BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BOILERMAKERS LOCAL 107

and

ADVANCE BOILER & TANK COMPANY

Case 8
No. 57347
A-5752

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Mathew R. Robbins**, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

Axley Brynelson, LLP, by **Attorney Michael J. Westcott**, 2 East Mifflin Street, Madison, Wisconsin, appearing on behalf of the Company.

ARBITRATION AWARD

Boilermaker's Local 107, herein "Union" and Advance Boiler & Tank Company, herein "Company" are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union, by request to initiate grievance arbitration received by the Commission on March 3, 1999 requested the Commission to appoint either a Commissioner or a member of its staff to serve as arbitrator. The Commission appointed Paul A. Hahn as arbitrator on March 4, 1999. Hearing in this matter was held on May 18, 1999 at Advance Boiler & Tank Company in Milwaukee, Wisconsin. The hearing was transcribed and the parties filed post hearing briefs which were received by July 13, 1999. The record was closed on July 13, 1999.

ISSUE:

The parties stipulated to the following issue:

Whether the Company violated Article 8, Section 2, of the collective bargaining agreement when it laid off Joe Schmitz and Ed Rosado on November 30, 1998 and, if so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1

RECOGNITION, SCOPE, AND PURPOSE OF AGREEMENT

Section 1. Recognition – The Company recognizes the Union as the sole and exclusive bargaining representative for the purpose of collective bargaining with respect to wages, hours of employment, and other conditions of employment, for all of the Company's hourly paid production and maintenance employees employed at the Company's plants at 1711 South Carferry Drive, Milwaukee, Wisconsin, or at any site that the Company may use or move in the future, but excluding office and plant clerical employees, professional employees, research and development employees, engineering employees, technical employees, guards, and supervisory employees, as defined in the National Labor Relations Act, as amended.

. . .

ARTICLE 8

SENIORITY

Section 1. Definition - Seniority is defined as the length of continuous service the employee has in the shop (Fabrication or Repair) in which he is presently employed.

Section 2 - In recognition of the responsibility of Management for efficient operation of the Company, it is understood and agreed that in all cases of decrease in work force (layoffs) or recalls after layoff the following factors as listed below shall be considered:

A. Ability to perform the work available.
B. Continuous service in the Fabrication Shop or Repair Shop as applicable.

. . .

Section 4 – Separate seniority lists will be maintained for the Fabrication Shop and the Repair Shop.

ARTICLE 12

GRIEVANCE AND ARBITRATION PROCEDURE

Section 1 – A grievance, for the purpose of this article shall be defined as a dispute between the Company and any of its employees or the Union with respect to the interpretation, application, or violation of any of the provisions of this Agreement.

. . .

Section 2. Arbitration Procedure - . . . . The decision of the majority of the Arbitration Committee shall be final and binding on the parties hereto. Such decisions shall be within the scope and terms of this Agreement, but shall not change such scope and terms.

. . .

ARTICLE 18

MATTERS PERTAINING TO MANAGEMENT

Section 1 - The management of the Company and the direction of the working forces, including but not limited to, the work to be performed, the locations of the operation, the schedules of operation; the methods, processes and means of operating; the establishing of reasonable Company rules of conduct and rules of safety practice, the authorization of leaves of absence, the scheduling of hours and shifts and the right to hire, promote, demote, transfer, discharge or discipline for just cause and lay off employees are the sole and exclusive responsibility of the Company.

The functions of management shall also include but not be limited to the right of the Company in its discretion, in whole or in part, to increase or diminish operations, increase or change productive equipment, establish reasonable shop rules and subcontract work, provided the Union is informed prior to such subcontracting.

The Company shall retain the above and all other rights and privileges except as specifically modified or abridged by this Agreement.

FABRICATION PAY GRADES

Helper – Any one or more of the following:
1. Proficiency with all cleaning, testing, painting, and shipping procedures.
2. Satisfactory use of the cranes.

