BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 244, AFSCME, AFL-CIO

and

THE CITY OF SUPERIOR

Case 176
No. 59098
MA-11176

(Johnson Seniority Grievance)

Appearances:

Mr. James E. Mattson, Staff Representative, Wisconsin Council 40, 1701 East Seventh Street, Superior, Wisonsin, for the labor organization.

Fryberger, Buchanan, Smith & Frederick, by **Attorney Joseph J. Mihalek**, 1419 Tower Avenue, Superior Wisconsin, for the employer.

ARBITRATION AWARD

Local 244, AFSCME, AFL-CIO ("the Union") and the City of Superior ("the City") are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the City concurred, for the Wisconsin Employment Relations Commission to designate a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to seniority. The Commission appointed Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Superior, Wisconsin on October 17, 2000; it was not transcribed. The parties submitted written arguments on November 22, 2000, and waived their right to reply.

ISSUE:

The parties did not agree to the issue. I state the issue before me as follows:

Did the City violate the collective bargaining agreement when it designated William Larson as having a higher seniority ranking than Robbi Johnson? If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 3
MANAGEMENT RIGHTS

The city possesses the sole right to operate the City Government and all management rights reside in it, subject only to the provisions of this Contract and applicable law. These rights include:

A) To direct all operations of the City.

B) To establish work rules and schedules of work.

C) To hire, promote, schedule and assign the employees to positions with the City.

. . .

ARTICLE 7
SENIORITY AND EFFECT OF SENIORITY ON FRINGE BENEFITS

7.01 Effective January 1, 1986, seniority according to this Agreement, shall begin with the employee's starting date of employment within this bargaining unit. After January 1, 1986, employees re-assigned from other bargaining units shall, however, retain longevity, sick leave accumulation and vacation based upon his/her years of service credited in such other bargaining unit. Seniority shall not be diminished by absence due to illness, authorized leaves of absence or temporary layoff. Seniority lists shall be maintained by each division and on a unit-wide basis. Each seniority list shall be brought up-to-date annually and copies of same shall be mailed to the Secretary of the Union.

7.02 The seniority of each employee of the City of Superior shall be maintained within the various divisions of the Public Works Department. Any person newly employed in any division, except employees returning from military service placed in a new division, shall begin at the bottom of the seniority list of that particular division.

ARTICLE 11
GRIEVANCE PROCEDURE

Crucial to the cooperative spirit with which this Agreement is made between the Union and the City of Superior is the sense of fairness and justice brought by the parties to the adjudication of employee grievances. Should any employee feel that his/her rights and privileges under this Agreement have been violated, he/she shall consult with his/her Union Grievance Committee. The aggrieved employee and the Grievance Committee shall, within ten working days of the date of the grievance occurred, present the facts to the employee's immediate supervisor or department head.

. . .

11.05 The arbitrator shall hold hearings and take testimony regarding the dispute and shall render his/her decision, which shall be considered final and binding to both parties to this Agreement. The arbitrator, in making his/her decision, shall neither add to, delete from, nor amend any of the existing provisions of this agreement.

. . .

BACKGROUND

This grievance concerns the relative seniority of two city employees, both covered by the collective bargaining agreement between the union and the city, who began work the same day. The union contends that the employe who worked the day shift, Robbi Johnson, has greater seniority; the city considers the employe who worked the afternoon shift, William Larson, to have been hired first and thus have greater seniority.

Johnson and Larson both applied for employment as equipment mechanic or welder fabricator with the city in May 1999. At that time, Larson had about 15 years relevant experience, endorsements in six separate classes on his commercial driving license (CDL), and was earning $14.14 hourly as a heavy equipment mechanic for a construction firm. Johnson

had about seven years relevant experience, a single CDL endorsement, and was earning $9.00 hourly as a mechanic and welder. Both men were graduates of Superior's South Shore High School, with Johnson also holding a two-year degree in diesel and power equipment from Lake Superior College.

The city hired both men, and had them start work on the same date, August 16, 1999. Johnson was assigned the first shift, starting at 7:00 a.m., with Larson directed to report to the second shift at 3:00 that afternoon. The city assigned Larson the employee number 3330 and Johnson number 3331. Pursuant to the collective bargaining agreement, both Larson and Johnson were on probation until February 16, 2000.

