

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

R.W. MILLER & SONS, INC.

and

TEAMSTERS LOCAL UNION NO. 43

Case 1

No. 59296

A-5888

Appearances:

Attorney Daniel D. Barker, for the Company.

Attorney John J. Brennan, for the Union.

ARBITRATION AWARD

Pursuant to the joint request of the parties, I was assigned by the Wisconsin Employment Relations Commission to arbitrate a grievance arising under the terms of the 1999-2003 contract between R.W. Miller & Sons, Inc. and Teamsters Local Union No. 43.

Hearing was held in Lake Geneva, Wisconsin on January 18, 2001. A stenographic transcript of the hearing was prepared and the parties agreed that the transcript was the official record of the proceedings.

The parties filed post-hearing briefs and the record was closed on March 20, 2001 when I received a letter from the Company advising that it would not be filing a reply brief.

ISSUE

The parties were unable to agree on a statement of the issue to be decided but did agree that I could frame the issue after considering their respective positions.

The Union asserts the issue is:

Did the employer violate the collective bargaining agreement by not awarding the cold roller job open on May 5, 2000 to the grievant?

If so, what is the appropriate remedy?

The Company contends the issue is:

Did the Company violate Article 4, Section 1 of the collective bargaining agreement when it refused to transfer John Laskowski from his assignment on the crushing machine to the cold roller?

If the Company violated this Article and Section, what is the appropriate remedy?

Having considered the parties' positions, I frame the issue as:

Did the Company violate the contract by denying the cold roller job to the grievant and, if so, what remedy is appropriate?

PERTINENT CONTRACT LANGUAGE

ARTICLE 4. SENIORITY

Section 1. Seniority, with ability and qualifications, shall govern in advancement to higher rated jobs. For other than seasonal work, employees will be called back to work by seniority in their classifications.

...

ARTICLE 34. MAINTENANCE OF STANDARDS

Section 1. The Employer agrees that all conditions of employment in his individual operation relating to wages, hours of work, overtime differentials, and general working conditions shall be maintained at not less than the highest standards in effect at the time of the signing of this agreement.

...

EXHIBIT "A"

Drivers, driver operators, and mechanics engaged in doing excavating, grading, paving and batch work, water, gas pipe, sewer and tunnel work, asphalt and all black top, snow removal, ashes, cinders, sand, gravel, stone, gravel pit stripping and utility men covering:

	6-1-99	6-1-00	6-1-01	6-1-02
A. New employees who have never driven trucks for this Employer before, first 90 days of employment	\$10.18	\$10.63	\$11.08	\$11.53
B. Truck drivers after 90 calendar days of employment	\$12.33	\$12.78	\$13.23	\$13.68
C. Combination truck driver & machine operator & mechanics	\$13.98	\$14.58	\$15.18	\$15.78

POSITIONS OF THE PARTIES

The Union

The Union asserts that the Company violated Article 4, Section 1 and Article 34, Section 1 when the Company denied the grievant the cold roller job in May, 2000.

As to Article 4, Section 1, the Union contends that the cold roller job is a "higher rated" job than operating the crusher because of the potential to earn "white sheet" wages. Because the grievant had the "ability and qualifications" to operate the cold roller and had more seniority than the employee given the job by the Company, the Union argues that the grievant was entitled to the job under Article 4, Section 1. The Union disputes the Company contention that the grievant's attitude or temper disqualified him from the job. The Union asserts that such factors are not "qualifications", that the grievant has never been disciplined for his attitude or temper, that there is no significant evidence that the grievant's attitude or temper is any worse than other employees, and that there is no documented evidence that the grievant's attitude or temper have affected job performance.

As to Article 34, Section 1, the Union argues that when jobs have been posted, lateral transfers such as the one sought by the grievant have always been awarded based on seniority. Under such circumstances, the Union asserts that the maintenance of standards language in Article 34, Section 1 was violated when the grievant was denied the cold roller position.

The Union asks that the Company be ordered to cease and desist from violating the contract, place the grievant in the cold roller position, and make him whole for any losses.

The Company

The Company initially argues that issue to be resolved in arbitration should be limited to the violation of Article 4, Section 1 alleged in the grievance. The Company asserts that where, as here, the grievance makes no mention of a past practice or a maintenance of standards clause argument and there is no evidence that such issues were discussed during the processing of the grievance, it is inappropriate to consider them now.

