BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SMITH STEEL WORKERS, D.A.L.U., LOCAL 19806

and

TOWER AUTOMOTIVE COMPANY, INC.

Case 4
No. 59326
A-5894

Appearances:

Ms. Marianne Goldstein Robbins, Attorney at Law, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North RiverCenter Drive, Suite 202, Milwaukee, WI 53212, appearing on behalf of the Union.

Mr. Richard A. Hooker, Attorney at Law, Varnum, Riddering, Schmidt & Howlett, LLP, 251 North Rose Street, Kalamazoo, MI 49007, appearing on behalf of the Company.

ARBITRATION AWARD

The Union and the Company named above are parties to a 1999-2003 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned to hear a grievance involving seniority in the bargaining unit. A hearing was held on January 30, 2001, at which time the parties were given the opportunity to present their evidence and arguments. The panel members present for the Union were Duane McConville and Percy Burt, and the panel members present for the Company were Susan K. Danielson and Don Stehling. The parties completed filing briefs by March 29, 2001.

ISSUES

The Union frames the issue as follows:

> Did the Company violate the parties' collective bargaining agreement when it refused to allow Grievant Terry Devitt to return to the bargaining unit? If so, what is the appropriate remedy?

The Company asks the following:

> Does Mr. Devitt have standing to file a grievance under the parties' collective bargaining agreement and therefore, is the instant grievance arbitrable?
>
> Did the Company act in a manner consistent with its rights and obligations under the parties' collective bargaining agreement in declining Mr. Devitt's request to return to a bargaining unit position in March, 2000?

The Union's framing of the issue is preferred, although the issue to standing will also be addressed below.

CONTRACT LANGUAGE

VII. SENIORITY

. . .

D. Application of Seniority:

. . .

> 6. When a management employee who previously worked in the bargaining unit is transferred from his management position to a position within the bargaining unit, he shall be credited with his accumulated seniority for all purposes from his last date of hiring with the Company; except that an employee who transfers from the bargaining unit after January 30, 1972 shall, in the event he returns to the bargaining unit, be credited for bargaining unit purposes with seniority accumulated as a management employee up to but not in excess of one (1) year, and upon his return to the bargaining unit, the employee's bargaining unit seniority shall be adjusted to exclude seniority accumulated as a management employee in excess of one (1) year. Upon his return to the bargaining unit, he shall be placed in the same classification and department which he last held prior to his promotion. If his seniority does not permit such placement, he may apply his seniority as provided in this Article, Section F – "Reduction in Force."
>
> > a. Effective August 1, 1980, an employee who is transferred from the bargaining unit to a management position shall continue to accumulate bargaining unit seniority for a period of two years following such transfer. If the employee remains outside of the bargaining unit following completion of this two-year period, the employee will cease to have any bargaining unit seniority.

b. Effective August 1, 1980, but prior to August 1, 1983, an employee who is retransferred from the bargaining unit to a management position, when the initial transfer was prior to August 1, 1980, shall be credited with bargaining unit seniority consistent with the employee's initial transfer as outlined in paragraph "6" above.
This provision applies to the first retransfer to a management position on or after August 1, 1980. For subsequent retransfers, the employee shall be credited with bargaining unit seniority consistent with paragraph "a" above.
c. Effective August 1, 1991, an employee who is transferred from the bargaining unit to a management position shall continued to accumulate bargaining unit seniority for a period of one year following such transfer. If the employee remains outside of the bargaining unit following completion of this one-year period, the employee will cease to have any bargaining unit seniority.