In December 1999 the city distributed a call-out list for winter snow plowing, showing the employees in seniority order. On January 8, 2000 the city provided to the union an updated seniority list, which was then posted in the city garage where Larson and Johnson both worked. Both lists showed Larson to have seniority over Johnson. Johnson was aware of the respective seniority rankings no later than January 2000.

On February 24, 2000, city Human Resources Analyst Cammi Koneczny sent Larson and Johnson the following letter:

> I understand that there has been some confusion about your seniority with the AFSCME Local #244 union so I am writing this memo hoping to clarify the issue for both of you.
>
> When you interviewed for a mechanic position with the City there were two vacancies. Based upon your interviews and work experience it was determined that the first position would be offered to William Larson and the second position would be offered to Robbi Johnson. The union contract states that seniority shall begin with the employee's starting date of employment within the bargaining unit. It is the City's privilege to determine order of seniority when hiring new employees as long as start dates don't contradict that order. Even though you both started on the same date, William was determined by the City to be more senior. We could have started Robbi a day later to make the seniority more clear but you were both available to start on the same day and we didn't want you to lose the opportunity to earn money. In this case, to clarify your seniority order, we also made sure that your employee numbers were issued with the more senior person receiving the lower number. In addition, it does not matter that one of you started on the day shift and one on the afternoon shift, seniority is based on start "date", not start "time".

I hope this clarifies your seniority questions. If you have any other questions please call me.

On February 29, 2000, the union filed a grievance, contending that Johnson should have seniority over Larson because he worked the earlier shift. On March 9, 2000, Koneczny replied to union steward Mike Rainaldo as follows:

I am responding to the above-referenced grievance at the first step.

Article 3(C) of the Local #244 Working Agreement, Management Rights, states that management has a right "To hire, promote, schedule and assign employees to positions with the City." We chose to hire William first and Robbi second, based on their interviews and work experience. We assigned William the lower employee number to clarify their seniority. We have used this same practice in the police department, where they often hire more than one officer at a time, with seniority defined by their employee number. Also, when Robbi was in our office I'm sure he asked me if he was the first or second mechanic hired and I told him he was the second.

Article 7.01 of the Local #244 Working Agreement, Seniority and Effect of Seniority of Fringe Benefits, states that seniority "shall begin with the employee's starting date of employment within this bargaining unit." Management determines who will be hired and on what date they will start employment, thereby determining their seniority ranking. Even though William and Robbi started on the same date, management had pre-determined that William would be more senior and documented that by giving him the lower employee number.

I am also attaching the memo which I sent to William Larson and Robbi Johnson on February 24, 2000.

Based on the facts stated above, your grievance is denied. You may elevate this grievance to the second step.

On March 17, 2000, Rainaldo wrote to Superior Mayor Margaret Ciccone as follows:

Attached you will find a copy of the above grievance along with letter from Cammi Koneczy responding to the grievance as well as a previous letter from her on the issue.

We have no problem with Article 3(C) of the contract in regards to management's rights "To hire promote schedule and assign employees to positions with the city." This is not the issue, however, it is the Unions contention that no matter who they decided to hire first, the contract does state in 7.01 that seniority **"Shall begin with the employees starting date of employment within this bargaining unit."** The issue is, who has seniority and who determines it when there is more than 1 person starting on the same day.

Cammi mentions the past practice in the police department. In the past this has happened in Local 244 with 3 people starting on the same date and straws were drawn to determine seniority.

In addition, the Union feels it is poor practice to have same starting dates and also would like to see some clear policy defining how and when people are hired vs. their starting date, to clarify seniority. This would prevent any mis-understandings and hard feelings in the future. After all, seniority is an important issue and should be treated as such!

Please schedule an appointment to meet with us on this as soon as possible to discuss this. Thanks for your time!

On April 25, 2000, Ciccone replied to Rainaldo as follows:

William Larson was selected to be hired before Robbi Johnson because he had more experience as a Mechanic, Robbi agreed that was true. By that decision the City determined William to be offered employment first and, accordingly, be more senior. Even though William and Robbi started on the same date, William was selected to be more senior and was given the lower employee number to clarify seniority between the two of them. There could have been more clear communication as to the order of seniority in this situation, and I would suggest that communication be sent to each employee in any similar situations in the future. I would also suggest that you discuss clarifying this issue in your next contract negotiations.