D. Mechanic – Any one or more of the following:

1. Any one welding process (SMAW, GTAW, FCAW/GMAW) qualified and satisfactory use of the cranes.
2. Acceptable proficiency with one of the following: the plate roll, the CNC plate burning machine, or one machine tool plus associated PREP. DEPT. paperwork and satisfactory use of the cranes.
3. SAW qualified.
4. Demonstrated proficiency with carbon arcing.

C. MECHANIC – D Mechanic plus any one of the following:

1. Two additional welding processes qualified if none qualified previously for "D" Mechanic.
2. One additional welding process qualified if only one welding process qualified previously for "D" Mechanic.
3. Demonstrated proficiency with the plate roll or CNC burning machine, and any one machine tool plus associated PREP. DEPT. paperwork.
4. Demonstrated proficiency at Free-Table Fitup.

B. MECHANIC – C. Mechanic plus any one of the following:

1. One additional welding process qualified.
2. Demonstrated proficiency with the plate roll and CNC plate burning machine, plus any two machine tools, plus associated PREP. DEPT. paperwork.

A. MECHANIC – B. Mechanic plus:

a. For Prep. Dept.:
    1. Demonstrated proficiency with all of: the plate roll, CNC plate burning machine, drill press, both lathes, milling machine, and associated PREP. DEPT. paperwork.
    2. Recommendation of your supervisor.
b. For Welder:
    1. SMAW, GTAW, and FCAW/GMAW qualified.
    2. Demonstrates proficiency at Submerged Arc welding.
    3. Recommendation of your supervisor.
c. For Fitter:
    1. SWAM, GTAW, and FCAW/GMAW qualified.
    2. Demonstrated proficiency at Free-Table Fitup.
    3. Recommendation of your supervisor.

STATEMENT OF THE CASE

This grievance arbitration involves Boilermakers Local 107, representing the employees set forth in Article I Recognition (Jt. 1), and Advance Boiler & Tank Company. The Union alleges a contractual violation by the Company for laying off two employees, Joe Schmitz and

Ed Rosado, employees more senior than employees that were retained. The layoff took place between December 6, 1998 and January 11, 1999.

The collective bargaining agreement has a seniority provision which provides that management shall consider ability to perform the work available and the seniority of the employes when determining layoffs. (Jt. 1) The most recent agreement was in effect as of May 1, 1996 and is applicable in the present dispute. (Jt. 1)

ABTCO is a boiler repair company that has been in business since 1918. Over the years the nature of the business has had significant change. From the 1950's until the early 1980's the ship repair business was the mainstay of the Company. In the early 1980's, however, the ship repair business began dropping off to the point where it is now less than one percent of the Company's business. ABTCO's business primarily consists of a tank Fabrication Shop as well as a Repair Shop.

The Fabrication Shop manufactures ASME pressure vessell systems which frequently go to utilities for steam-operated conditions. The Fabrication Shop also makes parts which a field installer will subsequently assemble into a much larger, complete boiler. Twenty-three of the thirty bargaining unit employees, including the Grievants, are employed in the Fabrication Shop.

The work in the Fabrication shop consists of five processes:

Fit up where drawings are broken down into material lists for the purpose of ordering material;

Prep where raw material is prepared in a manner that can be fabricated, such as burning material to a particular size, taking flat plate and rolling it into cylinders, drill press and lathe work;

Fit-up Taking the components fashioned in prep and tack welding them into an assembled product;

Weld welding the assembled product completely; and

CT&P (Clean, Test and Paint) where the product is hydrostatically tested, the welder work is cleaned and the product is then painted as necessary. (TR 59 & 60)

The Repair Shop has, over time, been involved in the ship repair business, boiler repair business, heat exchange or repair business, and tank alteration business. Ninety-five percent of the repairs are performed off site. Seven of the bargaining unit employees are employed in the Repair Shop.