BACKGROUND

Tower Automotive, Inc. is the successor to A.O. Smith Automotive Products Company and makes truck frames and parts at its Milwaukee plant. The Grievant, Terry Devitt, was hired by A.O. Smith in 1964 as a producer in the bargaining unit represented by Smith Steel Workers (herein called the Union). He took a supervisory position in March of 1969 and obtained a withdrawal card from the Union on March 5, 1969. When the Grievant first joined management, he was a manufacturing supervisor. In 1977, he became a supervisor of tooling and setup. In 1979, he became a manufacturing specialist. He then transferred to a management job as a coordinator and held a number of positions as a coordinator, such as coordinator trainer for the quality participation program, maintenance coordinator for the preventive maintenance program, coordinator trainer for the team concept, and training specialist for the team concept. In 1996, the training department was downsized and the Grievant returned to a position as a manufacturing supervisor. His immediate supervisor, Doug Lentz, gave him a suspension in 1997 for failure to follow his instructions. The Grievant did not receive merit increases for 1996 or thereafter. The Grievant asked Randy White at the corporate headquarters if he could return to the bargaining unit should there be an opportunity, and White indicated that he could. The Company was sold to Tower Automotive in 1997, and the Grievant continued to be a manufacturing supervisor in the Tower Company. The Grievant asked Chuck Whaley after the purchase of A.O. Smith whether he could return to the bargaining unit and was told that it was not an option.

During January of 2000, the Grievant was a supervisor in the GMT 420 line that was being phased out. His supervisor, Hans Lescher, told him that there would be no position for him upon the phase-out of that line. The Grievant asked Lescher if there was an opportunity to return to the bargaining unit, and Lescher was not sure. The GMT 420 production line ended

on April 7, 2000. The Grievant met with Lescher and Kris Luhring, Human Resources Manager, and was told that April 7th was his day of elimination of a job. The Grievant asked about returning to the bargaining unit, and Lescher told him that it was not a possibility. The Grievant then filed the instant grievance.

John Hartig is the Chairman of the Grievance Committee with the Union since April of 2000, and was previously a committeeman for the Union for eight years. In the 1968-1971 collective bargaining agreement, the parties agreed to give all management employees who were transferred back to the bargaining their full seniority. In June of 1971, the Union proposed that supervisors and employees from other bargaining units shall not get seniority for the time that they were not members of the Union. The Company gave the Union a counter proposal to give people one year of seniority as a management employee if they transferred from the bargaining unit to management after a certain date. The parties later agreed to the date of January 30, 1972, for the one year of seniority. Thus, those people who moved into management before that date were fully grandfathered, or they received credit for all their time with the Company, regardless of whether or not they were bargaining unit members. The language was reflected in the 1971-1974 contract.

In the 1980 negotiations, the Union proposed that bargaining unit members transferring to management positions not be allowed to return to the unit after one year. The parties agreed to the language in the 1980-1983 contract that provided for two years of seniority following transferring out of the bargaining unit to management but forfeiting any seniority if one remained outside of the bargaining unit after the two-year period. In 1987, the Company proposed amending the seniority section to revert to the language in effect before August of 1980. The proposal was ultimately withdrawn.

The Company has laid off many employees during recessions in the early and mid 1980's, as well as the early 1990's. A.O. Smith sold the Company to Tower Automotive in 1997, and Tower took over the collective bargaining agreement with the Union.

The Company provided the Union with several documents over the years regarding management employees who had previously been bargaining unit members. In October of 1979, Company representative Edward O'Connor sent Union President Paul Blackman a list of management employees who had previously worked in the Union's bargaining unit and who were being laid off. Another such list was sent from O'Connor to Blackman in January of 1980. From March through December of 1980, G.R. (Randy) White, a Company representative, sent several lists to Alex Elsesser, a Union representative, of supervisors who were laid off and had returned to the bargaining unit, showing the dates of their return to the unit.

In 1982, White sent a list of management employees returning to the bargaining unit to Tommy Burress, who was the Union's Chair of the Grievance Committee at that time. The Company provided a similar list on October of 1984. These documents show plant seniority

and adjusted seniority, with some people credited for full seniority and others have their time adjusted. Another such list – from T.E. Brunk, Director of Labor Relations to D.L. Roux, Chairman of the DALA 19806 Grievance Committee – was provided in October of 1986.