The City had justification in determining William to be more senior than Robbi, therefore I am denying your grievance at the second step. You may proceed to the next grievance step if you wish.

On June 19, 2000, the city's Human Resources Committee denied the grievance. The committee also approved an amendment to the city's Human Resources Policies and Procedures on Filling of Vacancies – Employee Processing, as follows:

> HRP05.05A – PROCEDURE – VII. Once all appointment processes are complete, the employee may start work and the required information will be input into the Personnel/Payroll system. The employee's seniority date will be established by the Human Resources Director in consultation with the department head. In the event that more than one individual is hired on the same day, the Human Resources Director will determine the order of seniority and will notify the individuals in writing on the order of seniority.

On August 3, 2000, the union submitted its Request to Initiate Grievance Arbitration to the Wisconsin Employment Relations Commission.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the union asserts and avers as follows:

> Seniority is based upon who starts work first. This is a simple matter of interpretation of seniority, which is determined by the time an employee starts working.
>
> The facts are clear, in that the grievant started work at 7 a.m. and Mr. Larson started work at 3 p.m., both on August 16, 1999. Without question, this makes the grievant the senior employee. Arbitral authority in ROBERTSHAW-FULTON CONTROLS CO., 22 LA 273 (1954) supports the understanding that the employee who starts work first is the more senior employee.
>
> The language in the collective bargaining agreement is clear and unequivocal, stating that "seniority according to this agreement shall begin with the employee's starting date of employment within this bargaining unit."
>
> Further, past practice upholds the union's position. While seniority ties have occurred only a few times in the past twenty-three years, never in such seniority ties did management decide the relative seniority of employees hired on the same day. Instead, the practice (once in 1975 and once in 1983) was for the union local to draw cards to determine seniority.

The employer's attempt to infer that the employee's number reflects a seniority ranking is incorrect, in that this number is not a determining factor for seniority. The union strongly rejects such an allegation. A review of the seniority list shows the employee's number does not consistently match the seniority ranking an employee has on the seniority roster. The employee number is a bookkeeping number and is not a seniority ranking number.

The city is also incorrect is attempting to raise timeliness for the first time at hearing. As arbitrator Gratz has written, the employer has "waived its timeliness defense by failing to raise it during the pre-arbitral processing of the grievance, such that the grievance is procedurally arbitrable."

The grievant did not file the grievance until February 29 simply because he was serving a six month probationary period which ended on February 16. Given the tentative nature of a probationary period, the grievance was not filed until completion of that period.

The facts are quite clear. Mr. Johnson reported to work before Mr. Larson. Mr. Johnson is the more senior employee. Nothing can be more fair and objective than the "clocked in" principle. If the city wanted to ensure that Mr. Larson had greater seniority, it could simply have started Mr. Larson a day earlier. By the city's action of having both employees start on the same day and having Mr. Larson report on the later shift the city waived its options regarding seniority designation.

Similarly, the city waived its argument regarding timeliness by waiting until the arbitration hearing to raise for the first time any concerns regarding timeliness.

Therefore, the arbitrator should sustain the grievance and award Mr. Johnson the higher seniority ranking.

In support of its position that the grievance should be denied, the city asserts and avers as follows:

The collective bargaining agreement unambiguously and explicitly provides that the grievance **shall** be presented within ten days of the date the grievance occurred. This contractual mandate is an explicit and unambiguous provision and must be applied as written. The grievant and union failed to comply with this contractual mandate, and so the grievance must be dismissed as untimely.

The grievant and union were aware of the order of hiring based on the call out list distributed in December 1999. No grievance was filed within ten days of the date on which they learned of the order of hiring.

They were also aware of the master seniority list dated January 8, 2000, but again no grievance was filed within the ten days.

The grievant and union admit they were aware of their disagreement with the order of employees on the seniority list, but intentionally chose not to file a grievance while Johnson was still a probationary employee. The collective bargaining agreement does not include any exception to the ten-day grievance filing deadline for probationary employees. Further, Johnson passed his probationary period on February 16, 2000; even if the ten-day period began to run on that date, the grievance was still untimely because it was not filed by February 26, 2000.