The collective bargaining agreement spells out the requirements for the various pay grades; not all employees who are in the pay grades can perform all the requirements spelled out for the pay grade by the agreement. (Tr. 75, 76) (Jt. 1) Each process is assigned work codes and those codes are used for classifying the completed work. (U. 1) No employee is qualified to perform every code. (Er. 5)

The Grievants are employees in the Fabrication Shop. Schmitz is skilled as a Helper or CT&P (Cleaner, Tester, and Painter). (Jt. 4) He is qualified to perform work in codes 6401 - 6415 (U. 5) Rosado is skilled in processes in the Prep area. (Jt. 4) He is qualified to perform work in codes 6101-6157 and CT&P codes 6401-6415, excluding codes 6104, 6105, 6108, 6111, 6152, and 6154. (U. 5) [There are no departments set forth in the collective bargaining agreement although witnesses testified and referred to the different fabrication shop processes as such. (TR 93)]

Schmitz was hired on June 22, 1992. (Er. 5) Rosado was hired on August 10, 1977. (Er. 5) Rosado has the second most seniority. Above him in seniority is only employee Igl who was hired January 30, 1975. (Er. 5)

Six Fabricator shop employees were laid off, including both Grievants, during the weeks of December 6, 1998 through January 10, 1999. Some employees, less senior that the grievants, were retained. (Jt. 4) The Union, on November 30, 1998 (Rosado) and December 2, 1998 (Schmitz) filed grievances on behalf of the Grievants for the Company's decision to retain less senior employes during the layoff period. (Jt. 2 & 3) The grievances were denied by the Company on December 4, 1998 and moved to the arbitration step of the grievance procedure. (Jt. 2 & 3)

The parties processed the grievances through the contractual grievance procedure and were unable to resolve the grievance. No issue was raised at the hearing as to the arbitrability of the grievances. Hearing in this matter was held by the Arbitrator on May 18, 1999. The hearing closed at 3:35 p.m. The hearing was transcribed. The parties were given the opportunity and filed briefs. The briefs were submitted to the Arbitrator, the latest received on July 13, 1999. The parties agreed not to submit reply briefs. The record was closed by the Arbitrator on July 13, 1999.

POSITION OF THE PARTIES

Union

The Union argues that the Company violated the collective bargaining agreement when it retained less senior employees during the lay off period. The Union maintains that in addition to seniority, the grievants were qualified to perform the work that was available during the lay off period. The Union submits that several employees performed operations that both Schmitz and Rosado were qualified to perform during the layoff. The Union placed in the record Weekly Production Hours data for each week during the layoff period, December 6,

1998 – January 10, 1999, in support of its argument that the retained workers were assigned jobs that the grievants were qualified to perform. (U. 2, U. 3.)

The Union argues that the seniority provision is a "sufficient ability" clause. The only consideration under this type of clause, the Union contends, is whether the employee with greater seniority can in fact do the job. The Union continues that a senior qualified employee will be entitled to preference even though a junior employee possesses greater skill and ability. The Union holds that the issue is whether the grievants were qualified, not whether they were more qualified than the retained employees.

In addition, the Union contends that the language of the Agreement does not allow for consideration of superior qualifications. The Union maintains that during negotiations of the present seniority language, the Union rejected the interpretation that seniority should only be a determining factor when the other factors were relatively equal. The Union dismisses proffered evidence to the contrary arguing that the pertinent seniority language is unambiguous and the Company failed in its attempt, when negotiating the current language, to include "relative ability" language. The arbitrator, the Union submits, should not give the Company what it could not obtain in negotiations. Finally the Union asks that the grievances be sustained and the grievants made whole for wages lost while on layoff.

Company

The Company argues that it did not violate the Collective Bargaining Agreement by retaining less senior employees during the lay off period. The Company contends that it weighed the employees' ability and seniority when determining what employees to retain and the grievants did not possess the requisite skills to perform the available jobs during the layoff period.

The Company maintains that the seniority provision is a relative ability clause which allows preference to be given to a junior employee where that employee is clearly superior to a more senior employee. The Company argues that in prior agreements the seniority clause was a sufficient ability clause (U. 1) but through contract negotiations in 1984 the provision was transformed into a relative ability clause with the change in the seniority language. (Er. 2, Er. 3) The Company contends that based on the change in the seniority provision, the Company can lay off employees with the least ability rather than laying off the junior more qualified employee. Furthermore, the Company argues that based on the order of the factors listed, ability is the most important factor in making a layoff decision because it is the first factor listed.