In February of 1987, Brunk sent Paul Blackman, Union President, a list of supervisors who intended to return to the bargaining unit. Also in February of 1987, Brunk sent a letter to P.L. Jozwiak, head of payroll, regarding dues deductions. In April of 1987, Brunk sent a letter to Blackman which listed 64 supervisors, including the Grievant, who were fully "grandfathered" and eligible to return to the bargaining unit with full seniority. Those were people who joined management before January 30, 1972. The letter listed another 121 supervisors eligible to return to the bargaining unit with adjusted seniority, or people who joined management after January 30, 1972. A February 12, 1987 letter from Brunk to Blackman listed 16 supervisors who were under the "two year" language of the agreement, and those are people who joined management after August 1, 1980. In November of 1988, another list showed several management employees returning to bargaining unit positions with either their full seniority of adjusted seniority.

Robert Trednic has worked for the Company for 40 years. Since 1973, his duties and responsibilities are labor related, dealing in grievances, arbitration and contract negotiations. He has been familiar with the collective bargaining units since 1960 and is familiar with the history of Article VII, Section D-6 of the collective bargaining agreement at issue in this case. He testified that the Company historically returned former bargaining unit employees who had become management employees to bargaining unit positions when they were no longer managers, but it did not do so in every case.

Trednic recalled four individuals who were not returned to the bargaining unit between the late 1960's and the middle part of the 1980's – Donna Meinke, Pat Zurhabachen, Al Winstrom and Gene Peltz. They were not returned to the bargaining unit for various reasons, such as attendance, performance or misconduct. No grievances were filed over these four cases.

Trednic testified that the Company's position on returning management personnel to the bargaining unit changed around 1994 or 1995. He talked to some people – including Dave Luring, Roger Kendall, Dale Drutkowski, Wayne Semandel and Dennis Manthey – and told them that there was a position for them in management and that the Company would not transfer them back to the bargaining unit. Since Tower took over, its policy has been that it will not return management employees who have either been grandfathered or partially grandfathered to the bargaining unit. A committee for supervisors approached the top management in 1997 or 1998, and they were told that the Company would not transfer them back to the bargaining unit. There have been 19 supervisors who separated from the Company after April of 1997 (or were slated to be separated within a month of the hearing) without being returned to a bargaining unit position. None of them except Devitt filed a grievance.

As of January 30, 2001, the least senior person working in the shop in the bargaining unit had started on March 17, 1973. The Union's analysis of the 19 people listed above (which was submitted after the hearing in this matter) is that most of the people would not have sufficient seniority with their adjusted seniority to be working in the bargaining unit, while one of them retired, and three of them had not left the company by February 9, 2001, when the Union submitted documents to supplement Company Exhibit #36.

The only instance of the Company returning a management person to the bargaining unit since April of 1997 was Carver Wynn. Wynn started working for the Company in 1972 and was in the bargaining unit. He was asked by Art Skowron to take a management position in 1999, but he first talked to Joe Filapek who told him he had one year to return to the bargaining unit. Wynn transferred to a management position on April 1, 1999, and decided to return to the bargaining unit in February of 2000. He talked to Laura Larabee in Human Resources, and then Don Stehling, who told him he could not go back to the bargaining unit. Wynn then talked to Filapek as well as Edgar Douglas, a Union committeeman. Douglas called Stehling and told him that Wynn had the right to return to the bargaining unit and that the Company's refusal to allow him to do so violated the labor agreement. Wynn went on vacation and when he returned, there was a memo starting that he would be transferred back to the Union effective March 15, 2000. Wynn's work in management was in the heavy truck business, which suffered lower levels of production and really went down in the early part of 2000. The heavy truck business was later sold. Since Wynn was within the one-year period to continue seniority for employees transferred after August 1, 1991, he lost no seniority in coming back to the bargaining unit. Trednic testified that the Company felt it made a mistake and should not have put Wynn into a supervisory position.