Any argument that the untimely grievance can be heard must be rejected. The collective bargaining agreement explicitly states that the arbitrator shall neither add to, delete from, nor amend any of the existing provisions of the agreement. Because the arbitrator's authority is derived exclusively from the collective bargaining agreement, the arbitrator should not stretch the time limits that the parties have intentionally placed upon the grievance process. Because Johnson and the union failed to comply with the time limits under the collective bargaining agreement, the grievance is untimely and must be dismissed.

Further, the city properly determined the order of hiring because the determination was within the city's management rights, the contract is silent on the issue and by past practice management determined the manner in which the order of hiring was determined for employees who had the same seniority date.

The collective bargaining agreement merely requires that the city assign to employees as their seniority date the date on which they started within the bargaining unit. The city has done this. There is no violation of the collective bargaining agreement.

Determining the order of hiring for employees with the same seniority date is within the city's management rights. Under the residual or reserved rights doctrine, an employer's right to manage and operate the business is unfettered unless it has limited its right to manage through a specific provision in the labor agreement. Where the collective bargaining agreement does not describe a procedure for breaking a seniority tie, the employer has the management right to

determine seniority. Here, because there is no specific provision in the collective bargaining agreement otherwise limiting the city's unfettered right to make the determination, the city has the sole right to determine the order of hiring of employees hired on the same date. The city possessed the right to hire Larson before Johnson and to determine their relative seniority ranking accordingly.

No reasonable interpretation of the term "starting date" would include the hour of the day on which the employee began work, and the grievant presented no evidence that the parties ever considered "starting date" to include hour of the day.

The city's determination of the order of hiring of Larson before Johnson was rational, being based on Larson's greater and far more pertinent experience. The city properly determined that Larson should be offered the first mechanic position, and had only one mechanic been hired, that would have been Larson. The city properly determined that Larson should be senior to Johnson, and did not abuse its discretion in making this decision.

There was no past practice of allowing the union to determine the order of hiring or the ranking on the seniority list of employees with the same seniority date. To be binding, a past practice must be unequivocal, clearly enunciated, readily ascertainable and accepted by both parties. Here, the union presented hearsay testimony to imply that on one or two prior occasions, employees drew straws to determine seniority ranking. However, this testimony clearly established that it was the personnel director of the city who made the decision on the method to use to determine seniority ranking, not the union or its members. The city could unilaterally change the manner in which it determined how these decisions would be made so long as nothing in the collective bargaining agreement limited its discretion. Mutual agreement is not required for management to change a particular method that management has chosen in the exercise of its managerial discretion.

It was the past practice of the city to determine the manner in which seniority ranking would be determined for employees with the same seniority date. It was the personnel director/mayor who determined in 1975 that the three members of Local 244 who started work on the same date would draw cards to determine their relative seniority ranking. It was the personnel director/mayor who directed three members of Local 244 who started the same date in 1983 to draw straws to determine their relative seniority.* It was the personnel director/mayor who unilaterally decided in 1992 which employee of three with

the same seniority date would be considered first hired. The method of determination used by the personnel director in 1999 was identical to that used in 1992, when no grievance was filed.

The decision to place Larson ahead of Johnson on the seniority list was simply a product of the decision that Larson was first hired because of his greater relevant experience. This decision was consistent with 25 years of past practice in which the determination of the method by which these decisions are made was dictated by the personnel director, not the union or employees. That the city may have opted for drawing cards or straws in the past did not preclude the city from using a different method at a later time. The method used by the city to determine seniority ranking between employees with the same seniority date is within the city's discretion.

Accordingly, the grievance should be dismissed.

DISCUSSION

Seniority is one of the most important aspects of an employee's work status. For the employees covered by the collective bargaining agreement under review, it can affect several conditions of employment, up to an including perhaps the most critical condition of all, job security.

The grievance before me presents the important question of determining the respective seniority of two employees who started on the same date, but on different shifts. The employer designated the employee who started on the second shift as having greater seniority than the co-worker who started on the first shift, a determination the union claims violated the collective bargaining agreement.

