BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

and

MANITOWOC COUNTY

Case 363
No. 59144
MA-11195

(Heath Miller Finish Grader Position Grievance)

Appearances:

Mr. Neil Rainford and Mr. Michael J. Wilson, Staff Representatives, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Steven J. Rollins, Corporation Counsel, Manitowoc County, appearing on behalf of the County.

ARBITRATION AWARD

The Union and Manitowoc County, hereinafter referred to as the County or the Employer, are parties to a collective bargaining agreement which provides for final and binding arbitration of certain disputes, which agreement was in full force and effect at all times mentioned herein. The parties asked the Wisconsin Employment Relations Commission to assign an arbitrator to hear and resolve the grievance of Heath Miller, hereinafter referred to as the Grievant, regarding the procedure used by the County to fill a vacancy for a "Grader Operator" position. The undersigned was appointed by the Commission as the Arbitrator and held a hearing in the matter in Manitowoc, Wisconsin, on April 11, 2001, at which time the parties were given the opportunity to present evidence and arguments. The hearing was transcribed. The parties filed post-hearing briefs and reply briefs by August 1, 2001.

ISSUE

The parties were unable to stipulate to the issue presented and left it to the Arbitrator to frame the issue in the award.

The Union would state the issue as follows:

Did the Employer violate the Collective Bargaining Agreement when it awarded motor grader #140 to Mark Novak? If so, what is the appropriate remedy?

The County would state the issue as follows:

Did the Employer violate Article 22, Job Posting, when it awarded the Grader Operator position that was posted on April 27, 2000, to a person who was not the most senior applicant? If so, what is the remedy?

The Arbitrator adopts the County's statement of the issue.

RELEVANT CONTRACTUAL PROVISIONS

. . .

ARTICLE 2 – SENIORITY

A. Seniority: It shall be the policy of the Highway Department to recognize seniority.

. . .

ARTICLE 3 – MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, management of the work and direction of the working force, including the right to hire, promote, transfer, demote, or suspend, or otherwise discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him or her for such period of time involved in the matter.

. . .

ARTICLE 8 – GRIEVANCE PROCEDURE

. . .

f. Decision of the Arbitrator: The Arbitrator shall not modify, add to or delete from the terms of the Agreement.

. . .

ARTICLE 11 – TRIAL PERIOD

An employee, upon being promoted or transferred to another classification, shall serve a trial period of ninety (90) calendar days in the new classification. An employee who cannot do the work of the new classification within the ninety (90) calendar day trial period shall be returned to his or her former position . . . .

The above paragraph shall apply to the position of foreman also, except that the trial period for an employee accepting a foreman position shall be for a period of one hundred eighty (180) days.

If the employee on a trial period for a foreman position fails to satisfactorily complete his/her trial period, the employee may then post for the first open position for which he/she is qualified . . . .

ARTICLE 22 – JOB POSTING

A. Notice of vacancies and new positions shall be posted within five (5) working days after the vacancy occurs on the bulletin board of the Department and the Personnel Department for five (5) working days. Tri and Quad axle trucks will be posted by equipment number. Any employee desiring to fill any such posted vacancy or new position shall make application in writing and submit it in a sealed envelope to the office of the Highway Commissioner. After the conclusion of the posting period, the envelopes will be opened at the Highway Commissioner's office in the presence of a representative of the Union at a time to be mutually agreed upon.

B. Whenever any vacancy occurs it shall be given to the employee with the greatest seniority within seven (7) work days after the completion of the posting period.

C. However, when the County deems it necessary to fill a foreman position, promotions to that classification will be determined on the basis of relative skill, ability, experience, and other qualifications. Where qualifications are relatively equal, seniority shall be the determining factor.

D. When objections are made by the Personnel Committee regarding the qualifications of an employee to fill the position, such objections will be presented to the Union Committee for consideration.

E. If there is any difference of opinion as to the qualifications of an employee, the Personnel Committee and the Union Committee shall take the matter up for adjustment through the grievance procedure.

BACKGROUND

The underlying facts in this case are simple and are not disputed by the parties. On April 27, 2000, the Employer posted the vacancy of the position of Grader Operator. Applications and bids for this position were received until 3:30 p.m. on May 4, 2000. The posting included a "memo" which advised prospective applicants that "The position of grader operator will include an interview and a field site test with a grader" and a job description which set forth, among other things, that one of the qualifications for the position was "3-5 years experience in operating motor graders."