The Company argues that the past practices of the parties since the aforementioned contractual change demonstrate that both parties interpreted the Agreement as allowing the Company to lay off individuals based upon their relative ability as opposed to laying off employees who meet the minimum qualifications on the basis of seniority. The Company asserts that although there were only three prior instances of layoffs since 1984, the Company

used the same procedure when determining which employees to lay off. In each of these instances, the Company contends the layoffs were based upon who was most qualified to perform the available work as opposed to meeting the minimum qualifications to perform the work. Based on these layoffs the Company maintains that the evidence shows that every time there has been a layoff since the language change in 1984, a relative ability approach has been taken in making the layoff decisions. The Company contends the Union has acquiesced with that philosophy in not grieving the practice and by never telling the Company it objected to the Company's interpretation of the seniority provision.

The Company states the current layoff decisions were based on the type of work projected for December, 1998 – January, 1999. (Er. 4) The Company claims that Schmitz did not have sufficient ability to perform the work during the lay off period. Because Schmitz was qualified to perform only CT&P work and all employees were qualified in that process, keeping employees who could perform additional duties was good business sense. The Company argues that it has a management right to determine how many positions to retain and the qualifications for those positions. In addition, the Company asserts that every employee in the CT&P department was laid off and thus seniority is not relevant. In addition, the Company contends that Schmitz was junior to any of the Prep department employees and did not have sufficient ability to perform all of the duties required in that department.

With regard to Rosado, the Company maintains that he did not have sufficient ability to perform the work. While Rosado could perform most of the Prep work (codes) and all of the CT&P work, he was not qualified to perform several jobs in Prep. Further, employees junior to Rosado who were retained could weld; Rosado was not qualified to weld, a key requirement as the Company estimated 80 percent of its work during the layoff period would be welding. The Company claims that the manager making the decisions about layoffs could not project with certainty the work the Company would have in the next several months. The Company claims that the manager's decision was in the normal range of business judgments that a reasonable person in similar circumstances would have reached the same conclusion. The Company further argues that it had no obligation to restructure its workplace in order to try to accommodate certain individuals and to keep them employed as compared to other individuals during a temporary layoff. Finally, the Company argues that the burden in a relative ability case is to prove the Company acted in an arbitrary manner which the Union failed to prove in this case. The Company supports this argument by record exhibits to show that the grievants were not qualified to perform the available work during the layoff. The Company requests that the grievances be denied.

DISCUSSION

The first issue I address is what type of seniority provision is present in the Agreement. There are three types of ability clauses. There is the sufficient ability, relative ability, and hybrid clause. The sufficient ability clause allows a senior employee to be given preference if he/she possesses sufficient ability to perform the job. 1/ That is, whether the senior employee has minimal competence. 2/ As the arbitrator found in CENTRAL MICHIGAN UNIVERSITY AND

U.A.W. LOCAL 6888, AFL-CIO, CMU STAFF ASSOCIATION, when seniority is a consideration, if the employee is qualified for available jobs, the employer must adhere to the senior employee even if a junior employee is more qualified. 3/ Comparisons between employees are unnecessary and improper and "the job must be given to the senior employee if he is competent, regardless of how much more competent some other bidder may be." See Elkouri supra at 839.

1/ How Arbitration Works, Elkouri & Elkouri, p. 839 (BNA, 5th Ed. 1997).

2/ The Common Law of the Workplace, St. Antoine, p. 143 (BNA, 1998).

3/ 102 LA 787, 794 (House, 1994).