Before I may consider the merits of this matter, however, I must first address the procedural objection the employer raised at hearing concerning the timeliness of the grievance itself.

The collective bargaining agreement provides that the grievant and the grievance committee "shall, within ten working days of the date the grievance occcurred, present the facts" to the grievant's immediate supervisor or department head. While Johnson may have known that the city regarded Larson as having greater seniority as early as December 1999, there is no dispute over the fact that the city provided to the union a copy of the updated seniority list on January 8 2000. Even allowing for a few days for the union to post the list and for Johnson to see it, his time limit under a strict reading of the collective bargaining agreement would appear to extend no later than late January.

The union seeks waiver of the time limit on two grounds – that Johnson was properly cautious in waiting till the expiration of his six-month probationary period to file the grievance, and that the employer had itself failed to raise the timeliness issue in a timely manner.

The employer cites two cases in support of its strict construction of the collective bargaining agreement and its contention that the grievance should be summarily dismissed as untimely. Owing to significant differences in the language of the respective collective bargaining agreements, neither is completely on-point.

In POWER WHEELS, 91 LA 1062 (Bittel, 1988), the collective bargaining agreement contained the following language:

> *Time Limits:* .... **There shall be strict adherence** to all of the time limits provided in the foregoing procedure, unless the parties shall agree in writing to an extension of such time limits at one or more steps in the grievance procedure. Should the Union fail to proceed with the time limits prescribed in the grievance procedure **the grievance shall be deemed to not exist and it shall not be subject to any further processing in the grievance or arbitration procedure.** (emphasis added).

The relevant language of the collective bargaining agreement at issue in MONROE MANUFACTURING, INC., 107 LA 877 (Stevens, 1996) is less absolute, but still of importance: "All time limits shall be strictly construed." The arbitrator explicitly relied on this clause, holding that "(g)iven the provision in the contract that the time limits shall be strictly construed, a waiver must be explicit, not implicit."

In the contract before me, there are no such absolutes or mandates, beyond the statement that the grievance "shall, within ten days of the date the grievance occurred," be presented to the employee's supervisor or department head. Despite this statement, however, the contract is silent on the effect of the Union's failure to comply with that deadline.

It is also of considerable, even dispositive import that the employer did not raise the issue of timeliness until the arbitration hearing itself. The city formally responded to this grievance on three separate occasions – analyst Koneczny's reply of March 9, Mayor Ciccone's reply of April 25, and the Human Resource Committee's action of June 19. At no time did the city ever raise the issue of timeliness; rather, it responded solely and directly to the substantive merits of the dispute.

The Union has cited an award by my colleague Arbitrator Marshall Gratz in support of its contention that the grievance should not be dismissed on the grounds of untimeliness. That award is worth quoting at length:

The Arbitrator agrees with the Union that the County's processing of the grievance at the various pre-arbitral steps without preserving the timeliness defense on which it relies in its brief, constitutes a waiver of that defense.

The arbitration awards cited by the County stand for the propositions the County asserts regarding waiver. However, those awards represent a minority viewpoint among arbitrators and, in the view of this Arbitrator, they are not as well reasoned as the cases representing the majority viewpoint.

The oft-cited arbitration reference, Elkouri and Elkouri, *How Arbitration Works*, (BNA, 4 ed., 1985) discusses this point at pp. 194-195. The authors state, "[i]n many cases time limits have been waived by a party in recognizing and negotiating a grievance without making clear and timely objection." For that proposition they cite a substantial number of awards. Id. at n.192. The Elkouris then go on to state, "But there are some cases holding to the contrary." For that proposition the authors cite a total of three awards, including the two cited by the County herein. Id. at n.193. 1/

1/ The Fifth Edition (1997) of this treatise has this discussion at pages 278-279.

In that context, and in light of the excerpts from various published awards that follow, the Arbitrator does not agree with the County that the County's position is supported by well-settled arbitral principles.