Four men applied for the position and one subsequently withdrew. This left three candidates; Michael Sickinger, Heath Miller and Mark Novak. All three men were members of the bargaining unit. Of the three, Michael Sickinger was the most senior employee, Heath Miller the next most senior and Mark Novak the least senior. The three were interviewed and then given a "field test" which consisted of each man demonstrating his ability to operate a "finish grader" by grading a rough 400 foot run to a grade of two or two and one half degrees. The Employer's agents conducting the field test posted grade stakes every 100 or 150 feet and the applicants were to grade to those stakes. Following this "field test," the five men conducting the test determined that Mark Novak was the best grader operator of the three and he was ultimately offered the position. Because he was the least senior of the three contenders and because the Union posits that the most senior applicant should have been awarded the position under the dictates of Article 22 of the Agreement, this grievance followed.

THE PARTIES' POSITIONS

The Union

The Union asserts that the Agreement between the parties is clear as it relates to the application of seniority to job postings. It says that Article 22 – Job Postings, unambiguously sets forth, under paragraph B thereof, that vacancies for which bargaining unit employees have posted must be awarded to the most senior person without regard to qualifications, abilities or skills. It argues that those portions of Article 22, which refer to qualifications, abilities or skills, relate solely to the foreman positions set forth in paragraph C of that article, not to the

vacancies described in paragraph B. In short, the Union takes the position that paragraph B of Article 22 is a "strict seniority" clause whereas paragraph C, which relates to foreman positions specifically, is a "modified seniority" clause of the "relative ability" variety.

In support of its theory, the Union points to the bargaining history of the parties and argues that the agreements of the parties since 1966 have given regular employees the right to post for positions on the basis of seniority and only in the case of "temporary employees" who apply for such positions was ability or qualification an issue. The Union points out that the rights of regular employees have always been distinguished from the rights of other types of employees (i.e. temporary, seasonal). In 1981, the parties added the Article 22, paragraph C, language (which we see today) referencing the position of foreman and, true to historical form, argues the Union, the regular employees are still distinguished by being given the right to those positions based upon their seniority. The Union says that paragraphs D and E of Article 22 were added in 1982 as a guide for the parties in the event an objection arose concerning the qualifications of an applicant for a foreman position under paragraph B. The Union says that the parties' intent was not to add any qualifications to the posting rights of regular employees. If that had been the intent, it says, such language would have been added to paragraph B.

The Union argues that the trial period set forth in Article 11 supports its position because it acts as a governor of the absolute seniority clause. It guarantees the employee 90 days to demonstrate his or her ability to do the job and it gives the employer the option to replace that employee if he or she fails to demonstrate his/her ability within 90 days. The Union says that the language of Article 11, which provides that an employee be returned to his or her former position if he/she cannot do the work of the new classification within 90 calendar days, is indicative of the fact that he or she need not be qualified at the time of transfer; only that the employee be able to demonstrate that he/she has become qualified within that 90 calendar day period.

The Employer

The Employer argues that the contract requires that it award positions to the "most senior qualified" applicant. It argues that the "trial period" is not a training period for applicants who have failed to demonstrate that they are qualified for the job. It says that it fully complied with the terms of the contract when it awarded the position to the most senior qualified applicant.

The Employer takes the position that the Union has failed to consider the contract as a whole. It says that when one considers Article 3, the Management Rights reservation clause, one finds that the Employer has reserved its right to the management and direction of the work force and that a key right therein is the right to determine qualifications required to hold a particular position. It says that a reading of both articles together (i.e. Article 3 and Article 22) clarifies management's contractual obligation to award posted positions to the most

senior qualified applicant. The Employer further supports this position by relating the events surrounding the hiring of a stockroom clerk position in 1997. In this instance, the Employer notified the Union of its intention to test applicants for this position and to hire the most senior qualified applicant. It is this incident, argues the Employer, which supports the argument that management has an "obligation under the contract . . . to award posted positions to the most senior qualified applicant."

The Employer says that an unqualified applicant is not contractually entitled to a trial period in order to qualify for a position. It maintains that the trial period referenced in Article 11 serves two purposes: first, "it gives the Employer an opportunity to determine whether an employee who has the qualifications required for the job can actually do the work;" and, second, "it gives the employee an opportunity to decide whether they [sic] want to stay in the job or return to their [sic] former position." According to the Employer, the trial period is not a training period and an applicant must be qualified and awarded the position before he/she is entitled to the trial period. It argues that it is well established that "If the senior employee is obviously unfit or unqualified, as in a situation where the job in question requires a high degree of skill that can be acquired only after a long period of training and there is no evidence that the senior employee has these skills or related skills, then management is not required to give a trial period and may give preference to the junior employee or new hire who already possesses such skills. The same holds true if there is a contract provision for a trial period." Elkouri and Elkouri, How Arbitration Works, 5th Edition, p.857 (1997).

