BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION NO. 43

and

SUPERVALU, INC.

Case 26
No. 59316
A-5889

(Training Grievance)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Ms. Andrea F. Hoeschen**, on behalf of the Union.

Michael, Best & Friedrich, LLP, by **Mr. Jonathan O. Levine**, on behalf of the Company.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and Company", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Pleasant Prairie, Wisconsin, on February 8, 2001, at which time the parties agreed that I should retain my jurisdiction if the grievance is sustained. The hearing was transcribed and the parties thereafter filed briefs that were received by May 7, 2001.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

The parties have agreed to the following issue:

Whether the Company violated the contract in the manner in which it selected trainers in July, 2000, and, if so, what is the appropriate remedy?

BACKGROUND

The Company maintains a wholesale and distribution center in Pleasant Prairie, Wisconsin. Ever since its opening in about 1990, the Company at that location has used so-called "trainers" to train new employees. At one time, there were up to about ten trainers. Now, there are only two.

This dispute centers on a June 16, 2000, posted notice that stated in pertinent part:

. . .

> With the anticipation of the case volume increasing in the future, the need for qualified full time associates to train new associates for selection will be present. We will need four trainers to start at 7:00am in grocery, four to start at 4:00pm in grocery, and four to start at 11:30pm in perishable. All training will be done on a Mon/Tue/Wed/Thurs/Fri work schedule. Any full time associate that may be interested in becoming a trainer should contact their immediate supervisor by 6/22/00.

Trainer Considerations

Employee hire date: The start date of continuous employment with the company

Attendance: The following will be reviewed when considering attendance

1) How many times if any the associate has left early when scheduled for work or overtime
2) How often the associate was late for work
3) If the associate has had any no call/no show, and if so how many
4) How often the associate has been absent
5) Total attendance points to date

Six-week performance average: A review of performance of the last six weeks. This review may go farther back if performance expectations are not all meet or if associate is on a job where selection performance is not applicable.

Active discipline: If the associate has any active disciplinary actions in their file that are still active.

> **Safety:** Any accidents or injuries that are safety related. Any safety rule violations or documented unsafe acts. Any safety violations that have been completed. Review of safety record with the loss prevention manager.
>
> **Supervisor recommendation:** The reasons given by the associates supervisor for recommending them for selection training or the reasons for not recommending them.

While the trainer position does not pay any additional money, it is attractive to some employees because of its Monday-Friday schedule and 7:00 a.m. – 3:30 p.m. shift.

Several employees sought that position, including Tom Strickland. He was passed over in favor of a less senior employee and the instant grievance was filed on July 11, 2000 (Joint Exhibit 2).

Union Business Agent Wesley Gable formerly worked for the Company, during which time he served as a trainer. He testified that the Company then "utilized the senior trainer that was on the shift at that time." He also said that the Union in the last round of contract negotiations unsuccessfully proposed contract language stating that "The Company will honor seniority when assigning trainers from these pools", and that "Employees interested in becoming certified trainers must sign the posting and employees to be trained will be taken by seniority from the posting." (Company Exhibit 1, Article 24, Section 3). He also said that when "things were relatively equal between two people" in the past, seniority would apply; that the Company in the past posted notices for trainers and that employees did not sign those postings; that trainers have not been made part of the contractual bidding procedure; and that the parties over the years had many discussions over this issue, with the Company always feeling "that they had the right to manage, and if we didn't like it, they would still choose them."

Chief Steward Vic Ausloss testified that he was a member of a joint labor-management committee and that it between 1998-1999 agreed that strict seniority should prevail in awarding the training position. On cross-examination, he said that the Company's position at that time was that if two employees were equally qualified, the job would go to the most senior employee.

Chief steward Strickland, a former trainer, testified that he told his supervisor in the Spring of 2000 that he was interested in the disputed trainer position; that he was never contacted about that position; and that his supervisor later told him that he was not disqualified for the trainer position. He denied that training supervisor Andrew Freink ever told him he was not awarded the position because he had active discipline in his file. He added that he was written up for not being in his work area when he was performing his duties as chief steward – which he believes he has a right to do.