Relative ability clauses allow seniority to be determinative only if the qualifications of the employees are equal. See Elkouri, supra at 838. It allows preference to be given to a junior employee where that employee is clearly superior to a more senior employee. See St. Antoine, supra at 143. In CARNATION PET FOODS DIVISION AND RETAIL, WHOLESALE, AND DEPARTMENT STORE UNION LOCAL 125, the arbitrator found that the burden is on the Union to show that Management had no justifiable basis for a lay off decision. 4/ In another decision, WAPATO SCHOOL DISTRICT AND PUBLIC SCHOOL EMPLOYEES OF WAPATO, A/W PUBLIC SCHOOL EMPLOYEES OF WASHINGTON, the arbitrator found that the management decision to promote or layoff should be deferred to as long as the record indicates that the right was exercised in good faith, based on a reasonable basis, and was not arbitrary or capricious or discriminatory. 5/ Comparisons between qualifications of employees being considered for layoff or bidding on positions are necessary and proper. See Elkouri, supra at 838.

4/ 89 LA 1288, 1291 (Berger, 1987).

5/ 91 LA 1156, 1160 (Gaunt, 1998).

Hybrid clauses allow both seniority and ability to be considered without indication of how much weight should be given to each. The greater weight should be given to one that better separates the employees. See St. Antoine, supra at 143. As explained in CALLITE TUNGSTEN CORPORATION AND UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, LOCAL 448, if there is only a slight difference in ability between the employees but a great difference in seniority, seniority will be determinative. 6/ Arbitrators have required, however, that under hybrid clauses, fair and reasonable consideration be given to both

seniority and relative ability, although the weight that may be given to each varies from case to case. See Elkouri, supra at 840. Both seniority and ability must be considered when comparing two or more employees.

6/ 11 LA 743, 744-745 (Feinberg, 1948).

The Article 8, Section 2 provision does not definitively indicate the weight to be given to each factor; therefore the provision is ambiguous in this respect. A determination must be made regarding the type of clause that is present in the agreement. In determining which type of clause is present in the contract, it is appropriate to consider the testimony given at the hearing regarding the 1984 contract negotiations when the change in the seniority provision was discussed. The weight to be given such testimony depends on the credibility of witness(es) and whether the testimony can be supported by other sources. In addition, testimony to disqualify the original testimony is considered when determining the weight to give certain statements. Based on the testimony, the documents presented, and the lack of any rebuttal testimony, I find that the original seniority provision was a sufficient ability clause. I further agree with the Company that based on the negotiations and the current language of the contract, the seniority provision is currently a relative ability clause.

For additional support of the finding that the seniority provision is a relative ability clause, I considered the past practices in previous lay off decisions. The past practices show that the Company, since the 1984 language change, has never considered seniority when deciding which employees to lay off. The record describes three prior lay off decisions, Magerowski, Terry Roeglin, and Ron Frontczak. At the hearing, when asked why Magerowski was laid off rather than junior employees, Gerald Zvara, Repair Shop service manager, testified, "[h]e was the helper, he was the only helper we had at that time, least amount of skills." (Tr. 110, L. 24-25) When asked why Frontczak was laid off rather than a junior employee, Zvara testified he was laid off because he did not have a valid driver's license, a requirement for the job. (Tr. 115, L. 3-4) When asked why Roeglin was laid off, Zvara testified, "he lacked the least amount of skills as the B mechanic." Zvara further testified that Roeglin, "… had the least ability." (Tr. 115, L. 6-7, 21) Because the employees abilities varied dramatically, it appears seniority was not a consideration. Zvara testified that ability was the only consideration when making lay off decisions. Although these layoffs occurred in the Repair Shop which has a separate seniority list, the seniority language of Article 8, Section 2 applies the same to both Fabrication and Repair. The Union never grieved this interpretation. And although these layoffs did not occur in Fabrication, given the small total number of employees, the Union had to be aware of them. There may be many reasons why an individual employee might not grieve, but the Union was aware of this Company interpretation of language critical to the Union. Therefore, in practice the Union did acquiese to the Company's interpretation of Section 2.

The past practices highlight the fact that ability was the first consideration in prior lay off decisions. In fact, seniority was not even considered. The abilities varied to a large degree between the employees based on the testimony of Zvara. Thus, seniority was not a consideration. These prior layoffs show that the seniority clause was interpreted and implemented as a relative ability clause. The Union has not grieved this interpretation. I agree with the Company that there would have been little reason to negotiate a language modification in 1984 from a very clear sufficient ability clause unless the clause was to mean something else. This is true even though the words "relatively equal" were dropped from the Company's 1984 proposal.