Thus, in COLUMBIAN CARBON CO., 47 LA 1120, 1125 (Merrill, 1967), the arbitrator stated,

There are a number of reasons why the contention of untimeliness seems not well founded. I shall content myself with the reason which would be dispositive even if all the others were not present. This is that the Union has produced an abundance of evidence, both by its own witnesses and through cross-examination of Company witnesses, that at no time during the prearbitration handling of the grievance by the Company authorities did anyone on behalf of the Company raise the slightest objection to the procedural sufficience of the presentation. Instead, at all levels, the Union's contention was considered and was denied upon the merits. No evidence to the contrary has been presented. By the clearly overwhelming preponderance of arbitral authority, this failure to object to the timeliness of presentation, coupled with disposition of the grievance on the

> merits, constituted a waiver of the objection of timeliness. [citations omitted]. Accordingly this objection is denied.

Similarly, in IRONRITE, INC., 28 LA 398, 399-400 (Whiting, 1956), the arbitrator stated,

> Article XXIII, Step 1 of the contract provides that "Step One must be taken within five (5) working days after the occurrence complained of". The Company contends that the grievance is thereby barred. It will be noted that no such objection to the grievance was raised in the answer, nor does it appear that such objection was made in the discussion of the grievance prior to the arbitration hearing. The failure to make such objection when the grievance was presented or in prior steps of the grievance procedure must be deemed a waiver of the contractual time limitation. Procedural time limitations serve a useful purpose but may be extended or waived by agreement, and lack of a timely objection is always considered a waiver thereof."

In DENVER POST, 41 LA 200, 204 (Gorsuch, 1963), the arbitrator stated,

> It is a well recognized principle of the grievance and arbitration process that each step of the grievance procedure is to serve the function of amiably settling disputes, where possible. Arbitration is only to be resorted to when the parties cannot settle the case themselves. . . . Further, it is incumbent upon each party to raise all issues and defenses at each step of the grievance procedure, in order to appraise the other party of all relevant problems. The underlying rationale here is that by laying their cards on the table at each successive step of the grievance procedure, the parties greatly increase their changes for settling the case without resorting to arbitration. . . . For the same reasons, when objections to procedure have been raised during the grievance process, arbitrators will normally refuse to hear them.
>
> The [union] had a right to know of management's intent to strictly adhere to the time limit for grievance initiation at the time it met to decide whether and how to proceed. Without such knowledge, the members could not make an intelligent choice as to whether or not to appeal the foreman's decision. [citations omitted].

In HARBISON-WALKER REFRACTORIES, INC., 22 LA 775, 778 (Day, 1954), the arbitrator stated,

> The evidence bears out the Company contention [that the grievance was not filed within the agreement time limit] . . . . However the merits of these contentions need not be labored in light of the company's conduct with respect to the grievance. That conduct makes it apparent that both lack of timeliness and the failure to follow the grievance procedure were waived as possible defenses. For it is absolutely clear that management discussed the grievance at every step after the first . . . . It is also reasonably evident that there was never a clear reservation of the right to assert the procedural defenses while discussing the merits until the appeal to arbitration. By then it was too late. [footnote omitted]. The waiver had already been effected.
>
> To the layman any invocation of a procedural rule to avoid dealing with the substance of an issue is apt to be regarded as a 'technical' and therefore reprehensible avoidance of the merits. The views expressed here should not be interpreted as embracing this conception. The doctrine of waiver is itself technical. And it is important to recognize frankly that there is a legitimate practical purpose to procedural requirements even in labor contract administration where technicalities are generally abhored. It just happens, on the facts, that in the present instance one "technical rule" is overbalanced by another.

In PHILIPS INDUSTRIES, INC., 63-3 ARB Par. 8358 (Stouffer, 1963), the arbitrator stated,

> [The company may not raise the question of timeliness of filing of the grievance in these arbitration proceedings]. The reasons therefor seem obvious. If [the arbitrator] were to find in favor of the Company on this issue, it could silently sit by and cause the Union to make unnecessary expenditures in preparation for arbitration. This would be unfair and inequitable. If the Company intends to press objections as to the arbitrability of issues, it should acquaint the Union with such objections in steps of the grievance procedure preliminary to arbitration. The question presented here is not a new or novel one. There is a division of opinion between Arbitrators thereon. However, in this Arbitrator's opinion, the better reasoned decisions hold that where, as here, there is an absence of contractual provisions on the subject, procedural objections are waived unless raised prior to arbitration. [citations omitted]
>
> Discussion of the merits of grievances in steps of the grievance procedure does not bar the raising of procedural objections at the arbitration level so long as such objections are voiced in proceedings prior thereto. Full discussion of all aspects of grievances are conducive to settlement thereof, and the parties have, in effect agreed by the terms of Section 8 [Grievance Procedure] of the Agreement, to do so.