Training Superintendent Freink testified that Strickland was not awarded the position because Strickland's supervisor told him Strickland was "non-cooperative"; because he had active discipline in his file; and because he did not perform his job well. He said that Strickland once asked him when he was very busy why he was not awarded the position, but that Strickland never pursued it after he became Chief Steward. He added: "When two people are equally qualified, the senior person is chosen."

On cross-examination, he said that he decided to "start over from scratch" when he reorganized the training program, which is why he never tried to ascertain whether Strickland or any other prior trainers had been good trainers; that there are no written qualifications for the trainer position; and that he looks at such factors as active discipline, attendance, and job performance in determining who should be selected as a trainer.

Vice-President of Human Resources Robert F. Samer testified that the trainer position has never been a posted job, or a bid job, or an annual bid job. He said that the trainer position has never been treated as a Section 7.06-covered job requiring posting and bidding; that "Training was the absolute number one issue" which previously caused high employee turnover; that such high turnover "was basically totally unacceptable"; and that the revised training program has greatly reduced turnover. He added that seniority governs only if "all things are relatively equal", but "not under the straight auspices of 7.06." Asked why there has been such a longstanding dispute over this issue, he replied: "The Company has taken the position it is a management right and the neutral decision-maker will make the final decision, and the Union has not agreed with that."

POSITIONS OF THE PARTIES

The Union claims that the Company violated Section 7.06 of the contract because "Training necessarily includes warehouse work" which is bargaining unit work under the contract and because the parties historically have "considered training to be bargaining unit work." It also contends that bargaining unit work must be assigned on the basis of seniority because the trainer position is not excluded from the contractual seniority proviso; because past practice "demonstrates that training jobs must be awarded on the basis of seniority"; and because the contract's "current restrictions are sufficient to allow the Company to hire only qualified trainers." As a remedy, the Union asks that the training job should be reposted and awarded on the basis of seniority.

The Company asserts that the Union has failed to meet its burden of proving that Section 7.06 has been violated; that trainers have never been covered by Section 7.06; that the parties "have excluded trainers as a job classification covered by the contract"; that the Company has never posted trainer positions under Section 7.06; and that the trainer position "has never been a posted annual bid job." It also maintains that the Union was "unable to

obtain in the 2000 contract negotiations what it now seeks to obtain through arbitration"; that the Union in any event has failed to prove that it improperly selected a junior employee over an "equally-qualified senior employee"; that it properly honored seniority; and that Freink properly determined that Strickland was not qualified to be a trainer.

DISCUSSION

This case mainly turns on the application of Section 7.06, entitled "Vacancies", which states:

. . .

> **7.06 VACANCIES**. Seniority within each seniority group as listed above shall be applicable to vacancies and new positions under the jurisdiction of this Agreement on the following basis: (Emphasis added).
>
> Notice of vacancies and new positions shall be posted on the bulletin board by the Employer for five (5) working days, (Thursday through Tuesday), but the Employer may fill such vacancies or new positions immediately pending selection of the applicant. Any employee desiring to fill any such posted vacancy or new position shall make application, in writing or via proxy through the steward, to the Employer.
>
> **Upon the expiration of the temporary vacancy, the successful bidder shall be placed back into original job bid and shift.**
>
> **All job postings shall identify the shift's set start time and current start time. In instances of multiple start times, tied into a shift (or overlapping shift days), the posting must so indicate such tie-ins for the purpose of overtime, vacation, personal leave day selection, etc.**
>
> **The senior qualified employee who bids a temporary assignment must accept for duration of absence, unless the employee signs for, and receives by seniority, a permanent full-time posting.**
>
> **The employee's accepting a temporary job posting shall take their vacation with them from the original assigned shift.**
>
> **No employee holding a bid job shall accept such position (temporary job posting).**

> Openings will be filled by the Employer giving preference to the senior employee, providing such employee is qualified to perform the work available. When qualifications of an employee are questionable, up to a thirty (30) day trial period will be provided the applicant. If he does not adequately fill the opening or vacancy to the Employer's satisfaction, he will be returned to his former position.