With regard to the testing process, the Employer argues that the test given to the applicants was reasonable, that it was fairly administered, that the course was fair and that the equipment used did not give Novak (the employee ultimately given the position) an unfair advantage.

Reply Briefs

The Union

The Union replies that management is attempting to assert a right to determine the qualifications required to hold a particular position which it is not given by the contract. It says that, even if that right were specifically given to management under Article 3 – Management Rights Reserved, it would be subject to the superior rights of the employees under the Seniority Clause found in Article 22 by virtue of the "Unless otherwise provided herein" language in Article 3. It says that if the parties had intended to limit employee's rights to post to a position by seniority they would have said so by adding language like "providing the employee is qualified" or words to that effect.

The Union again argues that the employee is guaranteed a trial period because of the absolute nature of the seniority clause. This would not be so, it says, if the seniority clause were modified to include a consideration of qualifications along with seniority, but because the

clause is an absolute seniority clause, the trial period is guaranteed. It further argues that the trial period guarantees the applicant ninety (90) days to show he/she can do the work. In short, it gives the applicant ninety (90) days to qualify or to prove that he/she is qualified.

The Union says that the "past practice" set forth by the Employer involving the hiring of the stock room clerk in 1997 does not establish past practice when viewed along side 20 years of contrary practice and, even if that one incident could rise to the level of a past practice, it is irrelevant given the clear meaning and language of the contract.

The Union argues in the alternative that if, in fact, the seniority clause is found to be a modified version then it still supports giving the job to the most senior man, Michael Sickinger, because the evidence suggests that he was "minimally qualified" as a grader operator and, as such, should be given the trial period and the opportunity to demonstrate his ability.

With regard to the field test, the Union argues that it was invalid because it did not relate to the requirements of the job, was not fair and reasonable, was administered in bad faith and with discrimination and was not properly evaluated in light of the contract provisions relating to seniority and job requirements. The Union says the test failed to identify the applicants who were minimally qualified and only identified the best among them. In this way, the Employer rejected two potentially qualified, albeit minimally qualified, applicants in favor of the best qualified applicant and this, says the Union, is an erroneous standard. The Union argues that the three to five year experience requirement imposed by the Employer unfairly discriminates against the most senior employee and, in any event, is an irrelevant requirement since the Highway Commissioner testified that in the event the field test unearthed a "diamond in the rough" (a natural grader operator) that that person would have been awarded the position regardless of years of experience. The fact that Novak was assigned the use of the grader used in the test for the two week period leading up to the test created an unfair advantage in favor of Novak and invalidated the test results.

The Employer

The Employer takes the position that the Union has misrepresented the contract language relating to the trial period by asserting that it guarantees the senior applicant a full 90 days to demonstrate his or her ability to do the job. Instead, it says, the Employer's right under Article 11 to ". . . step an employee back at any time during the trial period . . ." proves that the trial period is no guarantee at all.

The Employer suggests that because it has applied a "most senior qualified" standard in the past without objection from the Union that this renders the Union's argument that the seniority clause is absolute a nullity.

The Employer accuses the Union of misrepresenting the record as it relates to the stockroom clerk position because of the Union's assertion that the case is "shrouded in controversy." The Union says the parties disagree on whether the senior employee applicant declined the position or was not awarded it in favor of the "most senior qualified" applicant. The Employer's position is that the applicant awarded the position was the most senior qualified and the Union knows it.

The Employer suggests that the Union is guilty of faulty linguistic analysis when the Union says that the 1966 Collective Bargaining Agreement (Union Ex. 1), Article 2(c), which it says provides that the Employer has the right to determine qualifications, does not apply to regular "full time" employees. The Employer says it does apply to regular full time employees and this historical contractual language supports its theory that regular full time employees have always been subject to the Employer's right to determine qualifications. The Employer argues that because this Article requires employees to "make application" for a posted position this requires them to provide evidence of their qualifications. Again, the Employer argues that this language applies to regular full time employees as well as to others making application for posted positions.

Finally, the Employer argues that the changes made to Article 22 language in 1981-82 which set the hiring process for foremen positions apart from the hiring of other positions merely gave the Employer the right to hire the most qualified candidate for a foreman position. The new language did not alter the Employer's right to assess qualifications for other positions such as the one at issue here, says the Employer.