In view of the foregoing, it is the finding of this Arbitrator that the Company may not for the first time raise the question of timeliness of filing of the grievance in these arbitration proceedings."

> Also see, e.g., Pipe Fitters Local 636, 75 LA 449, 453 (Herman, 1980)("Timeliness is a procedural issue which, like the Statute of Limitations in a lawsuit, must be raised at an early step in the proceeding."); Aeolian Corp., 72 LA 1178, 1180 (Eyraud, 1979)("Arbitrators have held, and this Arbitrator agrees, that the timeliness argument must be raised during the discussion of the grievance at each appropriate step and that the defense must be preserved in oral discussions as well as final submission to arbitration."); and Patterson Steel Co., 38 LA 400, 403 (Autrey, 1962)(". . . if there was a failure of the Union to file the grievance within the five (5) workday time limits, such failure was waived by the Company when it allowed the Union to proceed to arbitration and incur the expense thereof without advising the Union that the issue of the timely filing was specifically reserved for a determination by the arbitrator.").
>
> The agreed-upon Art. VII time limits serve a useful purpose and must be applied where they have not been waived. However, as noted above, the overwhelming and better-reasoned view of arbitrators holds that such procedural requirements are ordinarily to be deemed waived not only by express agreement but also in other circumstances including where, as here, pre-arbitral grievance processing is engaged in without any reference to procedural noncompliance.
>
> In the Arbitrator's opinion, the outcome herein does not weaken the Agreement grievance procedure, but rather strengthens it. The parties expressly sought not only "prompt" but also "just" settlement of grievances in their introductory provisions of Art. VII Grievance Procedure. Moreover, as noted above, grievances are more likely to be promptly resolved if both parties reveal their issues and defenses in the prearbitral steps. The parties, of course, remain free to discuss the merits of grievances as to which a procedural defense has been preserved. Furthermore, the County's has unilateral control over whether its designated grievance representative preserve procedural defenses when deficiencies are present in the grievances submitted to them.

> It can also be noted that the County has not claimed or shown that its ability to preserve evidence and to present its case on the merits has been prejudiced by the timing of the grievance initiation involved here. cf. Mount Mary College, 44 LA 66, 73 (Anderson, 1965)(countervailing equities considered in determining whether pre-arbitral silence constituted waiver of procedural defense.)
>
> For the foregoing reasons, the Arbitrator concludes that the County waived its timeliness defense by failing to raise it during the prearbitral processing of the grievance, such that the grievance is procedurally arbitrable.

I concur with the research and analysis by my veteran colleague, Arbitrator Gratz. The city at no time prior to the arbitration hearing raised an objection to proceeding on the grounds that the grievance was untimely. Moreover, the delay in filing was not of such length as to materially disadvantage the city in responding to the grievance. Accordingly, I reject the employer's argument that this grievance should be dismissed on the grounds of untimeliness, and proceed to consider the matter on the merits. 2/

2/ In finding the grievance not untimely, I explicitly and expressly make no determination on the union's contention that the grievant's status as a probationary employee is a proper consideration in this analysis.

Regarding the merits of the matter, the union asserts that the basic principle of seniority is, essentially, first-in, first-served; that the relevant language is clear and unequivocal, and that past practice supports its position.

I agree that the language is clear in providing that an employee's seniority "shall begin with the employee's starting date of employment within this bargaining unit." Just as clear is that there has been no violation of that provision as pertains to the employees as individuals – both Larson and Johnson started on August 16, 1999, and both have seniority dates reflecting that fact. Implicit in the union's claim, however, is the argument that the seniority designation cannot be fully understood in terms of the single employee, but must be applied in the context of other employees.

The union claims that there is a past practice which supports its assertion that management has ceded to the union and the employees the power to assign respective seniority standing in cases where employees have the same starting date. The evidence suggests otherwise.