The Union argues that the reference to "each seniority group as listed above" includes warehouse employees because Section 7.01, entitled "Definition", states:

> Seniority is defined as the length of continuous full-time service with the Employer while working under the jurisdiction of this Agreement. Drivers, warehouse, garage mechanic and maintenance mechanic employees shall each be separate seniority groups.

In this connection, Section 1.01, entitled "Recognition", states that the bargaining unit includes "warehouse employees. . ."

On the other hand, Section 6.01 states that the Company retains the right to transfer employees, thereby supporting the Company's claim that it is free to transfer employees to the trainer position. In addition, Section 1.01 is not controlling because the question here is not whether the trainers are in the bargaining unit, but rather, whether their selection must be in accord with Section 7.06. Moreover, there is nothing in Section 7.06 - or any other part of the contract for that matter – which expressly states that the trainer position must be posted for bid and awarded on the basis of seniority. Indeed, the trainer position is not even referenced in any part of the contract.

The Union itself recognized that there is no express contractual language governing the filling of the trainer position, since it unsuccessfully tried to obtain language in the last round of contract negotiations reading: "The Company will honor seniority when assigning trainers from these pools", and that "Employees interested in becoming certified trainers must sign the posting and employees to be trained will be taken by seniority from the posting." (Company Exhibit 1, Article 24, Section 3). In this connection, it is axiomatic that a party cannot obtain in an arbitration proceeding what it failed to get at the bargaining table. See UNITED STATES TOBACCO COMPANY, 103 LA 908, (Petersen, 1994); CITY OF DAYTON, 105 LA 614 (Fullmer, 1995).

This bargaining history is augmented by a past practice showing that the Company in the past has not always followed seniority in selecting trainers and that it also did not solicit formal bids for the trainer position. Thus, Business Agent Gable testified that employees in the past did not sign the posted notices for trainers; that trainers were not part of the

contractual bidding procedure; and that the Company in the past always maintained that "they had the right to manage, and if we [i.e. the Union] didn't like it, they would still choose them." Vice-President Samer testified to that same general effect and said that the Company has always "taken the position that it is a management right and the neutral decision-maker [i.e. a Company representative] will make the final decision, and the Union has not agreed with that." This is why there has been no clearly-defined past practice and why the Union's reliance on numerous cases upholding a past practice is without merit. See MATANUSKA ELECTRIC ASSN., 111 LA 596 (Landau, 1998); GENEX LTD., 99 LA 559 (Bard, 1992); USS-MINNESOTA ORE OPERATIONS, 99 LA 1052 (Dybeck, 1992); DANE COUNTY, 83 LA 1205 (Briggs, 1984); DEMING DIVISION CRANE CO., 100 LA 659 (Feldman, 1992).

According to Chief Steward Ausloss, an exception to all this occurred in 1998-1999 under a joint labor-management committee which agreed that seniority should prevail in awarding the training position (Union Exhibit 1). That, though, does not constitute a binding past practice since the Company after 1999 followed a different approach in awarding the trainer position, and since the Union itself apparently repudiated the corroborative effort at such problem-solving in the last round of contract negotiations.

Based on the above, I conclude that the contract does not clearly and unambiguously state that the trainer position must be awarded on the basis of seniority and that, as a result, it is proper to consider parol evidence. That shows that the position has never been subjected to Section 7.06's formal bidding process and that the Union failed in the last round of contract negotiations to obtain the language it seeks here. It therefore follows that the Company is not required to follow seniority in filling the trainer position and that the Company thus did not violate the contract when it failed to offer the trainer position to grievant Strickland or any other more senior employee.

In light of the above, it is my

AWARD

1. That the Company did not violate the contract in the manner in which it selected trainers in July, 2000.

2. That the grievance is therefore denied.

Dated at Madison, Wisconsin this 31st day of July, 2001.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

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