As to the alleged violation of Article 4, Section 1, the Company contends that because the request transfer was not to a “higher rated job,” Article 4, Section 1 does not apply and that the Company was free to assign the roller job as it saw fit. The Company argues that the only contractually recognized basis for “rating” jobs is by pay classification and points out that the roller job is in the same pay classification as the crusher work the grievant was performing at the time of the transfer request. Arguments that the roller job is “higher rated” because of the potential for earning “white sheet” wages or because the roller job is “easier” should be rejected as being speculative, subjective, unworkable and without contractual support.

If the Article 34 maintenance of standards issue is entertained, the Company argues that it did not violate this contractual provision because the clause does not apply to the exercise of management rights such as job assignments and because there is no binding past practice to be maintained. The Company contends that job assignments are not “general working conditions” within the meaning of Article 34, Section 1. As to the alleged existence of a past practice, the Company alleges that there is no consistent, mutually accepted practice of awarding a lateral transfer to the most senior bidder.

Lastly, the Company argues that even if it is concluded that Article 4 or 34 generally require that lateral transfers be awarded based on seniority, the grievant was not entitled to this transfer because he did not have the ability to perform the work to the Company's satisfaction. The Company asserts that its judgement that the grievant's temperament would prevent the efficient functioning of the paving crew is not arbitrary and capricious and thus should not be second guessed.

Given all of the foregoing, the Company asks that the grievance be denied.

DISCUSSION

I begin with the issue of whether the dispute before me is limited to the Article 4, Section 1 violation alleged in the grievance or also includes consideration of whether Article 34, Section 1 was honored by the Company.

The Company correctly notes that arbitrators generally will not decide claims that are raised at the first time at the arbitration hearing. However, absent specific contrary language in the grievance procedure, where the claim remains the same but additional arguments or contractual provisions are cited in support thereof, arbitrators generally conclude that they have jurisdiction to consider the additional arguments/contractual provisions. Here, I conclude that the claim has remained unchanged (i.e. did the grievant have a contractual right to the roller job?) and the Union at hearing advanced an additional contractual argument in support of that claim. Under these circumstances, I am persuaded that both Article 4 and Article 34 are before me for consideration.

As to the alleged violation of Article 4, Section 1, the Company persuasively argues that because the two jobs in question are both Class C jobs for the purposes of wage rates, the grievant was not seeking a transfer to a “higher rated job” within the meaning of Article 4, Section 1. The only way the contract explicitly “rates” jobs is by hourly wage rate and use of phrase “higher rated” as opposed to “better” conveys an intent to exclude factors such as whether a job might be “easier.” For the same reasons, I reject the argument that the potential for “white sheet” earnings is a factor in how a job is “rated” under Article 4. Hourly wage rate is the only explicit contractual rating of jobs and the formality of the phrase “higher rated” conveys an intent to exclude other considerations which might make a job “better”- including the potential of “white sheet” earnings. While such additional factors clearly will play a role when an employee decides whether to bid on a different job, these factors do not play a role when determining how a job is “rated.”

Because the consideration of seniority under Article 4 is limited to “advancement to higher rated jobs,” and because I conclude that moving from the crusher to the roller is not “advancement to a higher rated job,” I find that the Company’s action did not violate Article 4. While the Company is free to consider seniority in such circumstances, it is not contractually obligated to do so by Article 4.

Turning to Article 34, the contract requires that the Company maintain

. . . all conditions of employment in his individual operation relating to **wages, hours of work, overtime differentials and general working conditions . . .** (emphasis added).

Because the transfer right asserted by the grievant is not a “wage,” “hour of work” or “overtime differential”, the question becomes whether it is a “general working condition” within the meaning of Article 34. I conclude it is not. While it can well be argued that a practice as to transfers is a “condition of employment,” Article 34 only protects those “conditions of employment” that are “general working conditions.” I am persuaded that the contractual phrase “general working conditions” does not include transfer practices but rather

are generally limited to matters such as the physical conditions under which work is performed. Thus, I concluded that the Company's conduct did not violate Article 34.

Given all of the foregoing, I deny the grievance.

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

Peter G. Davis, Arbitrator