Marshfield Run, and thus Miller's permanent assignment to that route was eliminated with it. Due to the signing of a contract with Rush Memorial Hospital in the Chicago area, a new "route" or "run" was created - the "Rush Run", which was to be rotated like the other runs. There is no longer a permanently assigned run and the four PMC's rotate through the runs, with Miller now assigned to drive the Rush Run every fourth week. While there was a negative impact on Miller as a result of the change in assignments necessitated by the loss of the Marshfield Run, his position as a PMC was

not eliminated and there was no reduction in the number of employes in the PMC classification. The work in the PMC classification was reconfigured due to the changes in customers and that work was assigned to the existing persons in that classification, including Miller. That being the case, there was no layoff situation under Section 10.5. It also follows that there was no involuntary transfer to another "position"; rather, there was a reassignment of duties within management's rights under Article 3 necessitated by the change in the Employer's customers. Further, even if the number of employes in the PMC classification had been reduced, Section 10.5 requires that it be the junior employe in the classification that is displaced, and that would not have been Miller. Thus, the event necessary to trigger the right to severance pay under Article 29, i.e. layoff, did not occur with regard to Miller.

In addition to the finding that Miller's "position" was not eliminated, the fact that the number of employes in the PMC classification was not reduced also distinguishes this case from the circumstances present in the cases involving Carol Rodgers and Robert Weeth. It appears from the evidence that Rodgers' position was eliminated, as the work she had been performing was being transferred out of the bargaining unit, resulting in there being no work for her to perform and one less employe in her job classification. With regard to a prior situation involving Weeth, it again appears that there was one less Lab Aide position and one less employe when all was said and done. Given that both the Rodgers and Weeth situations apparently resulted in a reduction in the number of employes in their respective classifications, they do not establish a practice that the elimination of a "position" (without a concomitant reduction of the number of employes in a classification) triggers the layoff provisions of Section 10.5, and thus, the right to severance pay under Section 29.0.

The Union has asserted that, the parties' Agreement aside, the Employer is bound by Ridgely's offer of the three options he gave Miller at the March 13th meeting, one of those options being to take the severance pay. In that regard, the Union has asserted the principles of good faith and fair dealing in a party's exercise of its rights under a labor agreement, the principle of "agency" and the doctrine of promissory estoppel. There are a number of problems with the Union's arguments. First, for there to be a binding agreement reached, there must have been an offer and an acceptance. While Ridgely's representations to Miller at the March 13th meeting could be said to constitute an "offer", there was no "acceptance" of that offer before it was revoked by Ridgely on March 28th. Formal acceptance of the offer was not communicated to the Employer until Rodenstein's letter of April 4th. The lack of acceptance of the offer made by Ridgely before it was rescinded, distinguishes this case from the situations in the awards cited by the Union with regard to the binding effect of entering into a grievance settlement.

The principle that all labor agreements contain an implied covenant of good faith and fair dealing such that a party may not exercise its contractual rights in an arbitrary, capricious or discriminatory manner is well-accepted. The Union infers in this regard that the Employer acted

in this case to deprive Miller of his contractual right to severance pay because of the animus

management bore towards him as the long-time president of the Union. There simply is no evidence of such animus. While the Employer's managers acknowledged that Miller had been very active in representing the Union's members, there is nothing to indicate that was the basis of Becker's or Robert's concerns with the options Ridgely had offered Miller. Becker credibly testified that he questioned Ridgely's interpretation of how the parties' labor agreement applied to the facts, in that he did not consider there to be a layoff situation giving rise to a right to severance pay, since there would be no reduction in the number of PMC's. Becker conceded that while he did not recall telling the Union's officers that he did not want to pay Miller two year's pay to play golf, he might have said it. Even if Becker made that statement, it is not sufficient to demonstrate animus or bad faith on his part. Most employers would reasonably balk at paying an employe a large sum of money when it is not necessary and would avoid doing so if it was not required. Having concluded that the situation did not require a layoff, it was not an act of bad faith on Becker's part to direct Ridgely to rescind the options he had offered Miller at the March 13th meeting.

The Union also asserts that the Employer should be estopped from rescinding its March 13th offer to Miller because of his having relied on that offer to his detriment. Under the principle of promissory estoppel, if Miller had in fact relied on that offer to his detriment, the Union would be correct. The detrimental reliance cited by the Union in this regard is Miller's failure to sign the posting for the Rush Run. Failure to sign for a posting would normally result in the loss of the opportunity to obtain the position posted and would constitute detrimental reliance. The issue of whether there was a "position" to be posted aside, Miller was instead assigned to the Rush Run, an action which the Union also challenges as unauthorized under the labor agreement as an "involuntary transfer". That question has been addressed previously in determining whether the Employer was required to instead lay Miller off, at least to the extent that the Employer's action was found to constitute an assignment of work within its contractual management rights and not the elimination of Miller's position. The point, however, is that promissory estoppel is after all an equitable doctrine, and alleging that the detrimental reliance was the loss of the opportunity to obtain something the party in fact received, but does not in truth want, does not comport with that doctrine.

The Grievant's disappointment and dissatisfaction with what has occurred is certainly understandable. What appears to have occurred, however, was an honest mistake on Ridgely's part, some confusion on everyone's part as to what constitutes a "position", and management's subsequent realization of its error. Other than the loss of a day's pay (March 31st), which management acknowledged was due to its mistake (and therefore ought to rectify), Miller has been treated in accord with the terms of the parties' labor agreement. It is concluded that the facts in this situation did not establish a layoff situation with regard to the Grievant, and that, therefore, the Employer did not violate the parties' Agreement when it denied the Grievant, Virgil Miller, severance pay.

Based upon the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 29th day of January, 1998.

David E. Shaw /s/ David E. Shaw,
Arbitrator

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