THE PARTIES' POSITIONS

The Union

The Union asserts that the Grievant has standing to grieve the Company's refusal to return him to the bargaining unit. Arbitrators have uniformly concluded that supervisors claiming seniority in a bargaining unit have standing to pursue a grievance over that seniority. The Company may claim that the contract language, while preserving the Grievant's seniority, did not entitle him to return to the bargaining unit – it only preserved his seniority in the even the Company decided to return him to the unit. Such an interpretation guts the seniority provisions and deprives seniority of any meaning, the Union argues. Seniority that activates only if the Company decides an employee can return to the bargaining unit is not seniority at all. A supervisor discharged from his position had a right to return to the bargaining unit in REYNOLDS METALS CO., 55 LA 1011 (BRANDSCHAIN, 1970). Arbitrator Epstein reached a similar conclusion in CEDAR RAPIDS ENGINEER CO., 58 LA 374 (1972).

The Union notes that the contract expressly limits the circumstances in which the Company can terminate seniority – if the employee quits or is discharged for cause, fails to respond to a recall notice, fails to return after a leave of absence, or is absent for three consecutive days without notice. The Union argues that the Company had no right to terminate the Grievant's seniority where not of those circumstances applied.

The Union believes that the contract language is unambiguous and there is no need to resort to bargaining history to resolve his grievance. However, the bargaining history confirms a mutual understanding that supervisors have a vested right to their bargaining unit seniority. In 1971, the Union first sought to limit supervisors' rights to return to the bargaining unit, but the Company resisted. In 1980, the Company again resisted restricting supervisors' rights to return to the unit, citing its interest in promoting from within the unit. In 1987, the Company tried to get contract language to allow full seniority for bargaining unit members entering management after 1980, and a Company negotiator said that people would have a right to come back. Although the Company withdrew its proposal, it understood that employees who went from the bargaining unit to management before 1972 had a right to return.

The Union finds the Company's current claim that supervisors have no right to return to be inconsistent with their prior pursuit of supervisory seniority rights as an incentive to join management. A right to return to the unit only at management's discretion would not serve the Company's recruitment purposes, as such a right is no right at all. The Company's bargaining position over three decades shows its intent to give supervisory recruits an entitlement to return to the unit.

Moreover, the Union maintains that the parties' arbitral history confirms that the parties understood that supervisors had a right to use their bargaining unit seniority. In the 1976 arbitration before Arbitrator Jones, the Company argued that the right to return to the unit was a protection that extended to a variety of management employees. The Company made similar arguments in 1976 before Arbitrator Gundermann and again prevailed. It would be harsh to conclude that employees recruited into management with promises of maintaining their seniority could not be deprived of that seniority with no notice.

The parties' past practice shows that supervisors have a right to return to the bargaining unit, according to the Union. The Company repeatedly gave the Union lists of laid off supervisors with rights to return to the bargaining unit. When the Union challenged the right of some supervisors to return to the unit in 1987, the Company stated that a supervisor's right to return to the bargaining unit is governed by the contract and can't be denied by the Union except for failure to tender dues and fees uniformly required. The Company further indicated that it was the supervisor's prerogative, rather than the Company's or the Union's, whether to return to the bargaining unit. A management employee returned to the bargaining unit as recently as 2000, when Carver Wynn's position was eliminated and he returned to the unit. While the Company tried to show a practice of not returning management employees in recent

years, its evidence was a list of management employees separated from employment between 1998 and 2001 who did not return to the unit. The list does not show when employees joined management, and if they joined after 1972, their seniority rights are more limited than the Grievant's and they may not have been eligible to rejoin the bargaining unit. As of the date of the hearing, the employee with the least seniority had almost 28 years of seniority. Also, the Company's summary exhibit does not show whether any of them wanted to return to the unit, and they may have retired or sought management positions with other companies. An investigation proves that many of the listed employees were not eligible to return to the unit. Michael Stephens retired. Wilbert Taylor and Richard Schmid had not been laid off as of the date of the hearing. Of the rest of them, only L. Kazinski had enough seniority to return to the bargaining unit, and there was no evidence that he sought to do so.