Therefore, I find that the seniority provision in the agreement to be a relative ability clause. Under this type of clause, ability is considered and then only if abilities are similar is seniority to be given consideration. Based on this interpretation, the first consideration must be whether a junior employee had the ability to perform the job which was superior to the grievants'. If the retained employees were clearly superior to the grievants, the Company did not violate the agreement. If, on the other hand, the retained employees were not clearly superior to the grievants, an analysis must be made to determine whether seniority was given consideration. As a relative ability clause, the Union has the burden of proving that the retained junior workers were not clearly superior to more senior employees, including the grievants.

The qualifications of the grievants and the employees in general are not in dispute. (Jt 5, Er. 5) The contract, Article 8, Section 2 calls for retaining employees who have (1) ability to perform the work available. (Jt. 1) In the cases discussed and cited by the Company, the disputes involved one job. Here the "job" is to build a vessel from Layout through CT&P. But that "job" is broken into many jobs. No employee, the record shows, has the ability to perform all the jobs or codes from Layout through CT & P. (Er. 5 and appendix to Er. brief) The parties did not dispute or disagree on the accuracy of Employer 5, therefore, the only reasonable interpretation is which employes are, as the contract states, qualified or have the ability to perform the multitude of factors that are the "work" to complete the job. In this regard it is necessary to consider the available work during the layoff to determine whether the grievants had the ability under a relative ability clause.

Because each grievant has different abilities and seniority, each will be addressed separately. Joe Schmitz was hired on June 22, 1992. He is classified as a Helper and is qualified to perform all 6400 series jobs. Based on my estimates, Schmitz was unable to perform between 23.08% - 100% of the work performed during the layoff. (Appendix A) The lowest percentage is almost 25%, thus Schmitz did not have the ability to perform approximately 25% of the job. It is not reasonable to expect the Company to restructure a layoff to accommodate a worker that can not perform 25% of the work. Therefore, under the Agreement provisions, the Company appropriately determined that Schmitz did not have the ability to perform the available work.

Because Schmitz did not meet the first threshold requirement under a relative ability clause, seniority does not need to be considered. It is also noted that Schmitz' entire CT&P department was laid off. Even if seniority were the determining factor, it does not have a

bearing on this issue as every employe in CT&P was put on layoff status. There was not a need for employees in that department regardless of how much seniority an employee had obtained. Furthermore, Schmitz was the last person in his department to be laid off because of his seniority status. The Company reasonably concluded that Schmitz should be laid off when the entire department was not needed for the upcoming projects.

Therefore, the Company did not violate the Agreement when it laid off Schmitz during the lay off period.

Ed Rosado was hired on August 10, 1977. He is classified as a "D" Mechanic and is qualified to perform Prep jobs with codes 6101-6157 and CT & P jobs 6401-6415, excluding Prep codes 6104, 6105, 6108, 6111, 6152, and 6154. Based on my estimates, Rosado was unable to perform 0%-100% of the job compared to the other employees in the Prep department. (Appendix A) Rosado was qualified to do the majority of the work that was performed by Chet Stachowiak, a less senior employee not laid off. For the week of January 10, 1999 Rosado could have performed all of the work performed by Stachowiak. In addition, Rosado could have performed approximately 60.5 hours out of the 64.25 Stachowiak hours worked during the period of December 6, 1999 – January 3, 1999. This calculates to Rosado being able to perform 94.16% of the work Stachowiak completed during the first five weeks at issue; and 100% of the work for the last week of the lay off period. (Appendix A)

Therefore Rosado was qualified to perform the majority of the available work that was performed by Stachowiak, a less senior Prep employee; this is the main thrust of the Union's argument. Preference can be given to a junior employee but only where that employee is clearly superior to a more senior employee. In this case, with the exception of several hours [3.75 hours in a five week period], Rosado's abilities to perform the work available were the same as Stachowiak. Based on these calculations, Stachowiak's abilities were not clearly superior to that of Rosado, a more senior employee. Because their abilities for the work avaiable were extremely similar, seniority must be a consideration.