DISCUSSION

The threshold question in this case, of course, relates to the interpretation of the language contained in Article 22 of the parties' collective bargaining agreement. Initially, the question is whether paragraph B of that Article is a strict seniority clause or a modified seniority clause. The former requires the unfettered recognition of seniority and the Employer must give preference to the employee with the longest continuous service without regard to any other conditions. The latter allows the Employer to disregard seniority under certain circumstances agreed to by the parties. Generally, modified seniority clauses strive to serve the fundamental aims of seniority while recognizing the needs of the Employer to consider such factors as skill, ability, aptitude, competence, efficiency, training, physical fitness, judgment, experience, initiative, leadership, and the like. (See Elkouri and Elkouri, 5th Edition, p. 837)

Paragraph B of Article 22 reads as follows:

> Whenever any vacancy occurs it shall be given to the employee with the greatest seniority within seven (7) work days after the completion of the posting period.

Standing alone this language clearly sets forth a strict seniority clause which dictates the recognition of seniority in filling vacancies without regard to any other conditions. This language does not stand alone, however. It must be read in conjunction with the remaining paragraphs in Article 22 and the language found in Articles 2, 3 and 11.

Paragraph C of Article 22 reads as follows:

> However, when the County deems it necessary to fill a foreman position, promotions to that classification will be determined on the basis of relative skill, ability, experience, and other qualifications. Where qualifications are relatively equal, seniority shall be the determining factor.

When this language is read in light of the preceding paragraph, two things become clear: first, the parties have drawn a distinction between "foreman" positions and other positions. Said another way, they have drawn a distinction between the way in which vacancies for foreman positions will be filled and the way in which vacancies for other positions will be filled. Vacancies for foreman positions will be filled following the Employer's evaluation of the "skill, ability, experience, and other qualifications" of the applicant. Only after that evaluation is made, and only if the applicants are fairly equal in terms of their "qualifications," does the Employer need to recognize seniority. Seniority is the tie breaker. Vacancies for other positions will be filled on the basis of seniority only. Second, the language found in this paragraph creates a "modified seniority" clause. Where comparisons of the qualifications of employees bidding for the same job are allowed, and where seniority becomes a determining factor only if the qualifications are equal, as here, the clause may be referred to as a "relative ability" clause. ROANOKE IRON AND BRIDGE WORKS, INC. 68 LA 1019, 1021 (MERRIFIELD, 1977); SAN FRANCISCO NEWS-CALL BULLETIN 34 LA 271, 273 (ROSS, 1960)

So, when read together, these two paragraphs present us with a strict seniority clause in paragraph B and a relative ability seniority clause in paragraph C. Article 22 contains two more paragraphs, each referring to qualifications, and these must also be read together with the two previous paragraphs as the next step in the analysis.

Paragraph D reads as follows:

> When objections are made by the Personnel Committee regarding the qualifications of an employee to fill the position, such objections will be presented to the Union Committee for consideration.

Paragraph E reads as follows:

> If there is any difference of opinion as to the qualifications of an employee, the Personnel Committee and the Union Committee shall take the matter up for adjustment through the grievance procedure.

Because paragraph C clearly distinguishes the foreman positions from all other positions referenced in paragraph B and the criteria for filling foreman positions is qualification based and the criteria for filling all other positions referenced in paragraph B is seniority based, the reference to qualifications in paragraphs D and E can only refer to those positions set forth in paragraph C, foreman positions. Any other interpretation would render the distinction created in paragraphs B and C meaningless and "It is axiomatic in contract construction that an interpretation which tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect." JOHN DEERE TRACTOR CO., 5 LA 631, 632 (UPDEGRAFF, 1946). Also see RUSSELL, BURDSALL AND WARD CORP. 84 LA 373 (DUFF, 1985); MARITIME SERVICE COMMITTEE, INC. 49 LA 557, 562-63 (SCHREIBER, 1967).

Article 2, paragraph A, sets forth the Employer's policy regarding seniority quite clearly: "It shall be the policy of the Highway Department to recognize seniority." This policy is consistent with the language in paragraph B of Article 22 and further supports the analysis above.

The Employer argues that its right to base the selection of employees under Article 22, paragraph B, upon qualifications rather than seniority stems from Article 3 – Management Rights Reserved. That Article begins with the phrase "Unless otherwise herein provided." As the foregoing analysis demonstrates, Article 22, paragraph B, does provide otherwise and trumps the Employer's argument relating to Article 3.

The Employer quotes language from Elkouri and Elkouri at page 857 in support of its argument that it has the right to award a position to a junior employee if ". . . the senior employee is obviously unfit or unqualified . . ." for the position. This passage cites 18 cases which support the proposition. The Employer quotes this passage out of context, however. In each and every cited case, this proposition is set forth in relation to a modified seniority clause, not a strict seniority clause. In DELTA MATCH CORP., 53 LA 1282, 1283 (MARSHALL, 1969) for instance, the operative seniority clause read:

> In case of promotions, demotions, transfers or new jobs created within the bargaining unit covered by this agreement, the employee having the greatest seniority shall have preference, in accordance with the provisions of Section 3, below, provided an employee has the ability to perform the available work to the satisfaction of the Company.