To be binding on both parties, Aribtrator Justin explained almost fifty years ago, a past practice must be "(1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties." CELANESE CORP. OF AM., 24 LA 168, 172 (JUSTIN 1954). The record before me fails to satisfy any of those standards.

The union offered testimony regarding two past experiences of employees with the same hiring date. In 1983, a time when the Mayor also served as the city's Personnel Director, four employees with the same starting date drew cards to determine their seniority ranking. In explaining this situation under cross-examination, union witness (chief steward and veteran officer Mike Rainaldo) testified that "the Mayor allowed the men to draw straws." In 1975, four employees started on the same date; a union witness testified it was his "understanding" that "management" told union officials it was "up to the union to settle," and that "they drew cards." The witness, Dennis Flaherty, one of the four at issue, testified that he had had "no personal discussions with management," but that "it came down that's what had been determined." Flaherty also testified that seniority in this instance was not based on who actually started work first. Even under the broadest and most generous interpretation, these two incidents do not satisfy the union's assertion that "past practice upholds the union's position." The union's claim to a meaningful and supportive past practice is further diminished by Kocezny's testimony that the then-Mayor/Personnel Director, Herb Bergson, unilaterally determined seniority rankings for three employees all hired on September 30, 1992.

The employer has cited several cases in support of its actions. At least one, BETHLEHEM STEEL CO., 26 LA 567 (Seward, 1956), seems particularly relevant. In that case, the language in the collective bargaining agreement provided for an employee's seniority to be computed "from the date he first began work" in the seniority unit. In the matter before the umpire, two employees began work the same day, on successive shifts. In rejecting the union's argument that the employee who started at 7:00 a.m. should have seniority over the employee who started at 3:00 p.m., the umpire noted that the "legal as well as the popular meaning of the word 'date' imports the day, month and year without reference to the hour of the day." The umpire concluded that the words "'date on which he first began work' clearly refer to the calendar day, but not the hour, on which an employee started to work in the seniority unit."

The entirety of the union's argument for Johnson having greater seniority is that he started work on the earlier shift than Larson. Accordingly, the reason for their respective assignments bears on my analysis.

There is no dispute but that the collective bargaining agreement grants to the employer the management rights of hiring, scheduling and assigning employees. The city's witnesses, principally analyst Koneczny, testified credibly and convincingly that the city considered Larson to have been the first-hired of the pair, and that if the city had only been hiring for one vacancy, it would have hired Larson. Given Larson's greater experience, training and qualifications, that is a reasonable and plausible position to hold. Koneczny also testified that, based on Larson's greater qualifications, she and Fleet Manager Art Swede determined Larson to have seniority over Johnson.

Mary Lou Andresen, the city's Human Resource Director, testified that, pursuant to the city's right to assign employees, Swede made the assignments of Johnson and Larson to their respective shifts. She testified, credibly, that Swede put Johnson on the day shift because that shift afforded greater supervision, while Larson, with his greater qualifications and experience, could start on the afternoon shift because of his lessened need for supervision.

The city cites the respective employee numbers which it assigned the two men as further indication that it considered Larson (#3330) to be more senior than Johnson (#3331). The union notes that the employee numbers and seniority rankings are not always fully aligned, which discrepancy the city explains by noting that seasonal employees who become full-time keep their initial numbers, but have seniority only from their permanent status. While the employer's argument is supportive of its position, I do not consider the issue of the respective employee number as being a significant factor in my analysis.

Subsequent to this controversy arising, the city unilaterally amended its handbook on policies and procedures for establishing employee seniority dates. In considering this grievance, I expressly and explicitly disavow any consideration or evaluation of the manner or means by which the city took this action.

Larson, the more qualified and first-hired employee, was placed on the later shift precisely because he was more qualified; it would be an unjust, even absurd result, for Johnson to receive greater seniority solely because he was assigned the earlier start time to address his need for greater supervision. The city's designation of Larson as having greater seniority than Johnson was consistent with the terms of the collective bargaining agreement.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is denied.

Dated at Madison, Wisconsin this 26th day of January, 2001.

Stuart Levitan /s/
Stuart Levitan, Arbitrator

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