The Union asks that the Grievant be reinstated to the bargaining unit and be made whole.

The Company

The Company asserts that the Arbitrator has no jurisdiction to adjudicate Devitt's rights under the labor contract because he was a supervisory employee specifically excluded from coverage under the agreement. The recognition clause specifically excludes supervisory employees from coverage, and the grievance adjustment refers to access by employees, aggrieved employees and affected employees. Devitt was none of those and has no right to invoke the grievance procedure. While the Union may cite its own right to pursue grievances over the seniority provisions, this is not an issue of arbitrability but one of standing. It was not the Union that sought to file this grievance – it was Devitt, and he is without standing to do so.

As to the merits, the Company contends that the contract language does not obligate it to return supervisory employees to the bargaining unit, and relevant history and practice show that the Company acted within its rights. The contract language is clear and unequivocal and states that seniority allocation is applicable only *when* the Company transfers a supervisory employee to the bargaining unit. A plain reading of the Agreement indicates that the return to the bargaining unit is within the discretion of the Company and is not mandated.

Federal courts have considered contract language similar to that involved here and found that it does not obligate the employer to return supervisory employees to the bargaining unit upon departure from their supervisory positions. The language only addresses the calculation of an employee's seniority if the company elects to return the employee. See MCTIGHE V. MECHANICS EDUCATIONAL SOCIETY OF AMERICA, 772 F.2d 210 (6th Cir. 1985). Also in MARTIN V. MARTIN MARIETTA CORP., 144 L.R.R.M. 2510 (1993), a plaintiff promoted to a supervisory position from a bargaining unit position was laid off, and the employer refused to reinstate him in the bargaining unit and the union refused to represent

him. The plaintiff filed suit against both the employer and the union, relying on a collective bargaining agreement which allowed seniority credits if he returns to a job within the bargaining unit. The court found that the contract did not obligate the employer to return a former supervisor to the bargaining unit. The contract provision used conditional language and did not create an enforceable right of return to the bargaining unit. The language in the instant case is similar and deals only with seniority allocation when a management employee is transferred to a position within the bargaining unit.

The Company argues that there is no binding past practice, as the Union must show that the contract language is either ambiguous or silent, that a uniform practice has been followed over a long period of time, and both parties have accepted the practice or acquiesced in it. The contract is neither ambiguous nor silent. The practice alleged was never uniformly followed, as A.O. Smith refused to return some supervisors and the Union made no protest. Tower Automotive openly departed from any such distant practice when it acquired A.O. Smith in 1997 and told managers and supervisors that management employees would not be returned to the bargaining unit. Devitt himself knew this because of his own direct inquiry. In the past 12 years before Devitt's separation, there was only one supervisor returned to the bargaining unit, and it was under exceptional circumstances. Moreover, there was no acquiescence from the Union to any ostensible practice, and just the opposite was true. If the face of the Company's position to not return supervisors to former bargaining unit positions, the Union bargainers came into the 1998 negotiations and responded by saying nothing.

DISCUSSION

This is an interesting case, as both parties have changed their positions over the years. While the Company historically tried to promote from the bargaining unit and allow supervisors to return to the unit, it stopped doing so in the middle of the 1990's. While the Union historically wanted to prevent supervisors from returning to the bargaining unit, it now seeks through this grievance to give supervisors the right to return to the unit, regardless of whether the Company wants to transfer them back or not.