And in VULCAN MATERIALS CO., 54 LA 460 (BLOCK, 1970) the operative seniority clause read in pertinent part:

> Seniority, ability and experience shall be the factors in awarding jobs on a promotional basis. If the abilities and experience of the bidders are substantially the same, seniority shall be the deciding factor.

In R.D. WERNER CO., 45 LA 21, 22 (KATES, 1965) the operative language of the seniority clause read:

> . . . the following factors as listed below shall be considered.
>
> (1) Continuous service
> (2) Ability

And in PUBLIC SERVICE CO. OF COLO., 77 LA 313 (WATKINS, CHAIRMAN, 1981) the seniority clause stated in pertinent part:

> Other Qualifications. In all matters to promotions, . . . Company will give full consideration to seniority. Provided physical fitness, skill, ability, efficiency and other qualifications, related to performance of the job are sufficient, seniority shall govern . . .

In the face of a strict seniority clause such as the one we have here, we look only to length of service and the above passage has no application.

The Employer also argues that the trial period outlined in Article 11 has no effect on the filling of vacancies under Article 22, paragraph B, because it is not a training period. It says that the employee must first be qualified before he or she may become eligible for the trial period. Since the foregoing analysis concludes that Article 22, paragraph B, is a strict seniority clause, and, hence, positions must be awarded to the most senior applicant absent reference to qualifications, then the trial period outlined in Article 11 is, in effect, a 90 calendar day period within which the most senior employee awarded the vacancy may demonstrate his or her ability to do the work. The pertinent language of Article 11 is clear on this point as well: " . . . An employee who cannot do the work of the new classification **within** the ninety (90) calendar day trial period shall be returned to his or her former position." (Emphasis added.) The Employer argues that the very next sentence of Article 11 demonstrates that this trial period is anything but a "guarantee" as the Union argues. That sentence reads:

> The Employer may step the employee back to his or her former position at any time during the trial period, subject to the grievance procedure.

The Employer seems to argue that it could step the employee back at will and, if that is the case, the trial period is no guarantee at all. There may be circumstances where the Employer and the employee both agree that the rigors of the job are too much for the employee and he or she will not be able to perform the work within the 90-day trial period. In this instance, the Employer has the ability to step the employee back. The Employer may even do it unilaterally. However, any such move on the part of the Employer would be subject to the standards of reasonableness and may not be taken in an arbitrary or capricious manner, i.e. subject to the grievance procedure. Once again, if the "step back" sentence were construed as the Employer suggests, it would render meaningless the whole idea and clear language of the trial period article. Sound principles of contract construction will not permit such a result.

Both sides argue that past practice supports their respective positions. If the language of the agreement is clear and unequivocal, as here, past practice will not vitiate it unless there is mutual accord of the parties that they have intentionally modified their contract and that the practice reflects their new agreement. See METRO TRANSIT AUTH., 94 LA 349,352 (RICHARD, 1990). This record does not contain any evidence that this was the case. "A practice . . . based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is a past practice but rather to the agreement in which it is based." "A contrary holding would place past practice on a par with written agreement and create the anomaly that, while the parties expend great energy and time in negotiating the details of the Agreement, they unknowingly and unintentionally commit themselves to unstated and perhaps more important matters which in the future may be found to have been past practice." FORD MOTOR CORP., 19 LA 237, 241-242 (SCHULMAN, 1952).

Both sides have also paid substantial attention in their arguments to the field test given to the applicants. Because I find that Article 22, paragraph B, is a strict seniority clause and hence the job should have been offered to the applicant with the most seniority, the particulars of the field test need not be addressed here.

In light of the above, it is my

AWARD

The County violated Article 22 when it failed to award the Grader Operator position to the employee/applicant with the greatest seniority. To rectify this contract violation it shall immediately offer that position to the most senior of the employees who made application for the position, Michael Sickinger. This employee shall be entitled to a ninety (90) day trial period, subject to the provisions of Article 11, within which time he must demonstrate his ability to do the work. If he accepts the position and demonstrates his ability to do the work within the ninety (90) day trial period, he shall receive back wages and benefits attendant to the new classification from May 15, 2000.

I will retain jurisdiction over this matter pending implementation of this award.

Dated at Wausau, Wisconsin, this 30th day of October, 2001.

Steve Morrison /s/
Steve Morrison, Arbitrator

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