In the testimony of Wachowiak, Manufacturing Manager, there is no mention that seniority was a consideration at all with the decision to lay off Rosado. Based on his testimony, the ability of Rosado was the only factor considered. When asked why Rosado was selected for lay off, Wachowiak responded, "[a]gain, I looked at the particular projects that I had forthcoming, looked at the necessary skill and abilities that were required to perform those functions to complete the projects and he did not have all of those skills and abilities." (Tr. 84, L. 18-22) However, under a relative ability clause seniority must be considered when the junior employee's abilities are not clearly superior to that of a more senior employee. I cannot ignore the contract's language "ability to perform the work available."

Based on the hiring dates, Rosado is the more senior employee. Because his abilities were similar to Stachowiak and Stachowiak's abilities to perform the "work available" were not clearly superior, seniority should have been considered. Given Rosado's seniority, he should have been retained over Stachowiak, a less senior employee. Whether Stachowiak, third on the seniority list, would have been layed off if Rosado has been retained is an issue not before me.

In addition, it is possible that for the 3.75 hours of work performed by Stachowiak for which Rosado was not qualified, the work could have been shifted to another employee with little economic inconvenience or consequence. I am not unappreciative of the Company's "crystal ball" argument. I credit production Manager Wachowiak's testimony that he made his best estimate prior to the layoff of what fabrication skills he would need. (Tr. 85) But at the same time, he admitted that customers were not releasing jobs (Tr. 70), so he certainly could not have known for sure. Welding skills is what he wanted and thought he would need. (Tr. 83, 84) However, as it turned out, welding comprised closer to sixty percent of the work during the layoff rather than 80 percent. (U. 2 & Tr. 85)) As shown by appendix A (Rosado), Rosado could have been retained in an effort not to discount 22 years of seniority. Further had Rosado been retained and more welding work came in and Prep work was available for which Rosado was not qualified, there is nothing in the agreement to have prevented laying off Rosado at that point. This is particularly true since no one, including Rosado, questioned his qualifications or lack thereof. As it turned out, Rosado could have performed almost all the work (Appendix A) of a junior employee.

The Company violated the Agreement when it did not consider seniority when the employees' abilities to perform the available work were so close. Furthermore, the Company could have kept Rosado on, due to similar abilities and seniority and laid him off later if the work required skills above Rosado's abilities. While the Company may have acted in good faith, its decision as to Rosado was not reasonable.

Based upon the foregoing and the record as a whole, I enter the following

AWARD

The Company did not violate the collective bargaining agreement when it layed off grievant, Joe Schmitz. The grievance of Joe Schmitz is denied.

The Company did violate the collective bargaining agreement when it layed off grievnat, Ed Rosado. The grievance of Ed Rosado is sustained.

Remedy

Ed Rosado shall be awarded back wages at Rosado's rate of pay less interim earnings for the number of hours Chet Stachowiak worked during the lay off period.

Dated at Madison, Wisconsin this 30th day of August, 1999.

Paul A. Hahn /s/
Paul A. Hahn, Arbitrator

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ARBITRATOR APPENDIX A

Calculations for Schmitz and Rosado:

To determine how much of the projects the grievants could NOT perform an analysis was undertaken. This included taking Union exhibits 2, 3 and 5 and determining how many hours the grievants could NOT perform the layoff job assignments based on what the grievants were qualified to perform. The calculations were conducted as follows; for each employee that the Union argued performed work during the layoff that Grievants could have performed, their regular hours for the week were added together to get a total hours worked figure. This figure included only time spent on jobs. This amount *excluded* any amounts not assigned to a job, such as RMT or NPL designations. After obtaining the total hours worked for each employee per week I determined which jobs, according to the testimony and exhibits, each grievant could perform. If the grievant was not qualified for the job, the hours were added together. Then all the hours the grievant was not qualified to perform were divided into the total hours worked. This percentage represents the portion of time the grievant would not be qualified to perform the tasks assigned for that week.