As to the issue of whether the Grievant has standing to bring this grievance, the Union has the right to test the seniority language, despite the Grievant's status as a supervisor (or former supervisor). The Union is seeking a determination of whether a supervisor has the right to return to the bargaining unit and contends that the seniority clause allows him to do so. There is a circular argument in the standing issue, because the contract refers to an "aggrieved employee" – and the Company correctly notes that the supervisor is not an "employee" covered by the collective bargaining agreement. However, the supervisor would be an "employee" if he had a right to return to the bargaining unit, despite the Company's refusal to return him. Thus, it is preferable that the Union may arbitrate the seniority issue to determine whether or not a supervisor has an absolute right to return to the bargaining unit. To test that case, the Union needs an "aggrieved" person, and the only person it can use is a former supervisor who has not been returned to the unit. Thus, the Grievant has standing and the Union may pursue a grievance that determines his rights under the labor contract.

Turning to the merits, the parties both argue that the contract language at the heart of the case is clear and unambiguous. There is no debate about how much seniority the Grievant would have if he were transferred back to the bargaining unit. The question is whether the language itself gives the Grievant the right to return without the Company's blessing. The most important part of the language states:

> "When a management employee who previously worked in the bargaining unit ***is transferred*** from his management position to a position within the bargaining unit, he shall be credited….." (Emphasis added.)

The words "is transferred" noted above indicate that the Company has to act to transfer a management employee, that he cannot transfer himself into the bargaining unit. The language goes on to use the phrase "is transferred" later, in Article VII, Section D, 6(a) and (b) and (c). The seniority rights that are both granted and restricted are significant for those supervisors that the Company returns to the unit, since many of them would not have sufficient seniority to retain a bargaining unit position. As the Union points out, this Grievant is one of the very few people who is in a position to actually hold a bargaining unit position with his seniority.

However, the Union cannot force the Company to return a supervisor to the bargaining unit. Nothing in the language leads to that conclusion, and it runs counter to the general premise in labor and employment relations that management employees are at-will employees, without the protection of a labor contract. It also runs counter to the Union's position in bargaining. The parties only agreed on how much seniority supervisors who were transferred back to the bargaining unit would have, which would in effect determine whether or not they were able to hold a job in the Company at all, given the great length of seniority in the bargaining unit.

The Company's position in this grievance is consistent with the parties bargaining positions in the past. The Union resisted allowing supervisors to come back to the unit, feeling that they burned their bridges behind them and should not get the best of both worlds by coming back. It was the Company that wanted the option, in order to encourage bargaining unit members to take management positions. The Union was successful in limiting the seniority of supervisors to one and two years in bargaining language for those transferred after 1991 and 1980.

The Company also at times refused to return supervisors to the bargaining unit, having dismissed them for misconduct or performance issues. When Tower took over A.O. Smith, it told managers and supervisors that it would not return them to the bargaining unit. The Grievant asked Chuck Whaley in 1997 after Tower purchased the Company about the option to return to the bargaining unit, and Whaley told him that it was not an option.

Significantly, had the parties agreed that supervisors or management employees could always transfer back into the bargaining unit by their own choice, they could have clearly said so. They never agreed to that, and they only agreed about how much seniority would be

given, depending on when people were transferred in and out of the bargaining unit. The language centers on the allocation of seniority for different dates of transfers into management. The allocation would determine whether a supervisor being transferred back into the bargaining unit would have enough seniority to retain a job with the Company. However, the labor contract, and specifically Article VII, does not create an automatic right of supervisors who have lost their jobs to bump back into the bargaining unit. In fact, its allocation of seniority would limit their opportunity to get back into the unit in many instances.

Based on the record and the reasons noted above, the grievance is denied.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin this 15th day of June, 2001.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

For the Company: Concur:

Susan K. Danielson: Susan K. Danielson /s/
(signed)

Don Stehling: Don Stehling /s/
(signed)

For the Union: Dissent:

Duane McConville: Duane McConville /s/
(signed)

Percy Burt: Percy Burt /s/
(signed)

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