The results are as follows:

Rosado

Name of Employee	Week Ending	Hours not qualified	Actual hrs worked	Total hours	% of week not qualified
Orlowski	12/06/98	5.5	38.25	40	14.38%
Peters		10.25	38.0	40	26.97%
Zirzow		23.25	25.25		92.08%
Saprykin		24.5	36.25		67.59%
Pinkowski		34.0	35.0		97.14%
Stachowiak		1.5	19.0		7.89%
Orlowski	12/13/98	12.5	34.75	36	35.97%

Peters		15.25	35.0	35	43.57%
Zirzow		35.25	36.25		97.24%
Saprykin		11.75	38.0		30.92%
Pinkowski		34.5	34.5		100%
Stachowiak		1.0	31.50		3.17%
Orlowski	12/20/98	30.	39	40	76.92%
Peters		18.5	39.5	40	46.84%
Zirzow		45.0	55.5		81.08%
Saprykin		25.75	38.75		66.45%
Pinkowski		32.2	35.0		92%
Stachowiak		.5	7.5		6.67%
Orlowski	12/27/98	8.	13	18.25	61.54%
Peters		12.5	19.25	22	64.94%
Zirzow		15.0	19.0		78.95%
Saprykin		13.75	19.75		69.62%
Pinkowski		24.5	24.5		100%

Stachowiak		.5	3.25		15.38%
Orlowski	01/03/99	16.25	16.25	24.75	100%
Peters		13.75	22	22	62.5%
Zirzow		16.0	18.0		88.89%
Saprykin		13.75	19.0		72.37%
Pinkowski		24.5	26.5		92.45%
Stachowiak	01/03/99	.25	3.0		2.94%
Orlowski	01/10/99	22.75	22.75	26.25	100%
Peters		21.25	36.25	39.75	58.62%
Zirzow		20.5	26.0		78.85%
Saprykin		14.0	37.0		37.84%
Pinkowski		26.5	34.0		77.94%
Stachowiak		0	23.75		0%

Schmitz

Name of Employee	Week Ending	Hours not qualified	Actual hrs worked	Total hours	% of week not qualified
Orlowski	12/06/98	38.25	38.25	40	100%
Peters		10.25	38	40	26.97%
Zirzow		23.25	25.25		92.08%
Saprykin		24.5	36.25		67.59%
Pinkowski		34.0	35.0		97.14%
Stachowiak		8.5	19		44.74%
Orlowski	12/13/98	27.75	34.75	36.	79.86%
Peters		15.25	35.0	35	43.57%
Zirzow		35.25	36.25		97.24%
Saprykin		11.75	38.0		30.92%
Pinkowski		34.5	34.5		100%
Stachowiak		20.75	31.50		65.87%

Orlowski	12/20/98	37	39	40	94.87%
Peters		18.5	39.5	40	46.84%
Zirzow		45.0	55.5		81.08%
Saprykin		25.75	38.75		66.45%
Pinkowski		32.2	35.0		92.0%
Stachowiak		7.5	7.5		100%
Orlowski	12/27/98	12.75	13	18.25	98.08%
Peters		12.5	19.25	22	64.94%
Zirzow		15.0	19.0		78.95%
Saprykin		13.75	19.75		69.62%
Pinkowski		24.5	24.5		100%
Stachowiak		.75	3.25		23.08%
Orlowski	01/03/99	16.25	16.25	24.75	100%
Peters		13.75	22	22	62.5%
Zirzow		16.0	18.0		88.89%

Saprykin		13.75	19.0		72.37%
Pinkowski		24.5	26.5		92.45%
Stachowiak	01/03/99	3.0	8.5		35.29%
Orlowski	01/10/99	22.75	22.75	26.25	100%
Peters		22.0	36.25	39.75	60.69%
Zirzow		20.5	26.0		78.85%
Saprykin		14.0	37.0		37.84%
Pinkowski		26.5	34.0		77.94%
Stachowiak		17.75	23.75		74.74%